

CONTRACTS AND NEGLIGENCE

IN THE BUILDING INDUSTRY

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MASTER OF SCIENCE - BUILDING 1980

THE UNIVERSITY OF NEW SOUTH WALES.

Dedicated to Patzy 'G'
whose loving patience,
encouragement and faith
turned my hardest times
to moments of hope and
good cheer.

'G'.

I hereby certify that the work contained in this Thesis
has not been submitted for a higher degree to any other
University or Institution.

Signature.....*Obugwo*.....

Date.....*7th July, 1980.*.....

TABLE OF CONTENTS

	Page
SUMMARY	(iii)
ACKNOWLEDGEMENTS	(v)
TABLE OF CASES	(vi)
CHAPTER ONE:	
INTRODUCTION	
'The Law and need for communication'	
General	1
Building Industry and National Development	5
Choice of Contract	9
Historical aspects	12
CHAPTER TWO:	
'TENDERING'	
Methods of Tendering	25
Purposes of Tendering	34
Overseas Methods	34
Construction Management	37
CHAPTER THREE:	
'BUILDERS' LIABILITIES'	
General	39
Building Environment	42
3rd Parties	44
Arbitration	52
Partial Occupation	58
Defects	63
Limitations	66

continued...../

	Page
CHAPTER FOUR: "SUBCONTRACTORS"	
General	69
Nominated Sub-Contractors	71
CHAPTER FIVE: "NOMINATED SUPPLIERS"	
General	89
Nominated Suppliers	89
CHAPTER SIX: "ARCHITECT'S ROLE"	
The Architect	99
Supervision	104
Certification	105
CHAPTER SEVEN: "TRENDS IN CONTRACT AND TORT"	
General	116
CHAPTER EIGHT: "CONCLUSION AND RECOMMENDATIONS"	
General	122
The Architect	126
Construction Management	129
likely Effects on Industry	132
BIBLIOGRAPHY	134

SUMMARY

From the time a particular building component changes from its raw material form to a finished product for incorporation into a building system it passes through a series of processes, controls and tests.

The relationships of those involved in these distinct, interrelated and independent stages is governed by some form of contract. By the time the item comes to rest in a complete building, a number of decisions will have been made concerning its suitability for selection.

One of the most important documents used in contracts administration is the standard form of contract. It is an attempt to integrate a series of contractual relationships by establishing liabilities, rights, duties and remedies of those involved in a building contract. It also attempts to split the privities of subsisting contracts between the various parties, in an effort to distribute risks across the whole spectrum of participants.

This complexity has brought about some major problems of identifying the risk allocation between the various parties due to overlapping responsibilities produced by the organizational structure of the industry. These problems are worldwide, no particular country can claim a monopoly over them. These problems are further aggravated by the fact that a building is designed and built to last for a number of years. The effect of a breach, be it during design or construction, may remain hidden for a number of years. Third parties (such as occupiers) are protected by common law from

misconduct of others and the mere fact that a contractual relationship cannot be established is not sufficient grounds to disclaim responsibility. The standard form used must be called into evidence to establish who was responsible to whom and for what and within what limits.

This report looks into the ways the courts in Australia and in the commonwealth countries have tried to give effect to building contracts when difficult questions of interpretation and risk distribution have occurred as a result of overlapping responsibilities.

Some recent principles in contracts and torts are also examined in an attempt to discover their likely effects on building and engineering contracts as they stand to date.

It is appreciated by the writer that when the knowledge of this law will not dramatically improve technical skills or professional competence of those involved in building and construction industry, such knowledge is necessary for more effective performance and less time would be wasted in the luxurious and often very costly arbitration and litigation processes.

ACKNOWLEDGEMENT

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G. Mbugwa.

TABLE OF CASES

- Bickerton & Sons v. N.W. Metropolitan Hospital Board* (1969) 1 WLR 607
page 4, 12, 79, 85
- Gloucester County Council v. Richardson* (1968) 2 All. L.R. 1181
page 12, 90
- Peak Construction Ltd. v. McKinney Foundations Ltd. (C.A.)* I. 1970
page 21
- Tolhurst v. Associated Portland Cement Manufacturers* (1903) 2 K.B. 660
page 40
- Bottomley v. Bannister* (1932) 1 K.B. 458, page 44, 45
- Otto v. Bolton & Norris* (1936) 2 K.B. 46, page 44, 45
- Donoghue v. Stevenson* (1932) A.C. 562, page 45, 116, 119, 121
- Batty v. Metropolitan Realizations Pty. Ltd.*, (1978) 2 All. E.R. 445
page 45, 122
- Cable v. Hutcherson Ltd.* (1969) 43. A.L.J.R. 321, page 50, 128
- P & M Kaye Ltd. v. Hosier & Dickson Ltd.* (1972) 1 All. E.R. 121
page 53
- Belgrove v. Eldridge* (1954) 90. C.L.R. 613, page 65
- Burke v. Lynn* (1976) V.R. 268, page 66
- Galambes & Sons Pty. Ltd. v. McIntyre* (1974) A.C.L.R. 10
page 66
- Anns v. Merton L.B.C.* (1977) 2 W.L. 1024, page 68, 122
- Sparham Souter v. Town & Country Developments (Essex) Ltd.*, (1976)
Q.B. 848, page 68, 122, 124, 132
- Jarvis v. West Minister Corporation* (1969) 1 WLR 1448
page 74, 101
- Leslie & Co. Ltd. v. Metropolitan District Managers* (1901) I.G.L.R. 802
page 86
- Mitchell v. Guildford Union Guardians* (1903) I.L.G.R. 857
page 86
- K. Cross (Doncaster) Ltd. v. York County Council* [(1966) (Unreported)]
page 86

T.M. Reilley Ltd. v. Belfast Corporation [(1967) (Unreported)]
page 86

Sutcliffe v. Thackral (1974) A.C. 727, page 99, 106, 109, 126, 127

Chambers v. Goldthorpe (1901) 1 K.B. 624, page 105

Arenson c. Casson Beckman Rutley (1975) 3.W.L.R. 815
page 110, 126

District of Surrey v. Church (1977) D.L.R. 472, page 111

Bevan Investments v. Blackhall & Struthers (1973) 2 NZLR. 45
page 112

Hedley Byne v. Heller (1963) I. All E.R. -575, page 114, 119

Ministry of Housing & Local Government v. Sharp (1970) 2 Q.B. 223
page 117

S.C.M. (U.K) Ltd. v. W.J. Whiteall & Son Ltd. (1971) 19B. 337
page 118

Spartan Steel & Alloys Ltd. v. Martin & Co. Ltd. (1973) 1 Q.B., 27
page 120

Supporting Cases

Bowen v. Paramount Builders (1977) 1 NZLR 394

Florida Hotels v. Mayo (1965) 113 C.L.R. 588

Voli v. Inglewood Shire Council (1965) 110 C.L.R. 74

Perini Corporation v. Commonwealth of Australia (1969) 2 N.S.W.L.R. 530

Comalco Fabrications Ltd. v. Dillingham Construction Pty. Ltd. (1977)
17 S.A.S.R. 82

CHAPTER ONE

INTRODUCTION

The Law and need for communication

General

Every organized community involved in social and commercial activities formulates rules and laws of conduct appropriate to those activities, The 20th century Layman though as intellectually capable as the Lawyer who drafts these rules finds himself in most cases incapable of fully comprehending new and important Legislations or even day to day documents which he may be required to agree to or to use.

