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CLAIMS AND THE CLAIMS PROCESS—
ADVICE TO THE CONTRACTOR
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SUBCONTRACTORS
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CURRENT TOPICS
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Subcontractors

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Problems presented by subcontracting are complex. Some people in the industry would even prefer to do without subcontractors, let alone the nomination system.

Many of the problems are caused by lack of knowledge and attention to the relevant principles when the subcontracts are being prepared. The courts have criticised the "amorphous and misty expressions" such as "in so far as such conditions are applicable hereto". The courts have emphasised the need for orderly thinking and systematic drafting.

The following article by Mr Douglas S. Jones is virtually an encyclopaedia on such matters. It will be invaluable to all involved. Although Mr Jones spoke briefly to it, in the limited time available, at an industry seminar at the Regent Hotel, Sydney there is of course much more in the following text.

Introduction

Disputes are best avoided by early identification of potential problem areas. In a legal sense this is most effectively done by an understanding of the relevant legal issues and the clear allocation of commercial responsibility for them between the various parties.

This article deals with the topic by examining some (but by no means all) of the issues relevant to the subcontract process. It does not attempt to take any particular point of view but rather to identify, in respect of the issues discussed, the effect of those matters upon the various interest groups in the industry, namely, principals, head contractors and subcontractors.

It can be dangerous for lawyers, even those familiar with a particular industry, to pontificate upon matters of commercial judgment. This article does not attempt to do so. Rather, it endeavours to assist those in the industry with that responsibility to recognise the relevant factors involved in the particular issues discussed and thus make informed commercial judgments.

A discussion of contractual issues in the construction industry is somewhat barren without reference to the standard forms in common use. Thus discussion of general principles of the issues dealt with in the paper is supplemented where possible by reference to the following standard forms:

Head Contracts
E 5b
MBW 1
NPWC 3
AS 2124-1981
FIDIC

Subcontracts
SCE 3
SCMBW 1
SCNPWC 3
AS 2545-1981

The article commences with the restatement of some basic propositions, and then examines in turn the issues of drafting of subcontracts, the obligations and liabilities of subcontractors (particularly outside of the subcontract), the head contractor's responsibility for subcontractors, and charges and liens available to subcontractors. It concludes with a brief examination of some specific problem areas.

1. Some Basic Propositions

1.1 *Ability to Subcontract*

1.1.1 *General Principles*

While the practice of subcontracting is widespread in the building industry, it must be remembered that, apart from express contractual provisions, a contractor's right to delegate his obligations by subcontracting is limited.

At common law, the right of a contractor to subcontract depends into which of the following two categories the building contract in question falls:

(a) Personal;
(b) Non-personal.

If the contract is characterised as of a "personal" nature, then the contractor is not permitted to subcontract or assign the work. Indeed, it will be a breach of his contract with the principal if he subcontracts the performance of the substance of the contract. See *Davies v. Collins* ([1945] 1 All E.R. 247).

On the other hand, if the contract can be characterised as of a "non-personal" nature, then the contractor *is* permitted to subcontract or assign the work.

Whether in any given situation the obligations are personal is a question of fact. As Lord Greene said in *Davies v. Collins* ([1945] 1 All E.R. 247 at 250):

> "Whether or not in any given contract performance can properly be carried out by the employment of a subcontractor must depend on the proper inference to be drawn from the contract itself, the subject-matter of it, and other material surrounding circumstances."

At common law, it was readily recognised that certain aspects of building construction would be carried out by subcontractors. Accordingly, most building works will be capable of being subcontracted by the head contractor, unless the facts establish that the principal contracted with the particular head contractor in question for a particular reason (for example, the special nature of the building works to be performed, or the head contractor's particular competence).

1.1.2 *Provisions of Standard Contract Forms*

The standard forms of building contracts in use in Australia specifically provide for subcontracting as follows:

(a) E 5b

Clause 13(b) provides that the contractor may subcontract any part of the contract works, provided that the consent of the architect is obtained. The clause provides that the consent of the architect is not to be unreasonably delayed or withheld.

(b) MBW 1

Clause 4.01 provides that the contractor may subcontract any part or parts of the contract works, provided that the contractor may not subcontract the contract works as a whole.

(c) NPWC 3

Clause 9.2 provides that the contractor shall not subcontract the whole of the contract works, but provides that the contractor may subcontract part of the contract works if certain conditions are satisfied. Either the contractor must obtain the prior written approval of the principal, or the contractor must be specifically authorised by the contract to subcontract that part of the contract works. If the contactor chooses to seek the written approval of the principal to subcontract part of the contract works, the contractor must make a written application to the principal, providing full particulars of the part of the contract works he wishes to subcontract and of the proposed subcontractor. The approval of the principal to any proposed subcontract is not to be unreasonably withheld.

(d) AS 2124–1981

Clause 9.2 provides for similar (but not identical) restrictions to those contained in cl. 9.2 of NPWC 3 (discussed above).

(e) FIDIC

Clause 4 provides that the contractor shall not subcontract the whole of the works. It further provides that, except where otherwise provided by the contract, the contractor shall not subcontract any part of the works without the prior written consent of the engineer, such consent not to be unreasonably withheld.

1.2 *Chain of Contractual Responsibility*

1.2.1 *General*

Historically, the rights and liabilities of the participants in the building industry have been governed by contract, and there has been a strictly tiered contractual structure which has served to:

(1) define the rights and obligations of the various parties with reasonable clarity; and
(2) allocate the risks inherent in the construction process.

Usually, a principal has a contract with a head contractor for the execution of a defined scope of work. The head contractor then enters into a variety of subcontracts whereby the head contractor arranges for the execution of its scope of work by various trade and specialist subcontractors who in turn may well sub-subcontract the execution of some of the work for which they are responsible. Sometimes particular specialist subcontractors are chosen by the principal and the head contractor is then obliged

to enter into subcontracts with these people. Such subcontractors are generally referred to as "nominated" subcontractors (a subject dealt with in more detail later).

Although it is dangerous to generalise too boldly, it is useful to identify in a general way some of the characteristics of this traditional tiered contract system.

The expression "chain of contractual responsibility" stems from the well-settled contractual principle of privity of contract. It is trite law that "as a general rule, a contract cannot confer rights or impose obligations on strangers to it, that is, persons who are not parties to it" (see *Halsbury's Laws of England*, 4th ed., Vol. 9, par. 329).

1.2.2 *Traditional Inaccessibility*

Traditionally, the passing on of responsibility for the satisfactory execution of the contract works, and the allocation of liability for default, has depended upon the principal looking to the head contractor, who is liable to the principal for all defaults in relation to the contract works. The head contractor then passes on any liability it may have arising from the default of any subcontractor to the relevant subcontractor. Thus it is said that the party best able to allocate responsibility for default, the head contractor (who is familiar with the industry and with the subcontractors and with the facts of the job), bears this risk while the principal has the much simpler task of looking only to the head contractor. In general, the courts have been reluctant to infer any contractual relationship between the principal and any of the subcontractors. A rationale for the courts' reluctance has been suggested by I. N. Duncan Wallace Q.C., the present editor of *Hudson on Building Contracts*, as follows:

> "The reason why, even in the case of subcontractors selected by the employer, a contractual relationship with the employer will not be inferred (for instance, by holding the main contractor or architect contracted with the subcontractor as agent for the employer), is that an employer wishing to have a building erected or works carried out wishes and intends to contract, as a general rule, with one contractor for the performance of the whole works. By this means he obtains one price for the whole work, avoids a multiplicity of contracts and liabilities, and the complicated problem of delay and interference which would certainly arise if the works were to be carried out by various contractors and their workmen, each separately employed by him to perform various parts of the work on the same site, though dependent on each for speedy and economical progress." (see pp. 746–747)

In recent times, therefore, major building construction (and even certain areas of house building construction) have involved very significant subcontracting.

Obviously, if the principal was to arrange all subcontractors himself he would have the responsibility of programming the project. Further if any aspects of the work proved to be unsatisfactory he may have to take several actions to enforce his rights. Therefore, from a legal point of view the simplest way of administering a building contract is to vest all liability with the head contractor. (However, it is fair to say that the "builder's work" component of many projects is small indeed and the head contractor often fulfils the primary role of co-ordinating the work of the subcontractors.)

The passing of responsibilities directly up and down the contractual chain mentioned above has been interfered with in recent times by developments in the law of tort and by statutory enactments which will be discussed later. These developments have, as a general rule, developed out of the desperate situations that arise when one of the parties in the chain becomes insolvent, and others in the chain seek to jump a link in the chain, and seek compensation from someone other than the person with whom they have direct contractual relations (and thus privity of contract).

1.2.3 *Need for Back-to-Back Responsibility*

In order for the traditional contracting arrangements to be commercially effective, it is essential that the contractual duties passed down the chain are consistent so that, for instance, if the head contractor's work is defective as not complying with his specification, the person to whom he has subcontracted that work is liable to him, and so on down the chain. The proposition is trite enough, but experience establishes that it is very easy for the chain to be broken. All that is required for this disaster to occur is that different contractual term(s) be introduced at the subcontract level.

It is surprising how many subcontractors march to a different contractual tune to their head contractors.

As will be seen below, great care in contract drafting is necessary to ensure effective back-to-back contractual responsibility.

1.3 *Builder's Liability to Complete is Unaffected by Subcontracting*

1.3.1 *General*

Generally, a head contractor remains directly liable to the principal for the defaults of his subcontractors. This, of course, depends upon the terms of the particular contract. However, all of the standard forms of contract in use in Australia reinforce the general rule, rather than contradict or vary it. (The provisions of the standard forms in this regard are dealt with below.)

A possible exception to the general rule arises in the context of nominated subcontractors, and this is discussed later.

1.3.2 *Provisions of the Standard Forms*

The following provisions of the standard forms of contract deal with the continuing liability of the head contractor following subcontracting:

(a) E 5b

Clause 13(c) provides that the head contractor is not relieved of responsibility under the head contract for such parts of the works as are subcontracted.

(b) MBW 1

Clause 4.02 provides that the head contractor, by subcontracting any part or parts of the works, is not relieved from any of his liabilities or obligations under the head contract.

(c) NPWC 3

Clause 9.3 provides that no approval to subcontract any part of the work under the head contract relieves the head contractor from any of his liabilities or obligations under the head contract. In particular, cl. 9.3(b) provides that the head contractor is liable to the principal for the acts, defaults and neglects of any subcontractor.

(d) AS 2124-1981

Clause 9.3 is the same as cl. 9.3 of NPWC 3.

(e) FIDIC

Clause 4 provides that any consent given by the principal for the head contractor to subcontract shall not relieve the head contractor from any liability or obligation under the head contract, and that the head contractor is responsible for the acts, defaults and neglects of any subcontractor as fully as if they were the acts, defaults or neglects of the head contractor.

These clauses add little, as the principal's approval to subcontracting would not ordinarily carry with it an implication that the contractor was thereby released from any obligations. See Dorter and Sharkey, *Building and Construction Contracts in Australia — Law and Practice* (Law Book Co Ltd, 1981), p. 177.

2. Drafting the Documentation

2.1 *General Principles*

2.1.1 *Defining the Extent of the Works*

As with all contracts, for the purposes of certainty it is essential that the extent of the works to be the subject of the subcontract be clearly defined.

Certainty of contract is particularly relevant in the building industry, where a contractor needs to know with certainty what is expected of him under his contract, so that he may accurately budget for the costs of construction.

From the head contractor's point of view, the scope of the subcontract work must coincide with the corresponding portion of the head contract.

In addition to the budgeting aspect, a clear definition of the extent or scope of the subcontract works will help define the responsibility of the subcontractor for:

- Design
- Extent of Works
- Quality of materials used
- Quality of work performed

Finally, there is the obvious point that, where a number of subcontracts are being let, the extent of work included in the various subcontracts must be clearly defined, to avoid any "demarcation" disputes arising between the various subcontractors at a later date.

2.1.2 *Payment Provisions*

An obvious commercial issue is whether the subcontractor's entitlement to payment from the head contractor, and the extent of that payment, depends to any degree upon the head contractor's entitlement to payment from the principal.

Examples of how the standard form subcontracts deal with this question are as follows:

(a) SCE 3 (for use with E 5b head contract)

Unless the parties otherwise specify in the Fifth Schedule, then, in the first instance, the subcontractor is only entitled to payment after the head contractor has received payment from the principal in respect of the work done by the subcontractor. Further, if the payment which the head contractor has received from the principal relates to part only of the subcontract works, then the head contractor is only liable to pass on a proportionate part of that payment to the subcontractor. The subcontractor is given certain rights in the case of lack of co-operation by the head contractor, but these rights by their nature do not operate until some time after the work in question has been done.

(b) SCMBW 1 (for use with MBW 1 head contract)

The standard position (unless altered by the parties) is that the head contractor must pay the amount of any progress claim made by the subcontractor within twenty days after presentation. Liability to pay the subcontractor arises irrespective of whether a payment has been made by the principal to the head contractor.

(c) AS 2545–1982 (for use with AS 2124–1981 head contract)

The head contractor must make payment to the subcontractor of each progress claim, by the earlier of the following two dates:

(i) the date which is thirty-five days after receipt by the head contractor of the progress claim in question (whether or not the head contractor has received payment from the principal with respect to the subcontract works to which the subcontractor's progress claim relates); and
(ii) the date which is seven days after the head contractor has received payment from the principal relating to the subcontract works to which the subcontractor's progress claim relates.

Clause 44.5 deals with payments by the head contractor to the subcontractor during periods of delay caused by the head contractor or by the principal. However, in the case of delay caused by the principal, payment under cl. 44.5 is conditional upon payment by the principal to the head contractor under the head contract.

(d) SCNPWC 3 (for use with NPWC 3 head contract)

The head contractor must make payment of the subcontractor's progress claims within thirty days of submission whether or not the head contractor has received payment from the principal, unless the subcontractor is a *nominated* subcontractor.

Where the subcontractor is a nominated subcontractor, the head contractor is only under an obligation to pay the subcontractor within seven days after receipt by the head contractor of a progress certificate that included an amount in respect of the subcontract work to which the subcontractor's progress claim relates. A nominated subcontractor is empowered, in certain limited circumstances, to take steps against the head contractor for non-payment after forty-two days have elapsed after submission of a progress claim by the nominated subcontractor.