In an ideal situation the declared rules and laws should be readily understood by every member of that community. But in a welfare state like Australia, such rules, regulations, obligations, rights and remedies and every form of control require confirming. Documents are drawn in the traditional way by the legal profession whose aim is to communicate clearly the meaning of such agreements.

Traditionally Lawyers originated from powerful, wealthy and charitable ancestry; their background so noble and gentle that their ability to be objective and to maintain high integrity in professional matters has never been a subject of debate or question. The community, therefore, has always entrusted the confirming of these rules and regulations to the legal profession.

The evolution of building trades and professionals has created a very complex and often confusing state of legal jargon potentially disastrous to the underlying commercial realities of all building and engineering contracts. At the present time, the majority of the more substantial building and engineering contracts in Australia and overseas are designed and administered by a professional team of advisers employed by the building owner.

This arrangement has important legal consequences. In general terms, the employer places far less reliance under such a contract upon the skill and judgement of the contractor in relation to the design of the project or choice of materials or their suitability for the purpose.

For a long time in the history of the industry, the architect or engineer has been looked upon as the "captain of the ship"; and if anything goes wrong or some unexpected event occurs, it is the duty of the architect or engineer to take command and issue fresh instructions to the contractor. It is also his duty to detect and order rectification of the contractor's defective work.

Contractors have not been slow to appreciate the potential financial advantage to themselves of this view, and have consistently in the recent years tried to encourage its adoption by the courts in seeking to elevate such duty into one owed to them by the employer. This of course has been aimed at absolving the contractor from liability if the architect failed to detect his defective materials and/or workmanship.

The standard forms of contract recommended by various bodies in the industry have for many years only contemplated this type of arrangement, and have made express provisions for the building owners' advisers to carry out important administrative and other functions under the terms of the contract. The majority of the now modern versions of Building and Engineering Contracts have also been drafted around this traditional arrangement.

The second myth has been the impression that the system of nomination especially of specialist sub-contractors owes its origin to the need of the employer to control the quality of the work in question; when in fact the need may more often be to secure a "competitive" price for such work within the practical exigencies of the main-contractor tendering.

One of the earliest codification of Building law is to be found in the Louvre Museum in which *Hammurabi* the Babylonian conqueror among his 282 laws outlines the rights and remedies which the building contracting parties owe to each other. To the building owner; "he shall give the contractor two shekels of silver per sé as recompense for work done". To the building contractor the consequences for poor performance are very grave in deed; for the law provides that. . ."If a contractor builds a house for a man and builds it not strong enough and it collapses and it kills the owner, the contractor shall be put to death". The laws further stipulate that the contractor shall likewise be responsible for the deaths of the owner's sons and his slaves. If the building were to fall or fail in whole or in part, the contractor was also responsible for replacement and repair.

Ancient as this document might appear by present contemporary social standards *Hammurabi's* philosophy of justice is not foreign to the modern standard stipulations in building contracts. The industry has only become more complex, more involved and segmented. The contractual arrangements have become more mercantile in their operations. Inevitably the legal profession has drafted laws that have failed to communicate. As *Sir Seaman* observes on this obscurity; "With such a fantastic skill and a high degree of precision, draftsmen do what they are instructed to do. It's their masters who due to insufficient considerations of the matters to be drafted cause lack of clarity and comprehensiveness".

Architects, Engineers, Builders, etc. have as a result found themselves involved in using documents whose interpretation is more intuitive rather than full understanding. Commenting on the Rents Legislation Act of 1965, *Anthony Lester* observes; "The legislation was drafted with such grotesque and avoidable technicality. . .to be understood. It's complex language conceals traps which only an experienced lawyer could be expected to avoid". On the celebrated case of *Bickerton and Sons v. Northwestern Metropolitan Hospital Board (1969) 1 W.L.R. 607*; judge Lord Justice Sachs declared; "It seems to me lamentable that such a contract form used to govern so many and such important activities throughout the country should be so deviously drafted with what in parts can only be seen as a calculated forthright lack of clarity. The time has now come for the whole to be re-drafted so that laymen contractors and building owners alike can understand what are their respective duties and obligations. . .At present, that is not possible".

Role of Industry in National Economy

In all developing and developed economies, the Building Industry has a very important role to play in fixed capital asset formation. All productive activities require to be sheltered. The huge sums of money expended by Governments and individuals in construction reflect the level of involvement in this vital activity prerequisite to all economic development.

Available statistics in Australian Building and Construction Industry show that the net direct building and construction volumes have been running at around \$8,500 million in constant 1974-75 prices since 1970. This figure represents from about 16.3% (in 1970-71) to 13.6% (in 1976-77) of Australian Gross National Expenditure; and from about 61.9% (in 1972-73) to 58.5% (in 1976-77) of Gross fixed capital expenditure.

Net direct building and construction actually done by the private sector cannot be accurately determined from available statistics. But an approximate estimate indicates a volume of around \$6,250 millions in constant 1974-75 prices. This represents about 75% of the total amount of building and construction actually done; or of the order of 10 to 10.5% of the Gross National Expenditure annually.

A little over half the total volume of building and construction activity is attributable to direct inputs from suppliers in the inter-industry production system. If indirect inputs are included, the total inputs from suppliers amount to two-thirds of the total output. In effect, because of the requirements of the inter-industry production system the value of suppliers inputs from the inter-industry system can

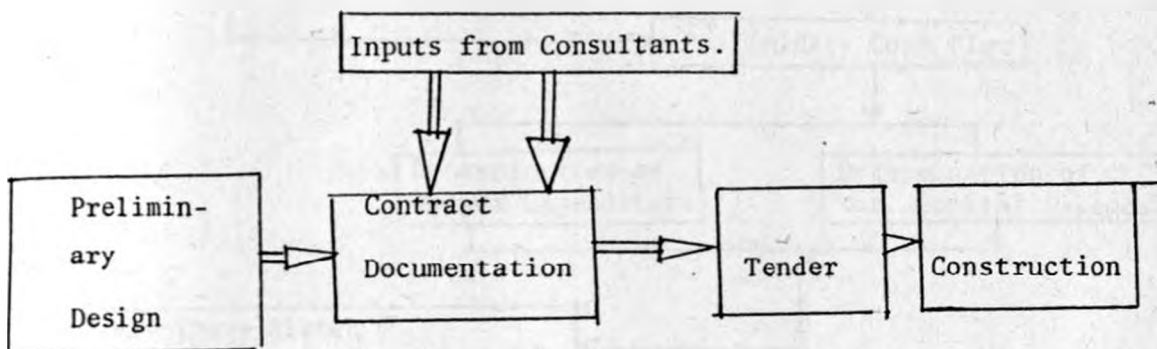
actually exceed the final net output of the Building and Construction Industry by nearly 15% and amount to 95% of the total industry output.

The 1971 census statistics showed that 412,200 people or 7.9% of the Australian workforce was directly engaged in the Buildings and Construction Industry. Calculations from 1968-69 input-output tables indicate that some 425,600 people or 8.1% of the workforce was engaged in supplying the industry. Thus around 1970, the total number of people directly contributing to the Building and Construction Industry was approximately 837,800 or 16.0% of the Total Australian workforce.

In 1968-69, people employed in the Building and Construction Industry received 10.2% of the total national wages, salaries and supplements. In 1976-77, this figure had fallen to 9.0%. In 1968-69, those supplying the industry were paid some 9.3% of the national total wages. Combining these figures, all people contributing to the industry were paid some 18.3% of the total national wages, salaries and supplements.

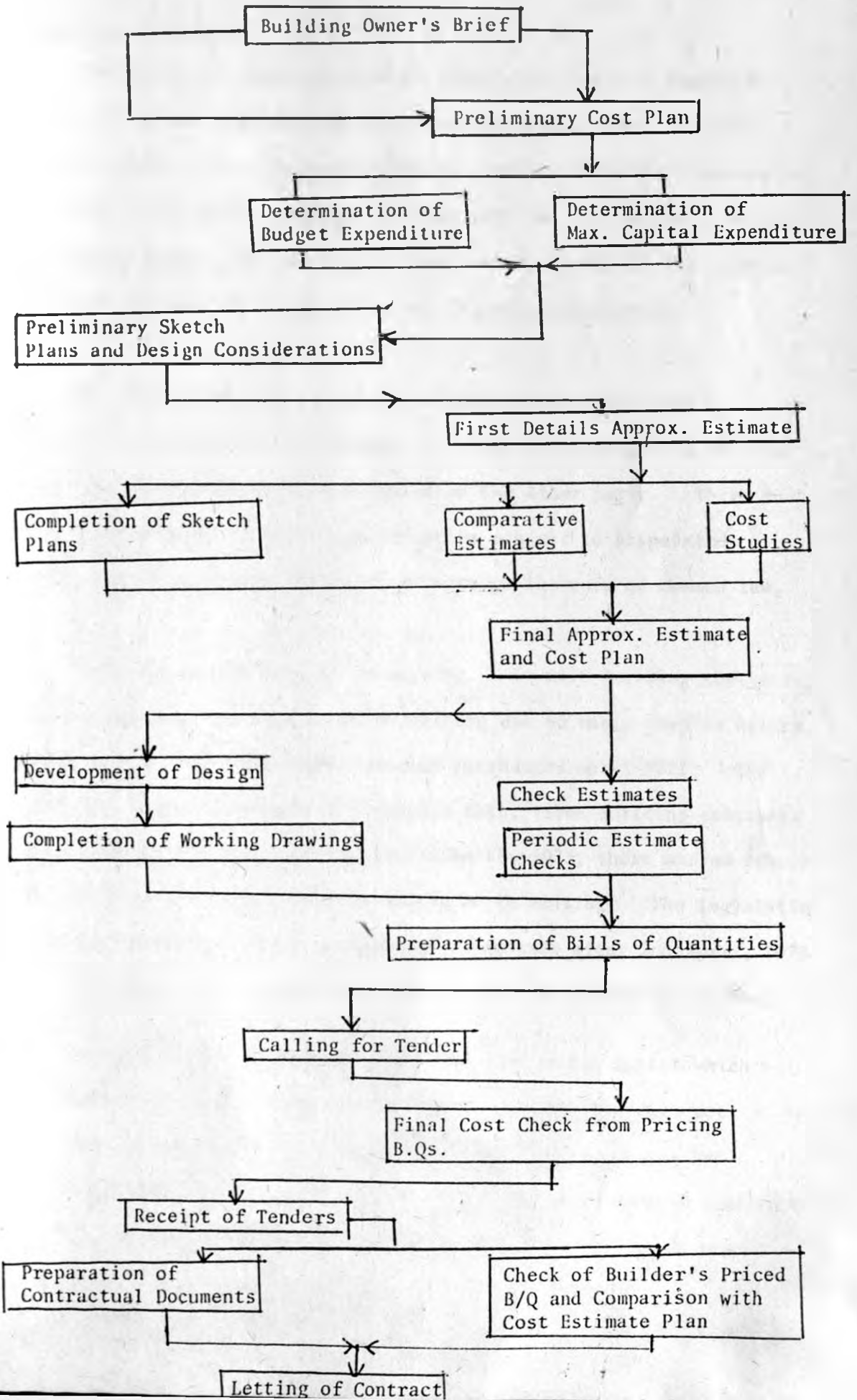
In spite of this vital role entrusted to the industry for economic development, the industry throughout the world has failed to view itself as a total activity. Development in technology, education and professional associations has segmented the process usually for narrow selfish purposes. From the end user's point of view the separation of the building process into design and construction or segmentation of the design professional inputs of the Architects, Engineers, Quantity Surveyors, etc. is irrelevant and from a systems point of view it is counter productive.

Traditional Approach



contract design, documentation and tender period = construction period in most major projects.

As it has been stated "The traditional methods of producing buildings is a very complex process. To assemble the land, money, labour, materials and equipment necessary to build a small country house in a process proportionately more involved than that of building an ocean liner. Hundreds of separate different items made by different manufacturers, distributed through a variety of channels, are assembled from a host of resources. A whole hierarchy of skilled trades and professionals must be integrated. A network of zoning and building ordinances, regulations and legislations, often contradictory, and at times obsolete have to be negotiated as do all the legal processes involving transfer of land titles, ownership and financing. As a result of this complex archaic system, building prices are high, quality of the product low and the supply hopelessly inadequate". A brief examination of the design process reveals the following maze of activities:



Choice of Contract

Throughout the English speaking world, the types of standard contracts in use are modelled so closely upon each other and upon English forms. This is partly because, even outside the Commonwealth countries the English language is often used in international contracts, and partly because the practical situations and needs of the parties are much the same in all Building and Engineering contracts.

The English law due to its mercantile nature recognizes a bargain as central to any contract. A contract starts with an offer that must be unconditionally accepted by the other party. There must be a promise supported by a consideration subject to stipulated conditions of agreement that are not outside the rule of common law.