2.1.3 *Time for Performance*

A further question which must be precisely dealt with is whether the subcontractor's obligations as to performance (and timing of that performance) are dependent upon the head contractor's obligations as to performance.

There are two common possibilities as to the manner in which the subcontract can deal with this question, namely:

(a) That the subcontractor's obligations as to performance are fixed by reference to a particular date or dates, without reference to the head contractor's obligations to the principal under the head contract.
(b) That the subcontractor is bound to perform his obligations according to a certain programme, which programme may be varied as required by any variations that may occur in the head contractor's obligations to the principal under the head contract.

It need hardly be said that the head contractor will be seeking to have the subcontract drafted so as to adopt alternative (b), in order to avoid the head contractor's liability for prolongation and/or delay claims by the subcontractor.

On the other hand, the subcontractor will have almost certainly tendered (particularly in relation to on-site overheads) on the basis of the programme as envisaged at the date of tendering, and so will be seeking provision for compensation if performance extends beyond the tendered duration.

2.1.4 *Quality and Detail of Works*

It is absolutely essential for the provisions in the

subcontract concerning the quality and detailed manner of execution of the subcontract work to be the same as the provisions in the head contract concerning that particular portion of the head contract works. If this is not so the subcontractor will be entitled to execute something different to that required under the head contract.

2.2 *Incorporation of Head Contract Provisions Into Subcontract*

2.2.1 *Dangers of General Drafting*

It is important to ensure that the obligations passed onto the subcontractor, under any subcontract, conform as closely as possible to the responsibilities cast upon the head contractor by his contract with the principal.

The guiding principle of the subcontracting system is that the head contractor will be principally liable for all the work, albeit that he probably has recourse to the subcontractor for any deficiencies in that work. A vital link will be missing unless the subcontract incorporates either directly or by implication the relevant provisions of the head contract. Refer generally to the discussions contained in section 1.2 above, pp. 111-112.

Therefore, one of the common issues arising between a head contractor and a subcontractor is whether, or to what extent, the terms of the head contract have been incorporated into the subcontract. A subcontractor is not bound by the terms of the head contract unless he has agreed to be so bound. The agreement of the subcontractor may be express or implied, but mere knowledge on the part of the subcontractor of the terms of the head contract is not sufficient to import those terms into the subcontract.

A variety of expressions have been and continue to be used to attempt to expressly incorporate into subcontracts the terms of the head contract. The effect of each must be determined on its own facts.

The courts have, however, generally treated head contract terms as being incorporated into the subcontract where the following conditions are satisfied:

(a) The reference in the subcontract to the head contract terms defines the head contract terms with sufficient particularity;
(b) There is a clear intention of the parties that the head contract terms (or at least some of them) are to be incorporated into the subcontract; and
(c) The head contract terms to be incorporated are not inconsistent with the express terms of the subcontract.

Whether or not a particular clause or phrase is effective to incorporate the head contract terms into the subcontract is not an easy matter to decide. This is clearly demonstrated by the authorities. A short consideration of some of these decided cases (being ones from each side of the dividing line) is useful and profitable.

A good starting point is the decision of the House of Lords in *Smith and Ors v. South Wales Switch Gear Ltd* ([1978] 1 All E.R. 18). The principal in that case had engaged the contractor to overhaul electrical machinery owned by the principal. The purchase note by which the principal engaged the contractor requested the contractor to supply the services specified in the note "subject to . . . our General Conditions Contract 24001, obtainable on request". In fact, there were three versions of General Conditions Contract 24001, a current one and two earlier versions. However, the contractor did not obtain a copy of those general conditions from the principal. An employee of the contractor was severely injured during the performance of the contract works, and successfully sued the contractor as his employer. The contractor then sought an indemnity from the principal, relying on an indemnity clause contained in all three versions of the general conditions. The principal argued against liability, contending that the general conditions had not been incorporated, as it was unclear which of the three versions was intended to be incorporated. The House of Lords rejected the principal's argument, and held that the reference in the purchase note was sufficient to incorporate the general conditions, and to show that the contractor intended that result. The words "obtainable on request" showed the manner in which the terms of the general conditions could be ascertained. In relation to the argument based on the question of which of the three versions was to be incorporated, Lord Keith, at 30, held:

> "Any reference to conditions can only be understood, in the mind of an ordinary reasonable man, as a reference to the conditions currently in force."

It is difficult to see how anything less than the words relied on in the above case would suffice to incorporate the provisions of the head contract into the subcontract.

The expression,

> "the [subcontractor] shall observe and perform the conditions contained in the [head contract] . . . and this [subcontract] shall be deemed to be supplemental thereto",

was considered in the case of *Dunlop and Ranken Ltd v. Hendall Steel Structures Ltd* ([1957] 3 All E.R. 344). The English Court of Appeal held that that expression, by itself was insufficient to incorporate the terms of the head contract as to payment. Lord Goddard C.J. said at 348:

> "That [phrase] is obliging the subcontractors to observe and perform the conditions in the [head] contract. No question arises here whether they have performed or observed the conditions .... Then comes the question whether they are only to be paid in accordance with the terms of the [head] contract, but that is not, I think, observing or performing the conditions."

However, the subcontract also provided that "payment for this order is to be made ... in accordance with the certificates and times provided in the said contract". The Court of Appeal held that these words made the subcontractor's rights to be paid by the head contractor conditional upon the issue of an Architect's Certificate (as required by the head contract).

The expression, "The [subcontractor] will carry out the work in accordance with the terms of the [head contract]", was considered in *Chandler Bros Ltd v. Boswell* ([1936] 3 All E.R. 179). The English Court of Appeal held that that expression did not have the effect of incorporating into the subcontract a provision of the head contract which allowed the engineer to require removal of any subcontractor. Greer L.J., at 185, made the following comments in relation to the above expression:

> "It only means that he was to provide work of the quality and with the despatch which was stipulated for in the head contract."

However, it must be remembered that the subcontract in that case expressly included certain terms of the head contract. In this regard, see particularly the judgment of Greer L.J. at 182.

The expression,

> "Subject to the provisions of this agreement the conditions of the [head] contract shall be incorporated in this agreement insofar as such conditions are applicable hereto",

was considered in *O'Neill and Clayton Pty Ltd v. Ellis and Clark Pty Ltd* ([1978] 20 S.A.S.R. 132). The South Australian Full Court held that the arbitration clause contained in the head contract was not incorporated into the subcontract, by virtue of that expression, as the subcontract contained its own arbitration clause which contained a complete agreement relating to the submission of disputes to arbitration.

These examples establish that the question of whether any particular clause or form of words is effective to incorporate the head contract terms into the subcontract must be decided on a case-by-case basis.

While the courts may find it less difficult to treat those provisions of a head contract which deal with subcontractors as having been incorporated into the subcontract, there is simply no substitute for actual verbatim incorporation of relevant contractual terms in order to be completely certain what the terms of a subcontract are.

2.2.2 *Risks of Standard Forms of Contract Where Head Contract Varies from Standard Form*

Various standard forms of subcontracts have been developed for use with standard forms of head contracts, namely:

(a) SCE 3, issued by the Master Builders' Federation of Australia and the Building Industry Sub-Contractors' Organisation of Australia, as a companion standard form of subcontract for the E 5b head contract.

(b) AS 2545-1982, developed by the Standards Association of Australia to "provide a set of *compatible* subcontract conditions for subcontracts involving site work on projects where AS 2124-1981 . . . is in use as the head contract".

(c) SCMBW 1, issued by the Royal Institute of Architects and the Building Owners and Managers Association of Australia Limited as a companion to MBW 1.

(d) SCNPWC 3, issued by the Master Builders' Federation of Australia, the Building Industry Specialist Contractors' Organisation of Australia and the Australian Federation of Construction Contractors as a companion to NPWC 3.

However, where a standard form of subcontract is used, the parties should take special care to ensure that the standard form of subcontract is amended to take into account

variations made to the corresponding standard form head contract. It is downright dangerous to use an unamended standard form subcontract if the corresponding standard form head contract has been varied as between the head contractor and principal.

2.2.3 *Need for Detailed Drafting*

First, in addition to the care which needs to be taken in the drafting of the words which incorporate the provisions of the head contract into the subcontract, particular care should also be taken in relation to the question of which of the head contract terms are *appropriate* or *desirable* for incorporation into the subcontract.

Obviously, some of the provisions of the head contract will be totally inappropriate for inclusion in *any* subcontract.

Others, while perhaps appropriate for certain subcontracts, will be inappropriate for other subcontracts.

Others again will only work if amended to take account of the commercial and legal reality of the particular subcontract.

Accordingly, the parties should take particular care to ensure that only those provisions of the head contract as are appropriate for inclusion in a subcontract are incorporated, and that that class of provisions is further tailored to suit the particular subcontract in question. After all, the incorporation, or not, of the head contract provisions into the subcontract is a two-edged sword: the head contractor may be arguing in favour of incorporation to bind the subcontractor to an obligation, or conversely the subcontractor may be arguing in favour of incorporation to secure a right against the head contractor.

Secondly, as discussed above, the courts have adopted a relatively strict approach in construing general words which purport to incorporate the provisions of a head contract into a subcontract.

Finally, the parties should remember that general words (if successful at all) will only incorporate the provisions of the head contract into the subcontract insofar as the provisions of the head contract are not inconsistent with those of the subcontract.

Accordingly, it is worth the trouble to undertake a careful drafting of any subcontract, particularly one of any substance.

2.2.4 *Provisions of Standard Subcontract Forms Concerning Incorporation of Head Contract Terms*

(a) SCE 3

The final paragraph of cl. 1 provides that no provision of the head contract shall be deemed to be included in the subcontract nor as binding as between the head contractor and the subcontractor unless incorporated in the terms of the subcontract "expressly or by necessary implication". The reference to "necessary implication" does not, it is submitted, add anything to the general position outlined in sections 2.2.1, 2.2.2 and 2.2.3 above, pp. 115–117.

(b) AS 2545–1982

Clause 1 defines "Subcontract Conditions" as "these Australian Standard Subcontract Conditions, as modified by the Annexures to these conditions". There is no express incorporation of the head contract provisions.

(c) SCMBW 1

Clause 1.06.03 defines the expression "this Agreement" as being the entire, final and concluded agreement between the head contractor and the subcontractor "as constituted by" certain listed documents. The head contract is *not* among those listed documents, although there is provision for the parties to insert a reference to the head contract (so as to expressly incorporate its terms into the subcontract) if they so wish.

(d) SCNPWC 3

Clause 2(a) defines the expression "Contract" as being the standard form general conditions, the drawings and Specifications and such documents, if any, as may be deemed to be incorporated therein either expressly or by necessary implication. The reference to "necessary implication" does not appear to add anything to the general position outlined in sections 2.2.1, 2.2.2 and 2.2.3 above, pp. 115–117.

Accordingly, it can be seen that none of the standard forms of subcontract expressly incorporate the provisions of the head contract. However, the door is left open for the parties, if they do wish to so incorporate the head contract provisions into the subcontract.

2.3 *Nominated Subcontract Post-tender Negotiations*

The usual pattern of nominated subcontracting involves the following steps:

(a) Preparation of the technical specification and drawings for the nominated subcontract work by the principal's consultants.
(b) Direct calling of tenders from potential nominated subcontractors by the principal before or (usually) after award of the head contract.
(c) Detailed post-tender negotiations between the principal and the preferred nominated subcontract tenderer.
(d) Nomination of the successful nominated subcontract tenderer to the head contractor.

Often the technical specification for the nominated subcontract work has been prepared prior to the award of the head contract and forms part of the head contract documentation. If this is not the case the principal will provide the head contractor with the relevant documentation which will have to be effectively incorporated into the head contract.

Although the post-tender negotiations with the preferred nominated subcontract tenderer will usually relate to price, there is often a detailed discussion of technical matters such as types of machinery, performance criteria, quality of work, and scope of work. The discussions effectively amend the nominated subcontract tender documentation, and unless the matters agreed are clearly defined the head contractor can proceed to contract with the nominated subcontractor on a different basis to that agreed between the principal and the nominated subcontractor.

The consequences can be unsatisfactory from the point of view of both the principal and the nominated subcontractor.

The principal may find that the head contractor and the nominated subcontractor are constructing something different to that agreed. On the other hand the nominated subcontractor can find that it is compelled to perform a quite different bargain to that struck with the principal.

Care must therefore be taken by both the principal and the nominated subcontractor to ensure that the results of the post tender negotiations are incorporated into the head contract and the subcontract at the time of nomination.

3. Subcontractor's Obligations and Liabilities

3.1 *To the Head Contractor*

3.1.1 *Contract*

It need hardly be said that the head contractor is able to enforce all of the subcontract provisions against the subcontractor.

There is also the possibility of a collateral contract between the head contractor and the subcontractor. In this regard, reference may be had to the decision in *Shanklin Pier Ltd v. Detel Products Ltd* ([1951] 2 K.B. 854), which is discussed below.

However, the High Court of Australia has clearly and consistently held that no collateral contract will be sustained by the courts if it is clearly inconsistent with the main contract (in situations where the main contract and the collateral contract are between the same parties). See *Hoyt's Proprietary Limited v. Spencer* ([1919] 27 C.L.R. 133), particularly per Isaacs J. at 147–148.

3.1.2 *Tort*

The subcontractor may be liable to the head contractor for any of the following torts:

- Negligent misrepresentation
- Negligent acts
- Trespass
- Nuisance
- Occupier's liability (depending on what degree of possession of the site is granted to the subcontractor)

The matters of negligent misrepresentation and negligent acts are discussed below in some detail in relation to the subcontractor's liability to the principal. That discussion is relevant to the liability between subcontractor and head contractor.

3.2 *To the Principal*

3.2.1 *Contract*

There is very rarely any privity of contract between the principal and the subcontractor. As *Hudson* points out at p. 742:

> "It cannot be over-emphasised that no privity of contract between the employer and the subcontractor can arise out of a subcontract concluded between the main contractor and the subcontractor. Attempts have been made from

time to time to argue that the main contractor or architect on the facts contracted as agent for the employer, and at one time this view appears to have prevailed in the courts, at least in relation to nominated or selected subcontractors, but it is clear that only the most special and unusual facts, showing that the employer expressly or by his conduct authorised the main contractor or the architects so to contract, could justify such a finding, which is contrary to the sense of the usual main contract and the almost universal practice in the building industry."

Notwithstanding the above, there may be cases where there *is* a direct contract between the principal and the subcontractor, such contract being collateral to the head contract, and containing warranties by the subcontractor to the principal. An example of such a collateral contract between the principal and the subcontractor is provided by the case of *Shanklin Pier Ltd v. Detel Products Ltd* ([1951] 2 K.B. 854) where the plaintiff was the owner of a pier, which had been destroyed during the Second World War. The plaintiff owner had contracted with a third party for the reconstruction of this pier. Negotiations were conducted with the defendant company (Detel Products Ltd) who were the manufacturers of certain types of paint. As a result of representations made during these negotiations the plaintiff owner required its contractor to use the paint known as D.M.U. The product did not live up to the representation made to the plaintiff owner and it sued on the basis of those representations.

The plaintiff owner argued that there was a collateral contract supported by consideration, in that the plaintiff owner had forced its contractor to purchase this paint from the defendant company. The defendant company argued that collateral contracts could only come into existence between parties who ultimately contracted on a formal basis. McNair J. said at 856 the following:

"Counsel for the defendants submitted that in law a warranty could give rise to no enforceable cause of action except between the same parties as the parties to the main contract in relation to which the warranty was given. In principle this submission seems to me to be unsound. If, as is elementary, the consideration for the warranty in the usual case is the entering into of the main contract in relation to which the warranty is given, I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A or that B should do some other act for the benefit of A."

However, there must be clear evidence that the warranties given by the subcontractor to the principal were intended to create legal relations. In *Independent Broadcasting Authority v. EMI Electronics Ltd and BICC Constructions Ltd* ([1980] 14 B.L.R. 1) the subcontractor had written to the principal stating that the subcontractor was "well satisfied that the structures will not oscillate dangerously". The House of Lords held that, in the circumstances of the case, there was no intention to create legal relations, and so the statement made by the subcontractor in its letter to the principal was unenforceable.

In relation to such collateral contracts between the principal and a subcontractor, *Dorter and Sharkey* points out at p. 220 that:

"A prudent principal will seek to have a formal collateral contract made with any subcontractor he proposes to nominate to the contractor, the consideration for the promises by the subcontractor being the nomination by the principal. An adequately drafted collateral contract will contain warranties by the subcontractor that he will so perform the subcontract works that the contractor will not become entitled to the benefit of clauses in the head contract excusing him from the consequences of default on the part of the nominated subcontractors. The Royal Australian Institute of Architects through its State Chapters has issued forms of warranty for use by proprietors in the circumstances considered above. The forms provide for execution by the proprietor, builder and subcontractor and are available with a practice note containing recommendations for their use."

3.2.2 *Tort*

It is proposed to deal in this paper only with the tort of negligence. The following two types of negligence will be dealt with separately:

(a) Negligent Misstatement.
(b) Negligent Acts.

(a) *Negligent Misstatement*

Since the case of *Hedley Byrne and Co. Ltd v. Heller and Partners Ltd* ([1964] A.C. 465) it is

clear that a person can be liable for financial loss resulting from a negligent misstatement of fact or opinion, although the misstatement was honestly made, and there was no fiduciary or contractual relationship between the parties. The question that was not settled by the authorities is what is the principle by which the courts are to determine whether a duty of care exists.

It seems clear from the recent High Court decision of *L. Shaddock and Associates Pty Ltd and Anor v. Parramatta City Council* ([1981] 55 A.L.J.R. 713) that the High Court leans towards the formulation of the rule suggested by Barwick C.J. in the case of *The Mutual Life and Citizens Assurance Co. Ltd v. Evatt* ([1968] 122 C.L.R. 556), particularly at 572 of the report of that latter case.

This test was formulated as follows:

(1) The circumstances must be such as to have caused the speaker, or be calculated to cause the speaker, to realise that he is being trusted by the recipient of the information or advice to give information which the recipient believes the speaker to possess or to which the recipient believes the speaker to have access;
(2) The subject matter of the information or advice must be of a serious or business nature;
(3) The speaker must realise, or the circumstances must be such that he ought to have realised, that the recipient intended to act on the information or advice; and
(4) The circumstances must be such that it is reasonable in all of the circumstances for the recipient to seek or to accept, and to rely upon, the utterance of the speaker.

It is fairly clear that a plaintiff can recover for pure economic loss (i.e. loss unrelated to any physical damage to property) which is suffered as a result of negligent misstatement.

(b) *Negligent Acts*

The general position with respect to negligent acts (as opposed to advice) was that recovery could not be had for economic loss unless the loss was in some way connected to physical injury to the plaintiff's personal property.

Although there is a considerable lack of uniformity in the reasoning of the Australian High Court Justices who decided the case of *Caltex Oil (Australia) Pty Ltd v. The Dredge Willemstad* ([1976] 136 C.L.R. 529), the decision itself appeared to herald a new era in the law related to recovery for negligently inflicted pure economic loss. The judgments made it quite clear that recovery was not to be denied merely because the economic loss was not accompanied by, or did not flow directly from, physical injury to the plaintiff's personal property.

Pure economic loss has an inherent capacity to manifest itself several stages removed from the direct detriment inflicted by the defendant's carelessness. The reason for the sceptical approach of courts prior to the *Caltex Oil* case was a "flood gates" argument, i.e. that to allow recovery for pure economic loss would open the way for many actions in which someone could be responsible for another's pure economic injury quite a distance removed from that original person's negligent act. The concern was that making the negligent person liable for pure economic loss suffered as a result of the initial negligence could result in "liability in an indeterminate amount for an indeterminate time to an indeterminate class", to use the words of Cardozo C.J. in *Ultramares Corporation v. Touche* ([1931] 174 N.E. 441 at 444).

The High Court of Australia held that there would be liability for negligently caused economic loss where "the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence". In this way the Court limited the scope of the people who could sue for economic loss.

In *Junior Books Ltd v. Veitchi Co. Ltd* ([1982] 3 All E.R. 201), the House of Lords considered the economic loss question in circumstances particularly relevant to subcontractors.

In that case, the principals engaged a building company to build a factory for them. In the course of construction the principals' architects nominated the defendant, as specialist subcontractor, to lay a concrete floor with a special surface in the main production area of the factory, and the subcontractor duly entered into a contract with the head contractor to carry out the flooring work. There was, however, no contractual relationship between the subcontractor and the principals.

Two years after the floor had been laid it developed cracks in the surface and the principals were faced with the prospect of continual maintenance costs to keep the floor usable. The principals brought an action against the subcontractor alleging that the floor was defective

because of the subcontractor's negligence in laying it. The principal alleged that it would be cheaper to lay a new floor than to carry out continuous maintenance on the existing floor, and thus claimed that the subcontractor was liable for the costs of replacing the floor and for consequential economic loss arising out of the moving of machinery, the closing of the factory, the payment of wages and overheads, and the loss of profits during the period of replacement.

The subcontractor in reply argued that, in the absence of any contractual relationship between the parties, or a plea by the principals that the defective floor was a danger to the health or safety of any person or constituted a risk of damage to any other property of the principals, the principals' pleading did not disclose a good cause of action. The Scottish Court of Sessions rejected the subcontractor's contention and held that the principals were entitled to proceed with their action. The subcontractor appealed to the House of Lords, contending, inter alia:

(i) That to impose liability on the subcontractor in the absence of any injury to persons or loss or damage to other property would in effect require subcontractors and other manufacturers or supplies or goods or work to give to an indeterminate class of potential litigants the same warranty regarding the fitness of the goods or work as they would be required to do under a contractual relationship; and

(ii) That a duty not to produce a defective article could not have a universally ascertainable standard of care, since the question of whether an article was to be judged defective depended on whether it measured up the contract under which it was constructed and the terms of that contract would not necessarily be known to the user of the article.

It can be seen that the argument of the subcontractor was basically the standard argument against pure economic loss recovery.

The main question therefore was whether or not, where the alleged negligence occurs in the production or manufacture of a work or article, the duty extends beyond one to take reasonable care to ensure that the work does not constitute a danger to person or property. Lord Roskill, at 213, phrased the question to be decided as "whether the relevant Scots and English law today extends the duty of care beyond a duty to prevent harm being done by faulty work to a duty to avoid such faults being present in the work itself". This therefore was the basis behind the subcontractor's claim that, because it was not alleged that the defective floor provided a danger to any person or would cause loss or damage to other property, the pure economic loss was not recoverable.

The House of Lords in *Junior Books Ltd v. Veitchi Co. Ltd* approved the test previously sanctioned by the House of Lords to define the scope of the duty of care to avoid causing economic loss. The test was that put forward by Lord Wilberforce in *Anns v. Merton London Borough Council* ([1978] A.C. 728). Lord Wilberforce said at 751-752:

> "... the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise ...."

Their Lordships in the *Junior Books* case found for the principal by a majority of 4 to 1. Three of their Lordships in the majority found that where the proximity between a person who produced faulty work or a faulty article and the user was sufficiently close, the duty of care owed by the producer to the user extended beyond the duty merely to prevent harm being done by the faulty work or article and included the duty to avoid faults being present in the work or article itself, so that the producer was liable for the cost of remedying defects in the work or article or for replacing it and for any consequential economic or financial loss, notwithstanding that there was no contractual relationship between the parties. In the particular case before them, their Lordships found that a sufficient degree of proximity existed, on the following grounds:

(i) The principal or its architect had nominated the subcontractor as a specialist sub-

contractor and the relationship between the parties was so close as to fall only just short of a contractual relationship.

(ii) The subcontractor must have known that the principals relied on the subcontractor's skill and experience to lay a proper floor.

(iii) The damage caused to the principal was a direct and foreseeable result of the subcontractor's negligence in laying a defective floor.

The *Junior Books* case represents a significant advance in the law of negligence. Before that case, there was a school of thought that liability for rectifying any defects in a defective article itself or in defective work itself, as opposed to recovery of other loss caused by the defective article or defective work, must depend on the principles of contract and not on the principles of tort. In the *Junior Books* case, three of their Lordships held that such liability can be founded on tort as well as on contract. It is yet to be seen whether Australian Courts will adopt this extension of the law of negligence. However, in *The Minister Administering the Environmental Planning and Assessment Act 1979 (New South Wales) and Anor v. San Sebastian Pty Ltd and Ors* ([1984] 51 L.G.R.A. 257 at 285) Glass J.A. expressed the opinion that the manufacturer of the article or the work *would* be liable in negligence for the cost of rectifying defects in the article or work itself (albeit that he also indicated that the exact academic rationale that he would adopt may differ from that adopted in the *Junior Books* case).

At 285–286, Glass J.A. also stated that the test which the House of Lords adopted in the *Junior Books* case, to decide in what circumstances economic loss may be recovered, is contradictory to the test laid down by the High Court of Australia in the *Caltex Oil* case. At 286 Glass J.A. expressed the view that the appropriate tests, under Australian law, are as follows:

(i) In relation to physical damage or personal injury caused by negligence — the test laid down in *Donoghue v. Stevenson*;

(ii) In relation to economic loss caused by negligent misstatement — the test laid down in the *Shaddock* case; and

(iii) In relation to economic loss caused by negligent conduct — the test laid down in the *Caltex Oil* case.

However, it seems that the test laid down in the *Caltex Oil* case would have been satisfied on the facts of the *Junior Books* case. An appeal to the High Court has been lodged in the *San Sebastian* case, but has not to date been proceeded with. If proceeded with it would no doubt be a landmark decision in the area.

On that basis, it is submitted that the following may be stated as being the present position (subject to review after the *Junior Books* case has been fully considered by the Australian courts):

(a) A subcontractor may be liable to the principal for negligence, even where the principal suffers "pure economic loss" as a result of that negligence, provided that the relevant test of "proximity" or "special relationship" between the principal and the subcontractor (being one of the tests outlined above) is satisfied.

(b) A court would hold that there *does* exist that degree of "proximity" or "special relationship" between a *nominated* subcontractor and the principal as to make the nominated subcontractor liable to the principal in this regard.

3.2.3 *Trade Practices Act*

The Commonwealth *Trade Practices Act* 1974 provides another source of possible liability of the subcontractor to the principal (and others including the head contractor), and particularly in relation to representations made to the principal by the subcontractor. Of course, except for a very narrow set of circumstances, some relating to natural persons, the provisions of the *Trade Practices Act* will only apply when the subcontractor is a corporation of the type specified in the definition section of the *Trade Practices Act*, namely s. 4(1).

Section 52 provides:

> "52(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.
>
> (2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1)."

Thus, s. 52 creates liability for engaging in misleading or deceptive conduct. Section 52 does not contain a requirement that a contract come into existence between the complainant and the person making the misleading statements. Consequently, the lack of privity of contract between

the principal and the subcontractor will not prevent the complainant (i.e. the one who has suffered loss or damage, being the principal in the context of the present discussion) from suing the subcontractor pursuant to s. 82 of the *Trade Practices Act*. Section 82 provides that any person adversely affected by a breach of, inter alia, s. 52 may sue the person responsible. Section 82 provides:

> "82(1) A person who suffers loss or damage by the conduct of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.
>
> (2) An action under subsection (1) may be commenced at any time within 3 years after the date on which the cause of action accrued."

It is possible that the scope for the use of s. 52 in building contract situations may be circumscribed by the case of *Westham Dredging Co. Pty Ltd v. Woodside Petroleum Development Pty Ltd and Ors* ([1983] 46 A.L.R. 287).

In that case, Westham had entered into a dredging contract with Woodside and had been supplied by Woodside with a report prepared by consulting engineers who were the second and third respondents. Their report was on the geological structure of a harbour base which was the subject of the contract. Westham alleged that some of the geological data specified in one report was inaccurate and sought damages under s. 82 of the *Trade Practices Act* alleging misleading or deceptive conduct by Woodside and the consulting engineers in contravention of s. 52 of the *Trade Practices Act*.