Contracts can be oral or in writing. In most Building contracts, legislation required them to be in writing due to their complex nature. In Australia, this requirement was not introduced until 1971. The *Builders' Licencing Act of 1971, states that, "Some Building contracts have to be in writing". Prior to 2nd April, 1973, there was no requirement that any Building contracts had to be in writing. The legislation therefore applied to those contracts entered into after 2nd April, 1973. This legislation was considered essential for the following reasons:

- (a) The parties can provide for contingencies at the outset which might not appear likely at the time of signing the contract. (Such as cost increases, delays in completion, disputes and methods of settling them outside the courtroom). These contingencies are expenses to either of the parties who defaults or is unable to fulfil his part of the bargain.

*Domestic sector only.

- (b) The rule of law provides that a written contract where it purports to contain all the details of a transaction cannot be added to or subtracted from. Under ideal circumstances, nobody should be in any doubt as to what is expected of him and there should be no need to rely on imprecise conversations and controversies to establish rights and remedies of the parties involved.
- (c) The use of standard forms of contract gives the Builders and clients the benefit of the experience of others. A great deal of knowledge and expertise has gone into the preparation of these standard documents. There are not many unforeseen circumstances in the various editions available.

A closer examination at the purported stipulations of such standard forms of contracts shows that there are increasing misunderstandings of the provenance of these forms. As per *Hudson's Building and Engineering Contracts 10th Edition page 2*, "the wording and policy of the forms are coming under increasing (and deserved) judicial criticism - in the United Kingdom, there is still a tendency to treat the forms as emanating from the employer or his representatives and, particularly since the method of placing contracts by tendering requires an initial stipulation of the contractual provisions by the employer, to apply the *contra proferentem* rule of construction against the employer when seeking to resolve their many ambiguities and discrepancies".

Another area of major difficulties is the attempt to modify the standard forms for application to "package deal" contracts. Such contracts, by reason of the virtual impossibility of devising methods of genuinely comparing tenders, present problems of cost evaluation

which are almost beyond resolution. Experience in the United Kingdom obtained with this type of arrangement has to date been an unhappy one. This has been due to the refusal of the contracting parties to depart from the traditional forms of contract to situations of "Package deal" or "Industrialized building" or to give the necessary long-term warranties, suitably bonded, as to the design of their work.

In Australia, the division of Building Research C.S.I.R.O. has investigated the performance of building contracts in Australia as part of a wider study on communications in the building industry, and their effects and structure. The forms of contract involved have been mainly those based on the R.A.I.A. MBFA Editions in private work, and the relevant Commonwealth and State standard conditions of contract in Government work. Dr. Bromilow has provided measures of time performance based on 329 projects whose value amounts to \$272 million. All the projects being those of over \$10,000 in value, and mainly being non-residential in nature. All these projects were professionally designed, supervised and used the more common contractual procedures (standard forms).

Among the many causes of failure revealed by the research, the forms of agreement were found to be deficient. Incompatibilities or conflicts between the main building contractor and the sub-contract conditions were found to be a common cause of complaint. Less complaint was heard about incompatibilities between the contractor and the clients designers. The reason for this was thought to be due to the non-specific nature of the conditions to be fulfilled by the designers. Contractors and sub-contractors learn by experience the limits of interpretation of each part of standard form. Wrong

interpretation can be catastrophic to a contractor.

Most judges, with a few notable exceptions, are not familiar with building contracts or situations when called upon to deal with the litigations which avoid or slip through the complicated web of arbitration. Apart from the lengthy process of examining and evaluating evidence, judges themselves have on occasions become divided in their opinions and interpretations of these conditions stipulated in standard forms. Per Judge Sachs L.J. in *Bickerton v. N.W. Metropolitan Hospital Board* (1967) 1 All E.R. 977 at pp.979, 989, ". . .the standard forms have produced problems which have given this court and other courts in the past, difficulties of interpretation which defy the experienced intelligence of the Counsel concerned with these matters and even more the efforts of the courts concerned, to give a reasonable and clear meaning to the terms of the contract".

The underlying difficulties produced by the standard forms seems to emanate from a document which purports to contain every major conceivable contingency but drafted in such an ambiguous and anologous fashion as to defeat its own purposes. Simple matters of procedure turn to judicial agony as was demonstrated in the case of *Gloucester County Council v. Richardson* (1968) 2 All L.R. 1181. (Discussed in nominated suppliers of this paper).

Historical Aspects

The present day standard forms of contract originate as far back as the mediaeval age. In *Henry IV, Part 2, Act 1, Scene 3*, W. Shakespeare says, "When we mean to build, we first survey the plot then draw the model, and when we see the figure of the house, then must we take the cost of erection, which if we find outweighs ability, what do we do

but draw over the model with fewer offices".

After the contract was negotiated between the owner and Master Mason or Master Carpenter and an agreement reached, a clerk was paid to draw up a contract document at first in French or Latin, and only later in English. Examples of these documents exist in archives throughout the countries of Western Europe. They range from contracts to complete castles (all trades included) to small ones related to bedroom or kitchen additions. Generally they commence with a reference to a platte or devyse which could be appended to the contract and also signed by both parties. A brief specification of the workmanship and materials is given.

For a majority of works (houses, shops, etc) it was common to draw up a separate contract for the main trades. Details of who was responsible for the supply of all or part of the construction materials used was given and also as to who was responsible for transport and storage. Apart from the contract sum the method of issuing payments and the method of payments was indicated. In the case of small contracts this would sometimes be divided into three payments, the first paid before the work commenced so that the tradesman could purchase his materials. One of these agreements actually contains a determination clause in it favourable to the builder whereby he could vacate the works if the employer failed to pay within a month the amount agreed as an interim payment. The builder was bound to a completion date and had to offer a surety bond to guarantee his ability to carry out and complete the work. Final payments included both money and payments in kind. The latter might include access to unused materials left over after a previous building had been demolished on

site or rolls of cloth (liveries). Disputes were brought to court by either party for such reasons as contractors failing to perform works in an adequate manner or for over-charging or against employers failing to pay for additional works and the like.

It is around this period that employers began to rely more and more on architects to guard themselves against inadequate performance and claims for extras from contractors. The name of the architect was then included in the contract. (e.g. Henry Tevele acted in this manner for works carried out at Cowling castle, Kent, in 1381).

The 13th century saw the organization of different trades into powerful guilds for the first time. These guilds regulated the training of tradesmen, the quality of work required, the rates charged for works, wages, holidays, etc. A contractor who contracted to do work had to prove that he could draw up plans for it or work to the drawings and details provided by a client's architect. In the rules of the freemasons of Strasbourg, dated 1459 it is stated; "If anyone contracts for work and gives a plan for it how it shall be, the work shall not be cut short of anything in the design but he shall erect it according to the plan which he has shown to the Lords of cities or people so that nothing shall be altered in the building".