Woodside and the consulting engineers submitted that the facts, even if proved, were not capable of establishing a contravention of s. 52 of the Act. St John J., of the Federal Court of Australia, examined the cases on the interpretation of s. 52 and refused the application for damages on the basis that s. 52 of the Act did not apply to the circumstances revealed to him.

The main thrust of his judgment was that s. 52 conceives of transactions in a consumer protection context. The case before him concerned a privately negotiated contract between business parties and was thus, in his opinion, beyond the ambit of the section. He did not consider that Westham fell within the concept of "consumer". In addition, he held that the words "trade or commerce" imported regularity of activity and that the case before him could not be said to fall into the ambit of that phrase.

Furthermore, at 298, he stated that:

> "The features of the facts alleged in this case which lead me to hold that s. 52 is not breached are the absolutely private nature of the negotiations leading to the contract, the lack of any circumstances which could be described as 'an unfair practice' according to good business morality and to the lack of any allegation of fraud, negligence or deceit. An inaccurate report may be misleading or likely to mislead, but the other elements required are lacking."

St John J. has since confirmed the views that he has expressed in the *Westham Dredging* case. See *H.W. Thompson Building Pty Ltd v. Allen Property Services Pty Ltd* ([1983] 48 A.L.R. 667 at 675).

However, the view expressed by St John J. in the *Westham Dredging* case to the effect that s. 52 is limited in its operation to "consumers", has been doubted by two other Federal Court judges.

In *Jet Corporation of Australia Pty Ltd and Ors v. Petres Pty Ltd and Ors* ([1983] 50 A.L.R. 722), Northrop J. said at 729:

> "With respect to the learned judge, on the present state of the authorities it may be doubted whether this conclusion [i.e. that s. 52 should be read down by reference to the heading "Part V Consumer Protection" and "Div. 1 Unfair Practices"] is clearly correct . . . ."

In *Lubidineuse and Ors v. Bevanere Pty Ltd* ([1984] 55 A.L.R. 273), Wilcox J. said, at 286:

> "The actual decision in *Westham Dredging Co.* may be supportable by the reference to other defences; as to that I say nothing. However, I find myself in respectful disagreement with the view of St John J. that s. 52 should be read down so as to limit its application to conduct affecting a person who is a 'consumer'; whether that word be defined in terms of section 4B of the Act or otherwise."

And at 289:

> "I have come to the conclusion that the view expressed by St John J., in relation to this matter, in *Westham Dredging Co.*, was inconsistent with binding authority and that it should not be followed. I hold that there is no

implication in s. 52(1) limiting the relevant conduct to conduct which affects a person properly to be described as a 'consumer'. It is enough that the conduct of the corporation be misleading or deceptive and that it has occurred in trade or commerce."

On appeal, the Full Court of the Federal Court unanimously supported the views of Wilcox J. (unreported, Morling, Neaves and Spender JJ., 24 April 1985, Sydney).

In the circumstances, the possibility of the *Trade Practices Act* 1974 providing fertile ground for claims against subcontractors (and others in the industry) cannot be discounted.

3.3 *To Third Parties*

3.3.1 *Negligence*

It is now clear from the foregoing that all participants in the construction process, including subcontractors, can be liable to third parties (including subsequent owners) for negligence during construction. Liability extends to damage for economic loss arising from defective workmanship, inadequate design, and inadequate supervision.

This liability is ultimately limited only by the relevant limitation of actions legislation, which in most States provides for the opportunity to commence proceedings for six years only after the particular cause of action arose.

It is unclear when the cause of action arises in tort in respect of building construction, the uncertainty being as to whether the cause of action arises when the damage actually occurs (whether or not it is discovered or discoverable) or whether it arises at the time when the damage should have been reasonably discoverable.

A recent decision of the House of Lords has provided some hope for participants in the building industry. It has been held that the cause of action arises when the actual damage occurs, even though at that time the damage cannot be discovered and in fact cannot be discovered within the six year limitation period (*Pirelli General Cable Works Ltd v. Oscar Faber and Partners (a firm)* ([1983] 1 All E.R. 65).

The position in Australia has not yet been decided by our High Court. There is a possibility that the decision in *Pirelli* will not be followed and that the cause of action will accrue from the date when the damage should reasonably have been discovered, rather than when the damage actually occurs. If it is held that the cause of action accrues from the date when the damage should reasonably have been discovered, the potential liability is extended for many years.

4. Responsibility for Nominated Subcontractors

4.1 *Introduction*

The system of nominated subcontractors allows the principal to select a subcontractor specifically, without incurring any direct contractual links with that subcontractor, thus preserving the traditional method of contracting and the chain of liability vesting ultimate responsibility in the head contractor. The advantages for the principal of this traditional method are said to be:

(a) The advantage of contracting only with one party (the head contractor);
(b) Not having a multiplicity of direct contracts with specialist subcontractors; and
(c) Retaining the ability to select a specialist subcontractor who is attractive to the principal in both price and ability.

In addition, the system is said to lead to a reduction in the time and cost of tendering so that duplication of effort is avoided, unlike the situation which would occur if all tendering head contractors had to obtain prices from all specialist subcontractors.

The following two areas of the head contractor's liability for the actions of a nominated subcontractor will be dealt with in this article:

(a) Liability for defective supply and workmanship.
(b) The "duty" of the principal to re-nominate a subcontractor where a nominated subcontractor fails to complete the work entrusted to him.

4.2 *Liability for Defective Supply and Workmanship*

Prior to the *Junior Books* case there had already been some significant interference by the courts in the contractual responsibility in this area. A study of two particular cases is of assistance in forming a balanced view on the vexed question of liability for nominated subcontractors. These cases are: *Young and Marten Ltd v. McManus Childs Ltd* ([1968] 3 W.L.R. 630) and *Gloucester-*

shire County Council v. Richardson ([1969] 1 A.C. 480).

4.2.1 *Young and Marten*

In this case the principal had required that the roofing tiles to be fitted by the roofing subcontractors be a brand known as "Somerset 13". This particular brand of tile was only manufactured by one producer, so accordingly, the contractor was obliged to obtain the tiles from that source.

The tiles proved to have latent defects and, accordingly, the principal sued the contractor for this defect.

The House of Lords held it was reasonable to imply a warranty that the tiles would be of good quality, and that to hold otherwise would deny the principal of any remedy; whereas to allow recovery would not seriously prejudice the contractor because there would be a chain of liability down the line of subcontractors and/or suppliers. Lord Reid in his judgment referred to the possibility of a breaking of the chain and said (at 633):

> "Of course, the chain may be broken because the contractor ... may have agreed to enter into a contract under which his supplier excluded or limited liability ... but in general that has nothing to do with the [principal] and should not deprive him of his remedy. If the contractor chooses to buy on such terms he takes the risk of having to bear the loss himself if the goods prove to be defective."

The House of Lords also indicated that, in appropriate cases, a warranty would also be implied that the material to be supplied was reasonably fit for the purpose for which it was being used. However, in certain circumstances, either or both of the warranties may be excluded from the contract between the head contractor and the subcontractor.

[*Young and Marten* actually concerned an action by the principal against the roofing subcontractor. However, the case was treated as if there was a direct contract between the principal and the roofing subcontractor, i.e., as if the head contractor had contracted as agent for the principal with the roofing subcontractor.]

Of course since *Junior Books* the principal will not necessarily be denied a remedy against the subcontractor in tort. The *Young and Martin* case represents the traditional view of the chain of contractual liability.

4.2.2 *Gloucestershire County Council v. Richardson*

Young and Marten did not deal with the situation where a principal had nominated a particular subcontractor or where he had negotiated a contract where the liability had been limited or excluded.

That situation was considered in this case.

In the House of Lords' decision, four of the five Lords decided that, for various reasons, the liability of the head contractor was limited due to either the nature of the subcontract or the nature of the head contract.

The various judgments of their Lordships require some consideration.

The Council entered into a head contract with Richardson to build extensions to a technical college. The method of construction provided by the contract called for the use of precast, prestessed concrete columns. The head contractor was obliged by the contract to accept the Council's nomination of a supplier with respect to these columns. The Council, pursuant to this power, nominated Messrs Cawood as the suppliers.

When supplied, the columns had defects which were not detectable but which became manifest soon after some of the columns were incorporated in the building. Due to these defects the architect ordered that all works be stopped on the perimeters of the columns. Relying on terms of the head contract the head contractor gave notice of determination on the ground that the work had been delayed for more than one month by reason of architect's instructions.

The question for the Court was whether the head contractor had been entitled to determine the head contract pursuant to the provisions referred to above. The head contractor would be so entitled if he was not in breach of the head contract in relation to the columns. The Council relied on the case of *Young and Marten Ltd v. McManus Childs Ltd* (supra) in its assertion that it was the head contractor's duty to ensure that the columns were of a merchantable quality, and that therefore the head contractor was not entitled to terminate the head contract as he was in default with respect to the columns.

Four of the five Lords decided, in favour of the head contractor, that there was no implied warranty with respect to the columns. Lord Reid, who represented part of the majority, did not publish reasons for his decision. Of the three

other Lords in the majority, there is a divergence in reasoning which may be significant if a similar problem arises in Australia.

The contract in question contained clauses relating to both nominated subcontractors and nominated suppliers. There was an interesting distinction between nominated subcontractors and nominated suppliers in that, with respect to nominated subcontractors, the head contractor was given a right of veto. No such right of veto was given with respect to nominated suppliers.

Lords Pearce and Wilberforce attached significance to these varying provisions.

Lord Pearce said (at 495–496):

> "The situation with regard to nominated suppliers, however, is noticeably different. The clause (22) which deals with nominated suppliers follows directly on that which deals with nominated subcontractors. It provides no veto on the ground of the contractor's reasonable objection, nor on the ground of the nominated supplier refusing to indemnify the contractor. This omission cannot, I think, be unintentional. It seems, in contrast to cl. 21, [the clause dealing with subcontractors], to point to an intention that the contractor is not undertaking liability for materials provided by a nominated supplier. Otherwise he must surely have been given, as in the case of a nominated subcontractor, an opportunity of making reasonable objections, and a right to insist on an indemnity from the supplier.
>
> It would not be unreasonable for the parties to intend that an employer should take the responsibility of materials provided by nominated suppliers. They have been selected, without giving the contractor any right to express views, by the employer's own expert architect who has decided that the nominated goods are suitable for the purpose and who has made the preliminary arrangements with the suppliers either before or during the main contract. The contractor is simply instructed to obtain his supplies from the nominated supplier. It is the employer who, through his architect, alone arranges the price, which is liable to be reflected in the quality and who alone can insist on tests and checks of quality. All the circumstances of the nomination appear actually to exclude any reliance on the contractor's skill and judgment. And, though the contractor receives a profit on the nominated supply, it is a controlled profit and he has certain duties to perform such as co-ordinating the delivery with the work and doing his best to see that there are no delays."

The problem with this interpretation of the contract is that the principal has no contract with and (thus) no right to sue the nominated subcontractor. Therefore, with respect to supply nominated in the fashion under this contract, the principal has no remedy against *anyone* for defective materials. Of course, prior to the *Junior Books* case the position would have been that there would be no remedy for the principal in either tort or contract. Lord Pearce made the following observations with respect to this problem (at 496):

> "... if the contractor is not liable for material provided by nominated suppliers, the employer is left without a remedy for faulty material. For the contract, by cl. 22, indicates clearly that the nominated supplier is in contractual relations with the contractor only and, although the employer is paying for the nominated materials, he pays the contractor for them and the contractor pays the nominated supplier. Thus to hold that the contractor is not liable for nominated supplies is to go against one of the important reasons for the general rule that there is a warranty of good quality in materials supplied under a contract for labour and materials, namely that the employer should have a remedy against the contractor who can in turn enforce it against the supplier with whom the fault lies."

After the *Junior Books* case this problem is reduced because of the possibility of the principal having a remedy in tort against the subcontractor. It may be that the head contractor now has a stronger argument that he should not be held strictly liable. Much will depend upon how the courts treat further developments in this area.

Lord Wilberforce also held that there was no implied warranty in the circumstances of this case. However, whilst there are similar threads of reasoning between the judgments of Lord Wilberforce and Lord Pearce, it would appear that the decision of Lord Wilberforce may have more general application than that of Lord Pearce.

Lord Wilberforce, at 507–508, sets out the situation in the following way:

> "The situation thus created was one of a special and complex character, differing

greatly from that which arose in *Young and Marten Ltd v. McManus Childs Ltd.* There, the employer nominated a brand article to be supplied by the manufacturer with no limitation on the contactor's freedom to contract with the manufacturer as he thought fit. The contractor could, and it would be the expectation that he would, or at least it would be his responsibility if he did not, deal with the manufacturer on terms attracting the normal conditions or warranties as to quality or fitness.

But here, the design, materials, specifications, quality and price were fixed between the employer and the sub-supplier without any reference to the contractor: and so far from being expected to secure conditions or warranties from the sub-supplier, he had imposed upon him special conditions which severely restricted the extent of his remedy. Moreover, as reference to the main contract shows, he had no right to object to the nominated supplier, though, by contrast, the contract does provide a right to object to a nominated subcontractor if the latter does not agree to indemnify him against his liability under the contract.

In these circumstances, so far from there being a good reason to imply in the contract . . . a condition or warranty binding the contractor in respect of latently defective goods, the indications, drawn from the conduct of the contracting parties, are strongly against any such thing. *It would, indeed, be most unjust if when the employer has (possibly to his own advantage as reflected in the price) limited the contractor's right of recourse as severely as he has . . . he should be given by implication an unlimited right to recover damages from the contractor.*

. . . In my opinion, the contractor in this case, *by virtue of the special terms of this contract and of the circumstances in which the subcontract was made* was relieved from any liability for the defective columns and was, therefore, not disabled from [rescinding the contract]."

The distinction between the reasoning of Lord Wilberforce and that of Lord Pearce is that Lord Pearce relied on the differences between the two clauses relating to nominated suppliers and nominated subcontractors. Lord Wilberforce relied only partly on this difference. He also noted that there were other circumstances which precluded the operation of an implied term in relation to work performed by a nominated supplier.

As indicated above, he particularly makes reference to the injustice which would occur if a principal was in a position to negotiate a contract for the head contractor with a nominated subcontractor, which severely limited the head contractor's rights against the subcontractor, *and then* to demand that the head contractor take full responsibility for the work of the nominated subcontractor.

This reasoning, it is suggested, is of wider application than that of Lord Pearce, who relied on the particular interpretation of the two clauses nominating subcontractors and suppliers. In Lord Pearce's judgment, it was the lack of a right of veto in the builder which excluded the operation of the implied warranty. The reasoning of Lord Wilberforce would allow the exclusion of the implied warranty as to quality in a wider range of cases. This line of reasoning is strengthened by the decision of Lord Upjohn who reached the same result following similar reasoning.

Lord Upjohn did not, however, rely on the differences between the two clauses nominating suppliers and subcontractors. At 502-503, he said:

> "The precise terms and conditions as between the employers and the contractor upon which each such person is nominated must depend upon the terms of the nomination at the time, whether expressed or properly to be implied in the circumstances of the case. Normally it seems to me that the usual rule of implied warranty must apply to the goods to be supplied by the contractor through the nominated supplier. Thus, if the architect merely nominated Cawood to provide forty columns without more, for my part I can see no reason why there should not be implied in the nomination the usual obligation that the contractor warrants the quality and fitness of the columns.
>
> But if the architect nominated Cawood to provide the columns upon the terms, which he instructs the contractor to accept, that Cawood should not be liable for any delays, defects or deficiencies whatsoever . . . it is difficult to see how in law or as a matter of common sense or justice the contractor could be held liable upon some implied obligation for the failure of Cawood to deliver the goods."

The facts of this case were a little out of the ordinary and would not arise under E 5b, MBW 1, AS 2124–1981 or NPWC 3 (provided the head contractor looked to its rights), but the decision illustrates the necessity for the courts to recognise that strict liability up and down the contractual chain may not be appropriate where the principal has chosen to use the nominated subcontract system to the obvious commercial disadvantage of the head contractor. The case was decided before the *Junior Books* case which may well be available to assist a principal who has been shut out by the court from a remedy against the head contractor.

4.3 *Duty to Renominate*

4.3.1 *The Nature of the Problem*

The nature of the problem which arises in this regard is succinctly stated in *Hudson* at pp. 332–333 as follows:

> "A further problem which arises in relation to nominated subcontractors occurs when through death, liquidation, bankruptcy or repudiation, the subcontractor 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 subcontractor in substitution for the original one, which by virtue of the provisions as to payment for subcontracted work in the main contract will usually mean that the new subcontractor's price (which in practice may often be higher than the original subcontractor'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 subcontractor, and that it is his duty to mitigate the loss by arranging for the work to be completed by any means available. On this view the contractor is entitled to be paid the amount of the original subcontractor'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 wording 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 renomination of subcontractors has been dealt with in a number of court decisions which are discussed below.

4.3.2 *Bickerton*

The general situation was considered in the case of *North West Metropolitan Regional Hospital Board v. T.A. Bickerton and Sons Ltd* ([1970] 1 W.L.R. 607). In this case, the Hospital Board had contracted with T.A. Bickerton and Sons Ltd to construct certain buildings at its hospital. The heating for the hospital was to be installed by nominated subcontractors and a P.C. sum was allowed for the cost of the work to be performed by that nominated subcontractor.

Shortly afterwards the head contractor entered into the subcontract with a nominated subcontractor, 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 subcontractor and paid the price of that other subcontractor, and that, as the Hospital Board had not done so, it must pay Bickerton on the basis of a quantim 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 subcontractor 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 subcontractor 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 would be contrary to the whole purpose of the scheme for nominated subcontractors. If the original nominated subcontractor 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 subcontractor drops out, there is a duty on the principal to renominate a new subcontractor to take the place of the defaulting nominated subcontractor.

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 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 subcontract in question. As Lord Reid stated at 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 613:

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

The basis upon which Lord Reid concluded that the head contractor had no duty or right to do the work of the nominated subcontractor was cl. 27 of the RIBA contract. That clause required that sums payable in respect of prime costs work "shall" be expended in favour of nominated subcontractors 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 subcontractor. Accordingly, it was seen that, where a nominated subcontractor 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 subcontractor because the first had 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.

4.3.3 *Percy Bilton*

Bickerton's case was subsequently considered by the House of Lords in *Percy Bilton Ltd v. Greater London Council* ([1982] 2 All E.R. 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 subcontractor for the mechanical services subcontract. During the course of construction of the project, Lowdells dropped out. Bilton had requested the Council to renominate, that request having been made the day before the nominated subcontractor had dropped out. The Council eventually renominated another nominated subcontractor.

It was common ground between the parties that two types of delay had been caused by the dropping out of the original nominated subcontractor, namely:

(i) The period of delay arising directly from the withdrawal of the original nominated subcontractor; 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 627:

> "The appellant [Bilton] contends that the loss directly caused by the withdrawal of the nominated subcontractor must fall on the respondent [the council], on the ground that it has a responsibility not only to nominate the original subcontractor and any necessary replacement, but to maintain a subcontractor 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 subcontractor had gone into liquidation and dropped out, the main contractor had neither the right nor the duty to do any of the subcontractor'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 subcontractor withdraws at a time when his withdrawal must inevitably cause delay, the main contractor is disabled from performing his obligations for want of the subcontractor 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 cl. 22.
>
> If that argument is correct, its effect would be to turn the employer's duty of nominating a subcontractor, and if necessary a replacement, into a duty to ensure that the main contractor is not impeded by want of a nominal subcontractor. That would be virtually a warranty that a nominated subcontractor would carry on work continuously, or at least that he would be available to do so. But I see nothing in cl. 22 or cl. 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 subcontractor, and no control over him. When the nominated subcontractor withdrew, the duty of the employer, acting through its architect, was in my opinion limited to giving instructions for nomination of a replacement within a reasonable time after receiving this specific application in writing from the main contractor under cl. 23(f)."

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

Thus, when the duty to renominate arises, and the head contract sets no time limit for the renomination, the principal must renominate 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.

4.3.4 *Townsville Hospitals Board*

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

The decision concerns the duty of a principal to renominate a nominated subcontractor where the existing nominated subcontract has been determined by the head contractor for alleged repudiation by the nominated subcontractor. 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, cl. 10 of those standard conditions required the principal to nominate subcontractors with respect to certain materials, declared such persons to be subcontractors and required the head contractor to enter into contracts with such nominated subcontractors 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 renominate.

The more recent National Public Works Conference standard form contract (NPWC 3), has amended its provisions in relation to nominated subcontractors, by providing that in the event of default caused by bankruptcy or liquidation of a nominated subcontractor, the principal *may* renominate 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* renominate.

Those amendments are unlikely to have altered the decision in the *Townsville Hospitals Board* case, as that case did not involve bankruptcy, or liquidation of the nominated subcontractor.

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

4.3.5 *Jennings*

In *The Corporation of the City of Adelaide v. Jennings Industries Ltd* ((1985) 1 B.C.L. 32) the High Court of Australia considered the duty of the principal to renominate under a contract the provisions of which were in all relevant respects identical to the E 5b 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 subcontractor 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 instructions 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 subcontractor 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 subcontractor".

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 subcontractor".

The nominated subcontractor 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 subcontractor 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 costs of having others execute the remedial work. The nominated subcontractor 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 subcontractor fails to perform its obligations under the subcontract, as was evident in this case, then the architect is under an obligation to nominate another subcontractor to complete the work.

At first instance Matheson J., of the South Australian Supreme Court, ((1982) 35 S.A.S.R. 1) held that the principal had no duty to renominate a subcontractor and that the terms of the contract effectively obliged the head contractor to complete all the work including the nominated subcontract work.

On appeal the Full Court of the Supreme Court of South Australia overruled the primary judge ((1983) 35 S.A.S.R. 1).

Two judges, Mitchell A.C.J. and White J., held that the principal 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 head contractor to complete the nominated subcontract work and that in the event of the default of the nominated subcontractor 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 principal.

The actual remedial work in respect of which the nominated subcontractor 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 the 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 subcontractor 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 judgment 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 subcontract works. In the contract in question here, cll. 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 subcontractor is in default. In the contract in question, cll. 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 subcontractor if the nominated subcontractor "drops out".

Brennan J. did, however, deal with one basis upon which *Bickerton's* case, and provisions similar to cl. 18 of E 5b, 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 subcontractor due to that loss being made up by the principal, the defaulting subcontractor escapes liability for default, there being no way for the principal to recover its losses from the subcontractor. This criticism is said to justify resting full liability for nominated subcontractors 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 subcontractor under cl. 18 of E 5b, the principal would be successfully subrogated to the head contractor 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 subcontractor is contained in the judgment of Brennan J.)

4.3.6 *The Position After Jennings*

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

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

(a) The clause that specifically dealt with renomination (cl. 10.8) was inapplicable, as the nominated subcontractor was not in liquidation;
(b) The second and third paragraphs of cl. 10.3 (which provided that the nomination of a subcontractor 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 subcontractor

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

In relation to item (b), in the *Townsville Hospitals Board* case, Douglas J. referred to the following two paragraphs of cl. 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 subcontractor or any employee or agent of the nominated subcontractor 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 cl. 10.3 of NPWC 3. At 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 subcontractor. With respect it has nothing to do with the nomination of a second subcontractor."

However, in the *Jennings* case, the equivalent RAIA clause to cl. 13(c) of E 5b was relied on as one of the reasons for distinguishing *Bickerton's* case. Clause 13(c) of E 5b 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 subcontractors or suppliers pursuant to this clause or to nominated subcontractors or nominated suppliers pursuant to cll. 15 and 16 of these conditions."

In relation to item (c), in the *Townsville Hospitals Board* case Douglas J. stated at 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 matters ancillary to prime cost areas which are referred to in detail. It is of interest to note that cl. 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 (cl. 18(c) of E 5b) was more onerous on the head contractor than the clause under consideration in the *Townsville Hospitals 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 Hospitals Board* case on the other hand, it is not possible to be definitive as to whether the *Townsville Hospitals 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 Hospitals Board* case is inconsistent with the *Jennings* case it could however be said that:

(a) Douglas J. in the *Townsville Hospitals Board* case gave a much lesser importance to the second and third paragraphs of cl. 10.3 of NPWC 2 than the High Court in the *Jennings* case gave to cl. 13(c) of E 5b.

(b) Douglas J. in the *Townsville Hospitals 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 nominated subcontractors) 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 Hospitals Board* case contained any equivalent of cl. 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 Hospitals Board* case to cl. 18(c) of E 5b. Clause 18(c) of E 5b 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, cl. 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 Hospitals 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 Hospitals Board* case at 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 and 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.

4.4 *Position Under the Standard Forms of Contract*

4.4.1 *E 5b*

The contract considered in the *Jennings* case was

for all intents and purposes identical to the E 5b standard form of contract.

Generally, E 5b places the risk of default by a nominated subcontractor upon the head contractor. In the situations set out in cll. 15(g)(i) and 15(g)(ii), the rights of the head contractor under cl. 15(f) are totally removed, except in the case of bankruptcy or liquidation of the nominated subcontractor. In other situations, the head contractor is (on the authority of the *Jennings* case) obliged to complete the subcontract works, albeit that the head contractor *might* be able to claim some of the extra expense involved from the principal (as an alternative to the probably worthless rights which the head contractor has against the defaulting nominated subcontractor). The question of the head contractor's possible rights to claim the extra expense from the principal is considered in the judgment of Brennan J. in the *Jennings* case.

Clause 15 is the relevant provision generally.

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

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

Clauses 15(f) and (g) deal with default of the nominated subcontractor.

Clause 15(f) provides that in the event of the default of a nominated subcontractor, 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 subcontractor.

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

(i) where the architect has before calling for tenders for the nominated subcontract 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 subcontractor submitted to the head contractor copies of all tenders received and agreed in consultation with the head contractor the selection of the nominated subcontractor — cl. 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 subcontractor, the specified terms and conditions of the subcontract and the amounts of all tenders received in respect of the subcontract, and supplied to the head contractor copies of all relevant documents submitted by the proposed nominated subcontractor with his tender — cl. 15(g)(ii).

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

4.4.2 *MBW 1*

The provisions in MBW 1 dealing with the position of the parties in the case of liquidation or bankruptcy of a nominated subcontractor 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 subcontractor caused other than through liquidation or bankruptcy. Clause 4.02 and the opening line of cl. 4.10 show an intention that the head contractor is to be

liable for the defaults of the nominated subcontractor in cases other than the liquidation or bankruptcy of the nominated subcontractor, 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 subcontractor. In particular, MBW 1 contains no equivalent of cl. 18(c) of E 5b — compare cl. 18(c) of E 5b with cll. 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 generally.

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

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

Clause 4.09 deals with payment by the head contractor to the nominated subcontractor. The clause provides two alternative cll. 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 subcontractor after the head contractor has received payment from the principal in respect of the portion of the subcontract works to which each progress claim relates. The second alternative provides for the parties to draft and insert their own payment provisions as special condition 15 to the head contract.

Clause 4.10 deals with the bankruptcy or liquidation of a nominated subcontractor. In such circumstances, the head contractor is to notify the architect, who is obliged *either* to renominate *or* to instruct the head contractor to omit the subcontract works or to execute the subcontract works himself. Clauses 4.10.02 to 4.10.05 deal with 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 costs thereby incurred, from the nominated subcontractor.

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 cl. 4.10 that the contract intends that, apart from liquidation or bankruptcy of the nominated subcontractor, the head contractor is to be liable for the consequences of default by the nominated subcontractor.

It is arguable that *Bickerton's* case may apply to MBW 1. While it may be possible to read cl. 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 cl. 18(c) of E 5b. 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 subcontract works which the head contractor executes is to be calculated.

4.4.3 *AS 2124–1981*

The provisions in AS 2124–1981 concerning the position of the parties upon default of a nominated subcontractor appear to be even-handed. While the head contractor remains liable for *defective* work of a defaulting nominated subcontractor, work remaining uncompleted at the date of default is treated as a "provisional sum", and the door is left open for a renomination 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 subcontractor.