As buildings, their uses and requirements became more and more complex, another breed of participants began to emerge, variously referred to as surveyors or clerks of works. This new participant was more of a clerical administrator responsible for the overall costs and job records. His modern namesake is some kind of a technical 'watch dog' employed and paid by the architect or the building owner.

The master stonemason was responsible for design and erection. He employed and organized labour and material and fixed wages.

This type of arrangement progressed happily until the breakup of the Monasteries under King Henry VIII. Fundamental social changes occurred during the Reformation but the building industry slipped through substantially unchanged. The powers of the master mason though began to decline and trade guilds weakened. The master carpenter began to emerge and his heyday occurred during the Tudor and early Stuart periods. This change of roles was accompanied by the development of the bricklaying craft stimulated by the introduction of Flemish Tiles. It is still one of the major trades in the building industry up to now.

The modern architectural profession emerged in southern Europe before its official recognition in Britain. During the Renaissance period the Italian city states had created a social climate whereby the role of the architect had changed from that of a highly skilled master craftsman to one of a minor courtier. Although obliged to attend court in pursuit of princely patrons he was an ingenious designer in his own right. He maintained a design workshop (Bottega) where he practised a lot of artistic crafts, very often with the help of paid assistants and indentured pupils. His basic training as a designer took as long as 10 years. He designed buildings in their abstract forms (drawings) combined with some literary pursuits. (The works and writings of Leon Battista Alberti is a manifestation of the Italian Renaissance Architect).

Towards the end of the 16th century another distinct personality in the building industry began to appear. He was called the "entrepreneur", a word loosely used to mean some kind of a middle man or co-ordinator. He wedged himself between the building owner and the tradesmen. He was more a man of affairs than a master mason. The settled times in France during the reign of Henry IV stimulated a lot of economic activity. The isle of St. Louis became a testing ground for town planning ideas developed for town housing. One of the most highly imaginative and intelligent architects was Louis le Vau who built the exquisite chateau of Vaux-le-Vicomte. The erection of this house was carried out at an enormous speed and demonstrated an organizational genius that would be hard to match to-day.

Towards the end of the 17th century France had started to produce school trained architects from the institution of Ecole des Beaux Arts. This led to the award of a Government Diploma for practising architects.

In England, similar architectural developments occurred after the restoration of the Stuarts in 1660. The Great Fire of London of 1666 and the need for tighter building regulations began to create a demand for brickbuilt houses in place of timber framed ones. Land and property speculation soared and created the squares and terraces of to-day's London. Christopher Wren became one of the most prominent figures of the period and was made surveyor-Governor of the Kings Works. He used his position to set new safety standards for England's building industry. Gradually the master tradesmen became more remote from the architect and became more afraid (as of date) of the latter's new found literary and mathematical skills. To bridge this ever-widening gap the builders began to employ measurers who acted on their behalf when

negotiating contracts with the architect. Very soon, this new profession began to pose a threat to the architectural profession. The architect in turn appointed his own measurer to act on his behalf. To-day, the professional bodies of I.Qs and the R.I.C.S. hardly see eye to eye.

The poor state of affairs prevailing in the building industry due to these segmentations at the end of the 18th century prompted the government to set up several committees of enquiry. Contracts were constantly delayed and courts full of plaintiffs. The recommendations of these task forces paved the way for a new form of public tendering; gross tendering on a competitive basis, and emphasized the need for principal builders or tradesmen to be in charge of the whole contract. During the same period, the philosophy of Laissez faire (Adam Smith's wealth of Nations) had begun to shape economic thinking and acted as a catalyst of change. The granting of the Royal charter in 1834 to the Institute of British Architects led to a greater emphasis in professionalism and competition among architectural practices who had remained luke-warm to Adam Smith's philosophies. Under the charter all the architects became bound to charge standard fees for their work.

This period was one of great urbanisation and tremendous enthusiasm for the formation of professional associations and government bodies to deal with the arising complexities. The breakdown of the old craft method of construction was followed by the rise of the capitalist employer and wage earning employees. The brick mason was to become the leading capitalist employer and like his stone mason counter-

part in the middle ages, he could also command the use of quite large sums of money. By 1830, the London master builders were numerous enough to form the Master Builders' Association. They in turn had to contend with a similar association of their employees named the Operative Builders Union. A permanent builders association called the London Master Builders' Association was formed in 1872.

Meanwhile the employment of gross contract tendering by larger government departments and large private building owners created the need for more accurate pre-contract documentation leading to the measurer becoming more identifiable as a professional adviser to the client. The first bill of quantities was used for the London Royal Exchange in 1842. An association of quantity surveyors was formed soon after and granted the Royal Charter in 1878. The Quantity Surveyors Association was amalgamated into the Royal Charter in 1922. This profession remained relatively small until the last world war when the vast amount of assessment that had to be carried out due to war damage swelled their numbers. The use of quantity surveyors did not penetrate the Australian scene until the late fifties.

The modernization of the building industry in the 19th century has been accompanied in later stages by considerable innovation in the building techniques and materials development which have in effect brought about various new legislations and building regulations. At the same time as the industrial mode of production of building materials has gathered momentum so have the specialist sub-contractors and suppliers. To-day the number of specialists involved in any major project include such specialists as:

Air conditioning contractors

Lifts, escalators contractors

Fire protection contractors

Electrical contractors

Structural steel contractors

Fabricators or manufacturers of materials and goods particular
to and designed exclusively for the project

Hydraulic contractors, etc. etc.

The number continues to rise as more innovations in materials and techniques are made. The social awareness through education and sheer economic necessity has increased as more people become involved in economic activities.

The law, rules, regulations, legislations or whatever name we give to it is a means of reflecting the social mood prevailing within a given period in time. The 20th century society has to contend with the inherited past and the very uncertain future. The consumerism of the urbanized and economic competition national and international makes time the most essential factor in economic development. Damages decreed by courts to injured parties in abortive contracts reflect on economic losses in either direct and/or consequential losses.