Clauses 10.2 and 10.4 also provide that the nominated subcontractor must enter into a subcontract with the head contractor, but unlike E 5b and MBW 1, do not set out the matters which the head contractor may insist be included into that subcontract.

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

There is no express obligation on the principal to renominate. The final paragraph of cl. 10.5 places on the head contractor the responsibility to remedy (at his own cost) any defective work of the nominated subcontractor. However, cl. 10.5 is clear in its statement that the subcontract works remaining uncompleted at the date of default by a nominated subcontractor are to be treated as

provisional sum items under cl. 11. Furthermore, the reference to cl. 10.1, 10.2, 10.3 and 10.4 applying in such a case opens the door for a renomination by the principal.

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

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 subcontractor, and to charge the principal for that work as a "Provisional Sum" under cl. 11. Clause 3 of the standard formal instrument of agreement, when read with the definition of "the works" in cl. 1 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 subcontract works in the absence of a direction from the superintendent to that effect under cl. 11.1.

4.4.4 *NPWC 3*

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

In light of the decision in the *Townsville Hospitals Board* case, it appears that the provisions in NPWC 3 place the responsibility for defaults of a nominated subcontractor 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 subcontractor.

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

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

Clause 10.8 deals with the bankruptcy or liquidation of the nominated subcontractor. If the nominated subcontract is terminated as a result of such bankruptcy or liquidation of the nominated subcontractor, cl. 10.8 provides that the principal *may* renominate. If the principal does renominate, 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 subcontractor caused other than through bankruptcy or liquidation. Accordingly, on the authority of the *Townsville Hospitals Board* case, the principles of *Bickerton's* case appear to apply to cases of default by the nominated subcontractor other than those dealt with in cl. 10.8 (namely bankruptcy or liquidation). However, it must be remembered that the *Townsville Hospitals Board* case may have to be reconsidered in light of the *Jennings* case (see the discussion in section 4.3.6 above, pp. 132-133).

4.4.5 *FIDIC*

The provisions of FIDIC make no attempt whatsoever to apportion liability, for the defaults of a nominated subcontractor, 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 subcontractor.

Clauses 59(2) and 59(3) provide that the head contractor must enter into a subcontract with

such nominated subcontractor, and those clauses then set out the matters which the head contractor may force the nominated subcontractor to include in the subcontract.

Clause 59(5) is the only provision dealing with payment of nominated subcontractors. 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 subcontractor have been paid. That clause also gives the principal the right to pay the nominated subcontractor direct.

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

The principles of *Bickerton's* case may well apply to the FIDIC standard form of contract. There is no equivalent of cl. 1(c) of the Articles of Agreement considered in the *Jennings* case, nor any equivalent of cl. 18(c) of E 5b (which provides for reimbursement of the head contractor for such of the nominated subcontract works as are executed by the head contractor). Clause 58(ii)(a) might at first glance be thought to be similar to cl. 18(c) of E 5b, but reference should also be had to cll. 58(ii)(b) and 59(iv) in this regard.

5. Subcontractors' Rights to Liens and Charges

5.1 *Queensland*

5.1.1 *Subcontractors' Charges Act 1974*

As indicated earlier the principal concern of a subcontractor is that the head contractor with whom he has entered into a contract may go bankrupt. In that case, his remedy would be to prove his debt in the bankruptcy or winding-up of the head contractor. This would result in him being paid a certain proportion of the moneys owed. In an extreme case of bankruptcy the subcontractor may only be entitled to some cents in the dollar.

However, the situation of a subcontractor in Queensland is different from that of a normal creditor, due to the application of the *Subcontractors' Charges Act*.

5.1.2 *Nature of Charge*

Section 5 of the Act provides:

"(1) Where an employer contracts with a contractor for the performance of work upon or in respect of land or a building, or other structure or permanent improvement upon land or a chattel, every subcontractor of the contractor shall be entitled to a charge on the money payable to the contractor or a superior contractor under his contract or subcontract.

(2) The charge of a subcontractor shall secure payment in accordance with his subcontract of all money that is payable or is to become payable to him for work done by him under the subcontract.

(3) The total amount recoverable under the charges of subcontractors shall not exceed the amount payable to the contractor or subcontractor under his contract or subcontract, as the case may be."

Thus a charge may come into existence in circumstances:

(a) where an employer contracts with a contractor;
(b) for the performance of *work*; and
(c) upon or in respect of land or a building or other structure or permanent improvement upon land.

Once these conditions have been established every subcontractor of the contractor shall be entitled to charge on the money *payable* to the contractor or a *superior contractor* under his contract or subcontract.

It is clear that requirements (a) and (c) noted above, will generally present no difficulties for a normal subcontractor.

Requirement (b) however refers to the term "work". This term is defined in the interpretation section of the Act as follows:

" 'work' includes work or labour, whether skilled or unskilled, done or commenced upon the land where the contract or subcontract is being performed by a person of any occupation in connexion with —

(a) the construction, decoration, alteration or repair of a building or other structure upon land;
(b) the development or working of a mine, quarry, sand-pit, drain, embankment or other excavation in or upon land;
(c) the placement, fixation or erection of materials, plant or machinery used or intended to be used for a purpose specified in sub-paragraph (a) or (b);

(d) the alteration or improvement of a chattel:

the term includes also the supply of materials used or brought on premises to be used by a subcontractor in connexion with other work the subject of his contract or subcontract but does not include —

(i) the mere delivery of goods sold by a vendor or under a contract for the sale of goods, to at or upon land;
(ii) work or labour done or commenced by a person —
(A) under a contract of service;
(B) in connexion with the testing of materials or the taking of measurements or quantities;
(iii) the supply under a contract of hire of materials, plant or machinery not intended to be incorporated in the work."

The effect of the definition of "work" and s. 5 is that suppliers to a building contractor are not protected by the Act. The Act only relates to "work or labour".

The case of *William Andrew Pty Ltd v. Santa Lucia* ([1983] Qd R. 349) is an example of a supplier who unsuccessfully sought to obtain a charge. In this case the defendant and the plaintiff entered into an agreement whereby the defendants were to supply to the plaintiff crushed rock or gravel which was to be reduced and dealt with by the defendants to a degree to make it comply with the specifications. Beyond the delivery of rock the only relevant work which was to be carried out upon the site for the contract was the provision and maintenance of access roads for the delivery of the material. Mr Justice Matthews in holding that the defendants were not subcontractors (for the purposes of the Act) because they were not performing work, said that it did not seem to him that the defendants were required by their agreement with the plaintiff to deliver the goods to the plaintiffs at the site of the work and that no relevant work was performed on the land where the contract was being performed, the provision of access roads or maintenance of access roads being merely ancillary to the delivery of goods.

This case indicates to a certain degree the illogical limitations placed upon the Act. If subcontractors are or should be entitled to the privileged position provided by the Act, one can only question why suppliers in the industry have been excluded.

Section 5 says that the charge is upon money "payable to the contractor or a superior contractor".

In the case of *Thiess Contractors Pty Ltd and Ors v. Groutco (Australia) Pty Ltd* (reported at p. 200 of this Journal) a subcontractor purported to create a charge over money payable by the principal in respect of the subcontractor's claim for damages for breach of contract by the head contractor. The head contractor made an application to the court to have the charge cancelled or modified on the ground that a claim for damages for breach of contract could not be secured by a charge under the Act. The judge at first instance (Thomas J.) held that the subcontractor's claim *was* one for "money that is payable . . . to him for work done by him under the subcontract", within the meaning of s. 5(2) of the Act and so allowed the charge to stand. The head contractor appealed to the Full Court from this decision. The Full Court held that the object and purpose of the Act is to secure claims for payment of money due for work done, calculated in accordance with the actual payment provisions of the subcontract itself, and accordingly that when s. 5(2) refers to moneys payable "in accordance with the subcontract", this is limited to those moneys which the terms of the subcontract itself provide as being or becoming payable. Accordingly, a claim for damages for breach of contract cannot be secured under the provisions of the Act.

A further question is raised by s. 5 as to what are moneys "payable" to the contractor or superior contractor. Consider this example:

A is the proprietor of a block of land for whom B is constructing a shopping complex. C has been subcontracted by B to do the tiling work. Three days after the tiling work has been completed B is declared bankrupt.

The original contract price was $100,000. To the date of the declaration of bankruptcy $70,000 of progress payments had been made, however a further $10,000 worth of work had been completed by the builder which had not been paid for by the proprietor.

A, now anxious to complete the building, proceeds to seek tenders for the completion of the building. The lowest tender received is $40,000.

Accordingly A has a right of action against B for $20,000. (That is the difference between the

cost of construction if B had complied with his contract and the cost which A will incur in an effort to have the structure completed.)

While there may be $10,000 owing to B by A, there is also a corresponding counter-claim of $20,000.

The question then raised is whether the Act allows $10,000 admittedly owing to the builder from A to be charged by a subcontractor.

There are no recorded cases in Queensland on this point. However, New Zealand cases, on similar legislation, suggest that only the net amount owing is chargeable.

Therefore, in the above example there would be no funds available to which a subcontractor's charge could attach.

The effect of the charge is that the subcontractor obtains a preference over other creditors.

Section 5 allows "leap frog charges" to be created. By the use of the words "money payable to the contractor or a superior contractor under his contract or subcontract", the section is clearly envisaging that a charge may be created in a complicated situation where there is:

(a) a proprietor;
(b) a contractor;
(c) a subcontractor; and
(d) a sub-subcontractor.

What the section suggests is that the sub-subcontractor would be entitled to charge moneys otherwise payable to the contractor.

This understanding of the section was endorsed by the Full Court of the Supreme Court of Queensland in the case of *Hewitt Nominees v. The Commissioner for Railways* ([1979] Qd R. 256). In this case a sub-subcontractor sought to charge moneys payable to the head contractor. The sub-subcontractor's immediate superior contractor, (i.e. the subcontractor) had been dismissed from the site for imcompetence and owing the head contractor a considerable amount of money. The only money available that the sub-subcontractor could charge was money owing by the proprietor to the head contractor who had probably never heard of the sub-subcontractor. The sub-subcontractor therefore sought to charge the money in the hands of the proprietor, and was successful in so doing.

5.1.3 *Procedure for an Effective Charge*

There are two requirements that have to be met prior to a charge affixing. They are:

(a) various notices have to be given and certified; and
(b) court action has to be commenced.

Section 10 of the Act sets out the requirements for notices. A subcontractor seeking to enforce a charge must give a notice to:

(a) the employer or superior contractor by whom the money is payable; and
(b) the contractor to whom the money is payable.

Section 10(2) provides that the notice must be given within three months of the completion of the work that relates to the charge in question. However, the section specifically provides that a notice may be given prior to the completion of the work.

Section 10(3) provides that claims in respect of retention of moneys only may be within three months after the expiration of the period of maintenance provided by the contract.

The distinction between s. 10(2) and s. 10(3) was considered by McPherson J. in the case of *FFE Group (Qld) Pty Ltd* ([1984] 1 Qd R. 267). The case involved an application for cancellation of a charge under the Act pursuant to s. 21. The subcontractor claimed a charge in respect of ". . . the money and/or retention money . . ." payable by the employer to the head contractor. Section 10(4) of the Act states that if notice is not given pursuant to s. 10 the charge shall not attach. The substance of the employer's case was that notice was not given within the time limits prescribed by ss. 10(2) or 10(3) and therefore the charge did not attach.

McPherson J. found that the notice was outside the time limits prescribed by s. 10(2) because the notice was not given within three months after the subcontractor completed its work. Consequently, on his analysis, if the charge was to attach at all, it had to fall within the terms of s. 10(3).

It was submitted on behalf of the employer that the charge did not attach because the notice was also given outside the terms of s. 10(3) because of the use of the expression "the money and/or retention money" as the description of the money sought to be charged. McPherson J. found in favour of that submission. He indicated that the "and/or" construction resulted in either:

(a) the notice of claim of charge not being "in respect of retention money only" within the terms of s. 10(3); or

(b) uncertainty as to the nature of the money charged.

It is a further requirement that the notice issued pursuant to s. 10(1) be certified by an authorised person. Section 10A of the Act defines "authorised person". Among others, registered engineers or architects are authorised for the purposes of certification.

Once the notice has been duly certified and issued by the subcontractor, the employer of the subcontractor may either:

(a) give notice in the prescribed form that he accepts liability to pay the amount claimed; or
(b) give notice that he disputes the claim.

The notice must be delivered to both the superior contractor (the person who is currently holding the money) and the subcontractor who gave the notice of charge.

If the employer of the subcontractor elects to accept liability to pay the sum, then the superior contractor is obliged to pay the amount claimed directly to the subcontractor.

If the superior contractor (i.e., the party holding the money) disburses the money held other than in accordance with the Act, then he becomes personally liable for the correct amount claimed.

If the money is not voluntarily paid by the superior contractor in pursuance of the employer of the subcontractor having accepted liability then the subcontractor *must* take legal action pursuant to ss 12 or 15 of the Act. The action seeking to enforce the charge must be taken within two months after notice of claim of charge has been given in respect to charges generally, and in the case of retention moneys within four months of such moneys becoming payable. A failure to take the action within the time prescribed by the Act will extinguish the charge.

If an effective charge is to be created it is essential to ensure that the necessary notice is given within time and that the legal action is taken within the further time prescribed.

Section 22 of the Act deals with vexatious or groundless notices of claim. That section reads as follows:

"(1) A person who vexatiously or without reasonable grounds gives a notice of claim of charge is liable to pay to a person prejudicially affected thereby such damages as he sustains in consequence thereof.

(2) Damages pursuant to subsection (1) shall be determined and fixed by the court on an application by the person prejudicially affected."

The *Subcontractors' Charges Act* 1974 substantially changes the common law position of subcontractors vis-à-vis the principal and/or superior contractors. The Act creates a direct relationship between those parties outside the normal principles of privity of contract. It is a relationship which can be of great commercial significance.

5.2 *South Australia and Northern Territory*

5.2.1 *The Workmen's Liens Act 1893*

The Workmen's Liens Act 1893 (as amended) is the relevant legislation. It is a South Australian statute, which continues to apply in the Northern Territory by virtue of the Commonwealth *Northern Territory Acceptance Act* 1910 (as amended) and the Commonwealth *Northern Territory (Administration) Act* 1910 (as amended).

The Act is unique in Australia in that it is the only Australian statute that provides machinery for a workman or contractor or subcontractor (as defined) to obtain a lien over the land or chattels upon which they did their work, in addition to the usual remedy of a charge upon moneys due to their employer or immediate head contractor. (Similar legislation in Queensland was repealed in 1964.)

While s. 9b specifically states that liens may arise in respect of a contract merely for the supply of materials, it appears that no charge arises for such a contract of mere supply of materials, unrelated to any work.

Section 8 sets the priority as between the respective liens and charges created by the Act as follows:

(i) Liens and charges of workmen for wages.
(ii) Liens and charges of subcontractors.
(iii) Liens of contractors.

5.2.2 *Liens*

Section 4 provides that "workmen" are given a lien for their wages for work in the cases specified, the lien only extending however to a maximum of $200. Section 5 provides that "contractors" and "subcontractors" are given a lien for that part of the contract price as has accrued

due, on the estate or interest in land of any owner or occupier, in the following circumstances:

(a) Where the work is done, with the assent, expressed or implied, of the owner or occupier to the land or to any fixture thereon.
(b) Where the materials are, with the assent, express or implied, of the owner or occupier, used or intended to be used in or about work done, or intended to be done, to the land or to any fixture thereon.

In cases other than that of workmen employed by the owner or occupier, s. 6 limits the extent of the lien, in that the lien does not extend beyond the portion of the contract price payable but unpaid by the owner or occupier at the time when he receives notice of the lien or of its registration, whichever first happens. Section 6 further provides that the lien does not exist *at all* in cases where there is no such contract binding the owner or occupier to pay a contract price (i.e., the price under the head contract).

Part II of the Act deals with registration and discharge of liens and provides that in order to enforce a lien, two steps must be taken by the person claiming the lien:

(a) The lien must be registered against the land in question, such registration taking place with the Titles Office. Section 10(1) provides that the lien must be registered before the expiration of twenty-eight days after the wages or contract price in respect of which such lien has arisen have become due. Section 10(2) deals with the question of when the wages or contract price may be said to have "become due" for the purposes of s. 10(1).
(b) An action must be commenced (in a court of appropriate jurisdiction) against the owner or occupier for enforcement of the lien within fourteen days of registration (s. 15).

Unless *both* of the above requirements are satisfied, the lien is not enforceable.

5.2.3 *Charges*

Section 7(1) provides that a *workman* has a charge on any money payable to the contractor or subcontractor by whom the workman is employed, for the workman's wages in respect of work done for the purposes of the contract of such contractor or subcontractor. Section 7(4) limits the charge to $200.

Section 7(2) provides that a *subcontractor* shall have a charge on any money payable to the contractor or subcontractor with whom the subcontractor has contracted, for that portion of the contract price payable to the first-mentioned subcontractor in respect of work done or materials furnished or manufactured for the purposes of the contract of such contractor or secondly mentioned subcontractor. It has been held that the expression "contract price" in s. 7(2) means the price under the subcontract.

Section 7(3) places the following two important qualifications upon the charges created by ss 7(1) and 7(2):

(a) the charge attaches only to money payable under the contract for the purposes of which the work or materials have been done, supplied or manufactured; and
(b) The charge lapses unless an action is brought to enforce the claim within twenty-eight days after the wages or contract price have "become due", within the meaning of those two words as set out in s. 10(2).

In *W. Curl and Sons Regd v. Buck Industries Pty Ltd and Anor* ([1972] 2 S.A.S.R. 335), Hogarth J. of the South Australian Supreme Court held that it was unnecessary, for a charge under s. 7 to arise, that there should be a debt presently due by a head contractor to a subcontractor at the time when the charge is claimed to have arisen. It is sufficient that there is then merely a debt payable in futuro.

5.2.4 *Procedural Provisions*

Part III deals with procedural matters and contains provisions dealing with joinder of persons primarily liable (e.g. principal, head contractor, etc.); payment into Court; detention or inspection of property; consolidation of actions and joinder of interested parties; vexatious or fraudulent claims; appeals; and costs.

The Act states that it does not affect other rights of the workmen, contractors or subcontractors at common law.

5.3 *New South Wales*

5.3.1 *Contractors' Debts Act of 1897*

This Act is of narrower application than the Queensland and South Australian Acts considered above.

The object of the Act, in the words of Latham C.J. of the High Court of Australia in *Concrete Constructions Pty Ltd v. Barnes* ((1938) 61 C.L.R. 209 at 213), is as follows:

> "The object of the Act is to secure payment to workmen for work and labour done, or to tradesmen for materials supplied or work and labour done and materials supplied, where the person with whom they are in contractual relations does not pay them but where that person is entitled to receive from third persons payment for the work and labour done or the goods supplied."

5.3.2 *Nature of the Security*

The Act applies to the following situations:

(a) Work and labour done by a "workman";
(b) Materials supplied by a "tradesman"; and
(c) Materials and work and labour supplied, provided and done by a "tradesman".

In relation to (a) above, s. 5 provides that, if the sums due is in respect of daily, weekly or monthly wages, the security is available only for sixty days' wages.

If the procedural requirements set out below are satisfied, the security obtained by the workman/tradesman under the Act is referred to in the Act as an "assignment", i.e. an assignment to the workman/tradesman of the right to be paid the moneys due to the person against whom the security is claimed. After the assignment takes effect, the moneys must be paid direct to the workman/tradesman. See ss. 8 and 9.

5.3.3 *Procedure for an Effective Security*

The scheme of the Act is that the assignment does not operate until the workman/tradesman has obtained a judgment in the appropriate court, and obtained a certificate of judgment, and served that certificate on the person from whom the moneys are claimed (see ss 3, 7, and 8). It should be noted that the procedure is *not* available upon default judgment (see s. 3).

Section 14 provides the workman/tradesman with a type of Mareva injunction remedy pending the obtaining of judgment. It allows the workman/tradesman to serve a notice of the action upon the person by whom the money is payable, and the notice has the effect of an interlocutory injunction until the judgment.

Section 18 introduces a fourth person — a subcontractor. As Dorter and Sharkey, *Building and Construction Contracts in Australia* (supra), point out at p. 222:

> "The section only extends the procedure available under the other provisions of the Act to a case where there is a subcontractor in addition to a contractor, a contractee, and a workman or tradesman. It does not impose upon a contractor an unrestricted personal liability for the debt of a subcontractor in respect of wages or materials or work and labour."

Section 6 provides that all proceedings under the Act in respect of debts due for material or for material and work and labour must be instituted within three months after any such debt accrues due. However, it was held in *Costain Australia Ltd v. Superior Pipe Installations Pty Ltd* ([1975] 1 N.S.W.L.R. 491), that s. 6 only applies to actions under s. 11, i.e. to actions against a person who pays money in contravention of the assignment granted to the workman/tradesman under the Act.

5.4 *New Zealand*

5.4.1 *Wages Protection and Contractors' Liens Act 1939*

Like the South Australian Act discussed in section 5.2 (pp. 140–141, above), this New Zealand Act also provides for liens over the land and chattels of the employer, in addition to the usual charge over contract moneys.

Both the liens and charges arise in respect of "work upon or in respect of any land or chattel".

Section 20(1) defines "work" as follows:

> "*Work* includes any work or labour, whether skilled or unskilled, done or commenced by any person of any occupation in connection with —
>
> (a) The construction, decoration, alteration, or repair of any building or other structure upon land; or
> (b) The development or working of any mine, quarry, sandpit, drain, embankment, or other excavation in or upon any land; or
> (c) The placing, fixing, or erection of any materials, or of any plant or machinery, used or intended to be used for any of the purposes aforesaid; or
> (d) The alteration or improvement of any chattels; or

(e) The threshing of grain (including in the term 'grain' all cereals, pulse, and seeds of every kind —

and also includes the supply of material used or brought on the premises to be used in connection with the work . . . ".

Thus, it appears that liens and charges can arise in respect of the mere supply of materials, provided that it can be shown that the materials were to be used in connection with the works (whether or not they actually were so used).

Like s. 8 of the South Australian Act, s. 26 sets the priority between the respective liens and charges created by the Act. The priority under the New Zealand Act is as follows:

(a) The liens and charges of workers for wages, not exceeding three months' wages or $100 (whichever is the lesser).
(b) The liens and charges of workers for wages not included in heading (a), *and* the liens and charges of subcontractors.
(c) The liens of contractors.

5.4.2 *Liens*

Section 21(1) provides that, where any employer contracts with or employs any person for the performance of any work upon or in respect of any land or chattel, the contractor and every subcontractor or worker employed to do any part of the work shall be entitled to a lien upon the estate or interest of the employer in the land or chattel. Sections 21(2), (3), (4) and 22 deal with the amounts to be secured by the lien.

However, where the employer is not the owner of the land or chattel in question, s. 23 provides that the lien only attaches to the land or chattel to the extent to which the owner has consented in writing that he should be liable for the contract price or that his estate or interest in the land or chattel should be liable. This, of course, is a narrower test than that set down in ss 4 and 5 of the South Australian Act.

Three steps must be taken to enforce the lien:

(a) The person claiming the lien must give notice to the owner of the land or chattel in question; to the employer (if the owner is not the employer); to the contractor or subcontractor (if any) by whom he is employed; to every superior contractor; and to every other person who to the knowledge of the claimant would, but for the claim, be entitled to receive any money payable to that contractor or subcontractor or to any superior contractor. See s. 28.
(b) The person claiming the lien must commence an action in the appropriate court to enforce the lien not later than sixty days after the date of the completion or abandonment of the work specified in the contract between the employer and the head contractor (or worker employed directly by the employer). See s. 34.
(c) If the lien relates to land, it must be registered with the New Zealand Titles Office. See s. 41.

Failure to comply with requirements (b) and (c) means that the lien is unenforceable (see ss 34(6) and 41(1) respectively).

Failure to comply with requirement (a), within thirty days after the completion or abandonment of the work in question, merely postpones the priority of the lien to the extent set forth in s. 26(2).

5.4.3 *Charges*

Section 2(1) provides that, where an employer contracts with or employs any person for the performance of any work upon or in respect of any land or chattel, every subcontractor or workman employed by the contractor or by any subcontractor to do any part of the work is entitled to a charge on the money payable to the contractor or subcontractor by whom he is employed, or to any superior contractor, under his contract or subcontract. Sections 21(2), (3), (4) and 22 deal with the amounts to be secured by the charge.

Two steps must be taken to enforce the charge:

(a) The person claiming the charge must give notice to the employer or superior contractor by whom the money is payable; to the contractor to whom the money is payable; and to every other person who to the knowledge of the complainant would, but for the claim, be entitled to receive any money payable to that contractor. See s. 29.
(b) The person claiming the charge must commence an action in the appropriate court to enforce the charge, within the same time limits specified above for actions to enforce liens. See s. 34.

Failure to comply with requirement (a), within thirty days after the completion or abandonment

of the work in question, merely postpones the priority of the charge to the extent set forth in s. 26(2).

Failure to comply with requirement (b) results in the charge being deemed to be extinguished (s. 34(6)).

5.4.4 *Procedural and Other Important Provisions*

The remainder of the Act deals with merely procedural matters, including the duty of the employer to retain moneys to cover the lien or charge; the duty of the contractor to give notice to the principal of all subcontracts; consolidation of actions; orders for protection of property; and vexatious notices of lien or charge.

6. Some Specific Problems

6.1 *Construction Management*

6.1.1 *General*

Construction Management is a phrase which means different things to different people. The way the phrase is being used in this article is to describe a situation where a "construction manager" contracts with a principal to arrange for the principal to have certain work carried out. The construction manager will often undertake a responsibility for design and co-ordination of consultants and will usually have some limits as to time and money imposed upon it but as far as the execution of the construction work is concerned, it will contract in the name of the principal for the execution of the work. There will thus be numerous direct contracts let by the principal to various contractors who will be responsible for the various packages into which the construction manager has divided the works. In this situation, it is common that there will be separate contracts for the discrete sections of the work which a head contract would normally subcontract, e.g. electrical services, fire services, mechanical services, partitions, ceilings and the like.

The subcontractors become head contractors.

6.1.2 *Consequence of Direct Contracts*

Subcontractors used to being between a rock and a hard place often welcome the opportunity to be a direct contractor in construction management situations similar to that described above. The problem is that although there are direct contracts for the execution of what can be generally described as traditional subcontract work, the problems of subcontracting do not go away. A subcontractor has usually been obliged to win the contract by competitive tender and thus will be unlikely to be receiving a greatly increased margin to that which would be obtained as a true subcontractor. The work will have to be executed in the same environment as if there was a head contractor with all the interface and co-ordination problems that are involved in the construction process. Thus, the traditional subcontract exposure to time and efficiency-related losses is just as great in this situation as in the traditional contracting context. Indeed, the problems for the traditional subcontractors can be greater than if the work is being executed under a head contract arrangement.

6.1.3 *Co-ordination*

Unless the head contract between the traditional subcontractor and the principal imposes upon the principal liability for the construction manager's failure to properly co-ordinate the works, the subcontractor can be left lamenting with no remedy whatever in relation to an inability to proceed efficiently due to interference by other "head" contractors. Although the traditional head contractor's liability for co-ordination is not entirely clear, a traditional head contractor is usually motivated to ensure that co-ordination is adequate to ensure the timely completion of the works as a whole in view of its own liability for performance generally, and timely completion in particular. In the construction management context the construction manager's motivation might be quite different to what it would be if the construction manager was itself liable for the execution of the work and its timely completion. Thus, from a practical point of view the "head" contractors can (and have in some instances) found themselves in a nightmare situation where they are the party expected to bear the delay and inefficiency losses arising from a lack of adequate planning and co-ordination on the part of the construction manager.