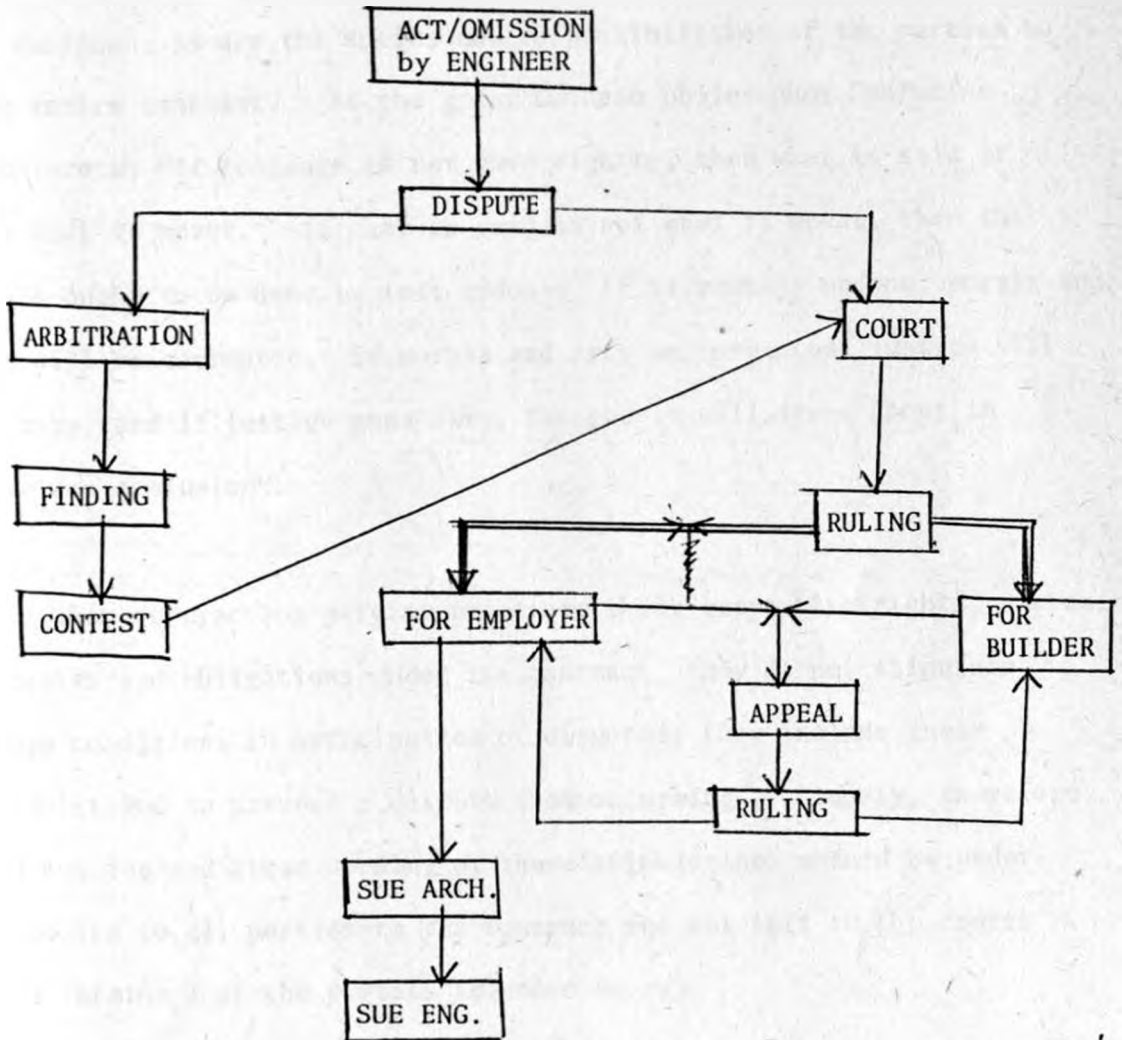
Since the industrial revolution and the ensuing economic structure in all industries, urban migration and concentration of populations to cities, the finite nature of land resources, imposition of health and safety regulations by governments and the ever increasing demand for buildings from all sides brought in the bankers to the building scene. To-day the banks have concentrated on buildings as one of their major

massive operations. Closely following the banks came the mortgage institutions and building societies. All of these organizations and the governments (taxes) depend for their survival on the successful operations of their creditors the building industry playing a major role. A miscalculated step in any single step in the building process sends ripples across a whole spectrum of inter-related and independent economic activities. A delayed payment to the contractor will not only affect his employees but the manufacturers employees and his debtors as well. In the C.S.I.R.O. report on "Contracts as Waste Generators", Dr. Bromilow (the author) observes that; "..to some extent the shortcomings observed in the building industry are caused by deficiencies in contract documents and procedures. The present standard forms of contract do not adequately provide for the interests of all parties in the building industry. They provide unworkable safeguards against the inevitable upsets to the stipulated course of the work and they are not easy to use". Experiences elsewhere confirm the view that these forms have failed to meet the purpose for which they are intended. A situation is developing in the building industry where on major works, reputable and efficient contractors who make an accurate assessment of the various contingencies affecting the contract and price accordingly have little prospect of being successful when tendering in the conventional manner. Inefficient and rash contractors secure a disproportionate amount of work and constantly arbitrate unmerited claims, sometimes only as a matter of commercial policy. As a result the contract price as alleged no longer appears to carry any certainty. While the legal practitioners no doubt become delighted at this state of affairs there is little doubt that the public interest would be far better served by a clearer form of contract and by a judicial attitude of arbitrators unaffected by their apparently irrepressible

instincts for compromise. An employer will always prefer to know the true extent of his commitments beforehand rather than undertake an apparent commitment at an unrealistic price and only ascertain the true extent of the price after the expense, inconvenience, loss of professional time, and uncertainties of arbitration or litigation have either been incurred, or discounted in the form of some equally unsatisfactory compromise settlement. As per Salmon, L.J. in *Peak Construction Ltd. V. McKinney Foundations Ltd. (C.A.) I. 1970*; "If a price were to be offered for the form of contract which contained the most one sided, obscurely and ineptly drafted clauses in the United Kingdom, the claim of this contract could hardly be ignored even if the R.I.B.A. form of contract was amongst the competitors".

While stinging criticisms have been directed at the standard forms binding building owners and builders, the situation is not much better in the standard forms published and used by the various professional bodies engaged to administer the project. In an age of economic uncertainty, each party will try their best to protect their interests by incorporating conditions favourable to themselves and their lot while attempting to put a selfless front in the guise of professional integrity. These contracts between professional consultants and their clients deliberately avoid any repercussions to the consultant by acts of contractors which are connected with commissions or omissions of the latter. These forms are therefore ambiguously drafted without any effort to co-ordinate the process as an entire operation. Any losses incurred by the contractor due to the negligent act of the structural engineer must be recovered from the employer who recovers the

same from architect who recovers from the engineer if directly employed by him. The situation becomes even more complex and time consuming where every party has to contest the claim lodged against him.



Schematic flow of claims and contests. *(in absence of Joint action)*

If nominated suppliers and sub-contractors are included the picture would only become more agonizingly complex.

Most building disputes originate because one of the parties to the contract will not accept the consequences of a risk which the other party contends he should accept. The major difficulty appears to be that even though the intentions of the parties are known at the formation of the contract the wording of the stipulated conditions are as ambiguous as are the duties and responsibilities of the parties to the entire contract. As the great Chinese philosopher *Confucius* once wrote; "If language is not used rightly, then what is said is not what is meant. If what is said is not what is meant, then that which ought to be done is left undone; if it remains undone, morals and art will be corrupted; if morals and arts be corrupted, justice will go awry, and if justice goes awry, the people will stand about in helpless confusion".