6.1.4 *Other Head Contractors*

A multiplicity of head contractors can lead to difficulties for both the principal and the head contractors. In a traditional head contract situation the principal knows where to look in the event of default; he looks to the head contractor.

It is then up to the head contractor to allocate responsibility for its liability to its subcontractors, which it can often do in an effective manner, at least from a commercial point of view. The principal on the other hand has difficulty allocating responsibility, for instance, for damage to the works due to the factual complexity of the situation.

From a subcontract point of view, assuming adequate co-ordination by the construction manager, significant losses can arise due to the default resulting from financial collapse or otherwise, of other subcontractors. It is very unusual indeed for the head contracts entered into in a construction management arrangement to provide for the principal to bear the risk of such losses. The possibility of direct claims between subcontractors in tort will no doubt be explored in the future.

6.2 *Delay*

It is not the aim of this article to examine the question of delay in great detail. However, identification of delay as one of the major causes of loss in the construction industry is a useful starting point when considering what should be contained in subcontract documentation generally.

6.2.1 *Subcontract Exposure*

The subcontractor's legal exposure as a consequence of delay depends upon the provisions of the subcontract regarding timely performance, the subcontractor's right to extensions of time and their costs, and upon the head contractor's duty to co-ordinate.

The provisions of the various standard subcontract forms will be discussed below.

It is generally accepted in the industry that time means money. Thus, the allocation of risk for delay is an important matter to identify in the contractual arrangements between the various parties. Generally speaking, it is unrealistic to expect that a head contractor will sign a subcontract in which the subcontractor's right to compensation for delay (and relief from liability as to timely performance) will be more extensive than the rights of the head contractor under the head contract. Such a proposition is easily stated, however, in order for the rights of the subcontractor under the subcontract to be as extensive as the rights of the head contractor under the head contract it is necessary for at least the following to be effected by the provisions of the relevant subcontract:

(a) The subcontractor's obligations as to timely performance need to be subject to extension in respect of neutral factors such as wet weather, strikes, etc., and acts of prevention by the owner, on the same basis as the head contractor's entitlements.
(b) There must be some provision in relation to the subcontractor's rights in the event of delay due to defaults of other subcontractors of the head contractor or as a consequence of the head contractor's failure to properly co-ordinate, plan and execute the work. Traditionally, subcontractors have been exposed to loss arising from delay due to the head contractor's difficulties, thus providing the head contractor with an opportunity to "spread the loss" in a situation of unsatisfactory performance. Of course, the reality is that in a traditional building contract the majority of the loss arising from delay is suffered by the subcontractors and not by the head contractor.

6.2.2 *Subcontractors' Liabilities for Delay*

Subcontractors are traditionally exposed to liability for delay arising from two sources, viz.:

(a) Losses suffered by the head contractor during periods of delay for which the subcontractor is responsible; and
(b) liquidated or other damages for which the head contractor may become liable due to the subcontractor's default.

It is common for subcontracts to provide for liquidated damages in respect of the head contractor's own loss and to provide for the head contractor to pass on the total amount of losses arising from claims by the owner against the head contractor in respect of the subcontracting delay.

The factual situation in delay claims is always far from clear and where numerous subcontractors are involved it is often difficult, if not impossible, to prove who is to blame. Thus, where there is an inequality of bargaining power between the head contractor and subcontractor, it is not uncommon to find arbitrary provisions enabling the head contractor to allocate responsibility for delay in order to ensure that it is recoverable from someone. In some such provisions it is not uncommon to find the liquidated damages recoverable by the head contractor from

each of the subcontractors to be equal to the head contract's liquidated damages. If the subcontract enables the head contractor to recover both its own loss and to pass on to the subcontractor the head contractor's liability to the principal for delay, serious doubts must arise as to whether the head contractor could enforce a further clause in the subcontract which purported to include (as liquidated damages under the subcontract) the liquidated damages payable by the head contractor under the head contract. Further, the recovery by head contractors of liquidated damages where none have been imposed by the principal is not uncommon.

There is some irony in a situation where "penalty" provisions for delay in subcontracts result in significant recovery by a head contractor despite the fact that the real potential (and usually actual) loss for delay was likely to be suffered by the subcontractors and not by the head contractor.

6.2.3 *Standard Subcontract Provisions in Relation to Delay*

(a) SCE 3

Clause 2(a) provides that the subcontractor must complete the subcontract works by the date stated in the Second Schedule to the subcontract. Clause 3 contains the corresponding obligation of the head contractor, namely that the head contractor must provide the subcontractor with such reasonable access as will enable the subcontractor to carry out and execute the subcontract works. In addition, cl. 8(d) provides that the head contractor is to use his best endeavours to ensure that the subcontractor is not obstructed or hindered in carrying out his obligations under the subcontract.

Clause 4 provides for liquidated damages where the subcontractor fails to substantially complete the subcontract works, or stages thereof, by the dates agreed between the parties. Clause 4 states specifically that the liquidated damages referred to in cl. 4 are without prejudice to the subcontractor's rights under cl. 5, but are to be treated merely as reimbursement to the head contractor "solely and exclusively in respect of additional expenditure [the head contractor] might be expected to incur as a result of the default of the subcontractor . . .".

Clause 5 is an indemnity to the head contractor from the subcontractor. The indemnity covers damages (liquidated or otherwise) which the head contractor becomes liable for under the head contract, but only where a breach by the subcontractor is "a substantial cause" of the head contractor becoming liable for those damages. Where a breach by the subcontractor *is* a "substantial" cause, but is not the "sole" cause, then the subcontractor is only liable for a proportionate share of the head contractor's liability. Clause 25(e) places other financial penalties upon the subcontractor.

Clause 25 deals with extensions of time. Clause 25(c) sets out the thirteen matters for which the subcontractor is entitled to claim extensions of time (including the much debated expression "any other matter, cause or thing beyond the control of the subcontractor"). In addition, cl. 25(g) allows the head contractor to extend time for any matter which the head contractor may believe to be "adequate cause", whether or not the subcontractor has applied for an extension for that "delay". This would enable the head contractor to extend for his own delay, in an attempt to avoid the "prevention" argument (which is relevant in considering, firstly, liquidated damages, and secondly, whether time has become "at large").

The second proviso to cl. 25(c) purports to limit the subcontractor's rights, and provides:

> "And provided always that should any delay of the subcontractor be the substantial proximate cause of delay to the builder in completion of the works the subject of the head contract then the subcontractor shall not be entitled to any further extension of time than what may be appropriate to the extension of time if any that may be granted to the builder for completion of the works the subject of the head contract."

The expression "delay of the subcontractor" is probably limited to delays for which the subcontractor is responsible. If this is correct, then by no means all of the circumstances which would justify an extension of time would invoke the operation of the proviso.

While this standard form subcontract imposes substantial financial penalties on the subcontractor (see above), it is almost silent on the subcontractor's *rights* of reimbursement for delay. The extension of time provision (cl. 25), contains a provision dealing with extra expense caused by a default of the head contractor (cl. 25(d)), but makes no provision for extra expenses arising out of delay generally. Accordingly, the subcontractor's rights appear to be

under variations (cl. 20), general damages (cl. 24), and the "complying with [head contractor's] instructions or directions" clause (cl. 8(f)).

(b) SCMBW 1

Clause 1.03 provides that the head contractor must make sufficient of the site available to the subcontractor to enable the subcontractor to execute and complete the subcontract works. Clause 1.02 provides that the subcontractor must execute and complete the subcontract works by the date for completion (set out in cl. 1.06.12).

Clause 10.15 provides for the payment of liquidated damages by the subcontractor to the head contractor where the subcontractor fails to "substantially complete" the subcontract works by the completion date. The amounts claimable by the head contractor under cl. 10.15 are stated to be exclusive of any amounts claimable by the head contractor under cl. 10.16

Clause 10.16 is an indemnity to the head contractor from the subcontractor. Clause 10.16 is similar to cl. 5 of SCE 3, discussed above, except that the breach by the subcontractor must be "a proximate cause" of the head contractor becoming liable under the head contract, rather than being "a substantial cause" as required by cl. 5 of SCE 3.

Clause 9 deals with extensions of time. Restrictions are placed on extensions for events other than variations. While cl. 9.01 refers to "any cause or causes beyond the control of the subcontractor", it is clear from cll. 9.01 and 9.03 that the subcontractor is not entitled to an extension of time under the subcontract unless the head contractor obtains a corresponding extension of time under the head contract, *except* for:

(a) Variations under the subcontract; and
(b) delays caused by an act, default or omission on the part of the head contractor.

Clause 10 deals with the question of how the financial burden of delay is to be borne between the parties.

Clauses 10.08 and 10.09 deal with recovery by the subcontractor from the head contractor of damages sustained or incurred by the subcontractor as a result of delay caused by an act, default or omission of the head contractor.

Clauses 10.11, 10.12 and 10.13 provide the subcontractor with limited rights to recover any costs and expenses incurred by the subcontractor as a result of delay in the subcontract works caused by certain delays in the head contract works. In particular, the proviso to cl. 10.11 purports to limit the head contractor's liability to the subcontractor under those clauses to the extent to which the head contractor has been reimbursed by the principal for the delays to the head contract works. (It should be noted that delays to the head contract works which caused delays in the subcontract works may in fact be breaches of the subcontract by the head contractor.)

(c) AS 2545-1982

Clause 36.2 provides that the subcontractor must execute the subcontract works to the stage of "substantial completion" by the date agreed between the parties. Clause 28.1 contains the corresponding obligation of the head contractor to provide the subcontractor with such access to the site as will enable the subcontractor to proceed with the subcontract works. Clause 28.1 expressly provides that any delay by the head contractor in giving the subcontractor such access to the site is not to be treated as a breach by the head contractor, unless it will delay the performance of the subcontract for more than three months (or such other period as agreed between the parties). Delays of less than three months are to be treated as grounds for extensions of time under cl. 36.4, with the right of the subcontractor to claim the "extra costs" referred to in the first paragraph of cl. 36.4.

Clause 36.5 provides for liquidated damages where the subcontractor fails to bring the subcontract works to the stage of "substantial completion" (such stage to be defined by the parties in Annexure A) by the agreed date (as extended). The proviso to cl. 36.5 provides that the liquidated damages claimable by the head contractor under Clause 36.5 are not to be

> "deemed to be inclusive of any liability of the [head contractor] for allowance or payment of damages in respect of which the [head contractor] by virtue of cl. 36.6 shall be entitled to be indemnified by the [subcontractor]".

Clause 36.6 is an indemnity to the head contractor from the subcontractor. Clause 36.6 is similar to cl. 5 of SCE 3 (discussed in heading (a) above), and in particular the fact that the breach by the subcontractor must be "a substantial cause" of the head contractor becoming liable under the head contract.

Clause 36.4 deals with extensions of time. It enables a subcontractor to claim extensions of time for any cause beyond the subcontractor's control, and any acts or omissions of the principal, the superintendent, or the head contractor. Clause 36.4, in addition, enables the head contractor to extend time for his own defaults, whether or not the subcontractor makes application for extensions of time with respect to those defaults.

Unlike SCE 3 and SCMBW 1, AS 2545-1982 does not purport to limit the subcontractor's rights to extensions of time to situations where the head contractor is able to obtain a corresponding extension under the head contract. The extensions of time obtainable under cl. 36.4 relate to the date for "substantial completion" of the subcontract works. It should be noted that cl. 36.3 makes the date of "practical completion" of the head contract works to the date of "practical completion" of the subcontract works as well. However, the timely performance obligations of the subcontractor under the subcontract appear to be based around the date of "substantial completion", and not the date of "practical completion".

(d) SCNPWC 3

Clause 3 provides that the subcontractor must complete the subcontract works by the date agreed between the parties. Clause 22(a) contains the corresponding obligation of the head contractor to give the subcontractor possession of the site sufficient to enable the subcontractor "to commence and proceed with" the subcontract works. Clause 22(a) further states that delay in providing such possession to the subcontractor is not to be treated as a breach by the head contractor, but is merely to be a ground for the granting of extensions of time to the subcontractor.

Clause 32(a) provides for liquidated damages where the subcontractor fails to substantially complete the subcontract works, or stages thereof, by the agreed dates. The proviso to cl. 32(a), like the proviso to cl. 4 of SCE 3, provides that the liquidated damages referred to in cl. 32(a) are without prejudice to the head contractor's rights under cl. 32(b).

Clause 32(b) is an indemnity to the head contractor from the subcontractor. Clause 32(b) is similar to cl. 5 of SCE 3, and in particular the fact that the breach by the subcontractor must be "a substantial cause" of the head contractor becoming liable under the head contract.

Clause 31 deals with extensions of time. Clause 31(b) allows the subcontractor to claim extensions of time for delays arising out of breaches by the head contractor, the principal or the superintendent, and for "any other cause" except breaches by the subcontractor. Clause 31(e) allows the head contractor to extend for its own breaches even if the subcontractor has not applied for an extension of time. Clause 31(h) deals with extra costs incurred by the subcontractor arising out of extensions of time. The subcontractor is only entitled to recover these costs where the need for the extension was due to a breach by the head contractor, the principal or the superintendent. In relation to extensions due to breaches by the principal or the superintendent, the subcontractor can only recover these costs where the head contractor has recovered those costs from the principal.

6.3 *Commercial Reality*

In the introduction to this article the inadvisability of lawyers pontificating upon matters of commercial judgment was noted. It is not intended to transgress this principle, but it would be naive to suppose that well-informed contract drafting proceeds on the basis of legal niceties alone.

Subcontracting is a vital part of the construction industry, particularly the building sector of the industry. The bargaining power of subcontractors varies enormously, which is predictable enough considering that they range from small formworkers to multi-national mechanical and fire-services companies.

Logically, the market place should determine vital legal drafting issues such as allocation of risk for delay, terms of payment, and responsibility for nominated subcontractors. While this is undoubtedly the case on many occasions, it is surprising to find that in many instances parties in a strong commercial position simply fail to adequately protect themselves. The only explanation can be that they are ignorant of the relevant issues.

Thus the irony is that while lawyers should not meddle in matters of commerce, ignorance of legal issues often nullifies commercial strength.

It may also be said that some decent legal advice at the right time can be an important part of effective commercial negotiation.