When contracting parties negotiate their respective rights, duties, remedies and obligations under the contract, they do not stipulate these conditions in anticipation of disputes; they include these stipulations to prevent a dispute from occurring. Clearly, therefore, the concise and clear wording of these stipulations should be understandable to all parties to the contract and not left to the courts to determine what the parties intended to say.

As society becomes more complex and rules of conduct change the standard stipulations should also be modified to conform to the needs of the times. Technology of the 20th century has meant more specialization than has been the case in previous centuries. The complexity of the present and future building projects do and will require more specialised participants. The emergence of the construction manager to co-ordinate sub-contractors may soon see the present day builder

becoming obsolete. This is bound to create new legal implications which the present day standard contracts do not reflect. The standard forms themselves are bound to become obsolete.

Every building project is unique. In fact, buildings are as individually unique as the people who design them. Circumstances leading to the erection of these buildings are as varied as the times in which these buildings are erected. Their uses and requirements are as special as the owners and end users. Each project attains its unique nature as soon as it is incepted. The circumstances leading to its inception and the ensuing design, tender and letting process do affect its legal position though a standard form of contract is signed by the parties involved. Since the courts will call into evidence the surrounding circumstances leading to the formation of the contract a look at the methods of tendering is called for. It is to be remembered that cases cited may have followed different methods of tendering but the responsibilities and obligations of the contracting parties under the stipulations of standard forms of contract remain substantially unchanged. This is probably because in spite of the trends in the building industry the organizational structure has relatively remained unchanged over the years. An attempt to introduce new obligations to an existing structure is bound to meet resistance from all parties involved; for the building industry is and has always been very conservative and beaurocratic.

CHAPTER TWO

TENDERING.

Basically there are about six (6) methods of tendering for substantial projects practised in Australia and overseas. Each method has its own merits and demerits. There is no legal requirement as to what type of project has to be let on any given method; everything depends on the parties concerned though there are trends that different organizations seem to favour one system or the other. The available systems are:

Open or competitive tendering system

Selected competitive tendering system

Negotiated tendering

Package deal

Two-tier tendering system

Construction management.

The evolution of these tendering systems can be traced to the Elizabethan era in the United Kingdom. After the Crimean war, the social conscience in England was re-awakened and a large programme of public works was initiated, mainly hospitals, schools and workhouses.

By 1872, the first recommendation for a standard method of measurement on which the contractors could base their tenders had arrived. Common drawings, specifications and bills of quantities based on a recognized and adopted standard method of measurement

provided:

- (a) equity in tendering
- (b) the basis for interim valuations
- (c) the basis for valuing variations
- (d) the basis for the compilation of cost records for future reference.

Other countries like the United States evolved their own tendering systems in which projects were let on drawings and specifications both fully detailed and of good practice. The bidders took off those quantities they felt were necessary and substantial to affect the tender price. Generally the builders got the sub-contractors to perform this chore. This system has subsisted to this date and though the American building industry feels that the bills of quantities could and do serve a useful purpose, the complexity of the United Kingdoms bill of quantities has held them back. They (the Americans) are still reluctant to adopt it in their system.

The American system has had severe public criticism. Their conventional tendering and letting system has been found by public opinion to be corrupt and contrary to public interest. As a result the letting system has become more complex and tortuous, at least to the builders, to give the public the impression that justice is done. The acceptance of the lowest bidder irrespective of merit as long as he meets some legislature requirements may very well turn out counter-productive as has been the experience of other countries. It is, for example, in the American system to hold the contractor responsible for ground conditions and sub-structures are not subject to re-measure-

ment on completion. The amount of variations or change orders is very reduced and require special permission especially in public works. At the same time, the client has no access to unit prices used by his contractor and this is supported by the American Institute of Architects.

There appears, however, some sort of a hybrid between the American system and the United Kingdom system (including Australia). In the system of open tendering, especially where bills of quantities form part of the contract documents, specialized works such as mechanical, electrical and other special items are the subject of provisional or prime cost sums. They are usually tendered on drawings and specifications leaving the bill of quantities to deal with the main shell of the structure which in any case is very easy to measure. These special items are left out to some later date after the main contract had been let which makes for loss of effective cost control. (see Bickerton's case).

An illusion held by most clients through the advice of their professional consultants is that the contractor bears the burden of tendering. This impression stems from the fact that unless in special circumstances, the client is not responsible to the contractor for the costs of tendering. This may be so in the very short run but in the long run, these costs are passed back to the employers by the contractors by way of overheads and hidden profits which only end up in escalating building prices.

Construction while used in many countries as an economic regulator in either inflating or deflating the economy, other countries use it as the main stay of their economy. In Kuwait for example, construction

has been a well tried method of getting money to circulate through the economy. In countries where resources are limited such as the United Kingdom, this method may be difficult to implement. It may not work in other economies though similar circumstances may prevail. In Iran and Saudi Arabia for example, attempts to implement their five-year development plans by setting aside huge sums of money has merely set Ministry bidding over Ministry for limited resources in men, materials and plant. This has fueled an inflation rate reaching the peak of over 40% in recent years. It clearly follows, then, that a thorough knowledge of the economic climate and all other factors that influence the industry is prerequisite to any tendering system being recommended and adopted.

When placing contracts, employers in general expect to achieve certain satisfactions from the contract. The firms purporting to place tenders for pre-qualification and selection should be those which fulfil at least the following:

- (i) Financial ability and resources required to get on with the work at least before the first interim payment is due;
- (ii) Manpower and supervisory resources necessary for due performance and completion of the works in a satisfactory manner;
- (iii) Management and specialized skills availability if and when required to tackle some special aspect of the job, including programmers and analysts;
- (iv) Plant and equipment availability; and
- (v) Previous experience and a successful record of previous jobs of the same magnitude or bigger with particular emphasis on dates of completion and other relevant aspects.

The employer also expects the design team to:

- (i) issue all drawings and specifications necessary to complete the contract,
- (ii) issue of bills of quantities based on adequate drawings so that bidders may tender on a fair and similar basis, and
- (iii) to give tenderers adequate time in which to prepare and return the tenders for evaluation.

On the other hand, the contractor being an independent organization has his own objectives. Most substantial contractors have a marketing organization which identifies favourable fields of endeavour and vice versa. Some of the factors that most contractors would put into consideration include:

- (i) size and content of the proposed works and location,
- (ii) construction time stipulated (if not subject to negotiation).
- (iii) their previous experience on that type of contract,
- (iv) availability of finance, management, plant and manpower,
- (v) likely competitors and their resources,
- (vi) knowledge of client and previous experiences with the consultant team,
- (vii) type of contract - whether lump sum, cost plus etc.
- (viii) calculation of variations,
- (ix) prevailing economic climate,
- (x) imposition of bond, sureties and insurances,
- (xi) content of specification, accuracy of quantities and expected standards of performance, and,
- (xii) the type of head contract he is required to sign.

Research evidence in Australia shows that about 50% of all building and construction projects involves some tendering process. The following data shows the use of tendering systems in both public and private projects involving both residential and non-residential projects: The following figures were obtained from 1710 jobs (non residential) with a total value of \$763 million.

(1978)

Method of Tendering	% Contracts	% Total value
Open Tendering	20.40	15.90
Selected Tendering	24.20	29.10
Negotiated Tendering	5.00	11.20
Design Builder (Package deal)	8.70	11.70
Owner Builder	32.5	24.30
Management Contract	2.30	4.80
	93.10%	97.00%

Of the total projects analysed, government work accounted for about 37% of the total number of jobs.

Private Sector

Method of Tendering	% Contracts	% of Total
Open Tendering	6.00%	5.80%
Selected Tendering	25.60	28.30
Negotiated Tendering	6.90	17.60
Design Builder or Package deal	11.60	16.40
Owner Builder	37.40	23.60
Management Contracts	2.70	3.60

The following figures show the relationship between type of work and builder selection. (Private sector only).

Method of Tendering	<u>Type of Job</u>		
	Commercial	Industrial	Community
Open Tendering	5.3%	2.7%	12.0%
Selected Tendering	40.5%	15.0%	45.5%
Negotiated Tendering	8.9%	7.2%	6.2%
Design Builder	10.9%	18.3%	11.5%
Owner Builder	21.1%	43.7%	16.3%
Management Contract	2.0%	4.8%	2.4%

Private Sector.

Residential Buildings.

Method of Tendering	Flats/Units	Others
Open Tendering	2.8%	23.9%
Selected Tendering	8.5%	32.6%
Negotiated Tendering	6.6%	8.7%
Design Builder	6.0%	6.5%
Owner Builder	64.6%	8.7%
Management Contract	1.3%	4.3%

An Overall View of the Industry

Private Sector

(1978)

Total Value of Work done	\$50,000 to \$150,000	\$151,000 to \$500,000	\$501,000 to \$1,000,000	Over \$1,000,000.
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No. of Jobs as

% of Total Value	52.8%	34.2%	7.4%	5.6%
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Public Sector

(1978)

Total Value of Work done	\$50,000 to \$150,000	\$151,000 to \$500,000	\$501,000 to \$1,000,000	Over \$1,000,000
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No. of Jobs as

% of Total Value	12.2%	23.8%	13.1%	50.9%
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Public and Private Sector

(1978)

Total Value of Work done	\$50,000 to \$150,000	\$151,000 to \$500,000	\$501,000 to \$1,000,000	Over \$1,000,000
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No. of jobs as

% of Total Value	50.3%	34.4%	8%	7.3%
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% Value of Total
in Economy

	10.5%	21.5%	12.8%	55.2%
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Builder Selection in \$ Value:Private Sector.

Method of Selection	\$50,000 to \$150,000	\$151,000 to \$500,000	\$501,000 to \$1,000,000	Over \$1,000,000
Open Tenders	6.6%	5.6%	4.5%	4.4%
Selected Tenders	22.7%	26.6%	32.6%	38.2%
Negotiated Tenders	7.5%	5.8%	6.7%	7.4%
Design Builders	8.9%	13.1%	16.9%	20.6%
Owner Builders	40.1%	37.8%	32.6%	16.2%
Management	1.6%	3.4%	2.2%	10.3%

Observation:

- (a) Open Tendering in private sector is relatively insignificant at all value ranges.
- (b) Selected Tendering is dominant.
- (c) Package deal (Design builder) becomes more significant as value of job rises.
- (d) Although research has indicated that open tendering is most wasteful, yet over 50% of all the jobs were let by open tendering, however, this only represents 10% of the total value of all the projects.

Purpose of Tendering.

The well tried methods of tendering, viz. open tendering, selected competitive tendering, package deals, etc., are but some of the methods used for the purpose of obtaining a price for a job. There is little or no merit in negotiations unless two basic criteria are met; i.e.

- (a) the contractor is already on site or on adjoining site, and
- (b) there is a suitable instrument such as a bill of quantities for a lately previous project which would form a suitable basis on which to negotiate.

Open tendering though used as the fairest method and is mainly in conformity with public interest, it is nothing more than illusion in times of economic stress, depression, hyper-inflation or other forces which tend to overheat the economy.

Overseas Developments.

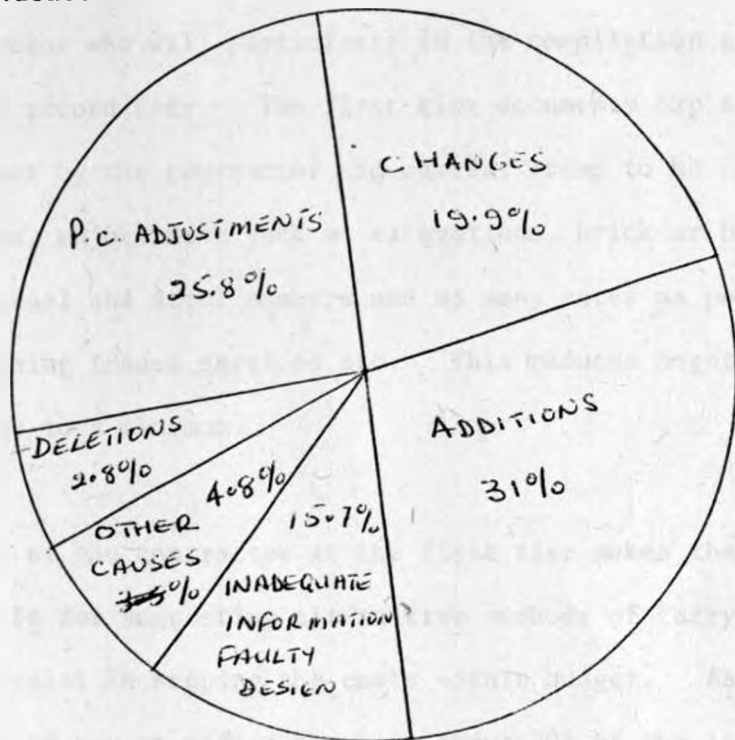
(a) Two Tier Systems & Construction Management.

The two tier method of tendering is finding favour in most countries of the world. The proponents of this system have recognized that design documents are never complete until the project is handed over. Research evidence in Australia supports this contention and as Dr. Bromilow's research on "Contracts as Waste generators" shows, one of the major setbacks in contracts performance stems from variations in proportions as shown below:

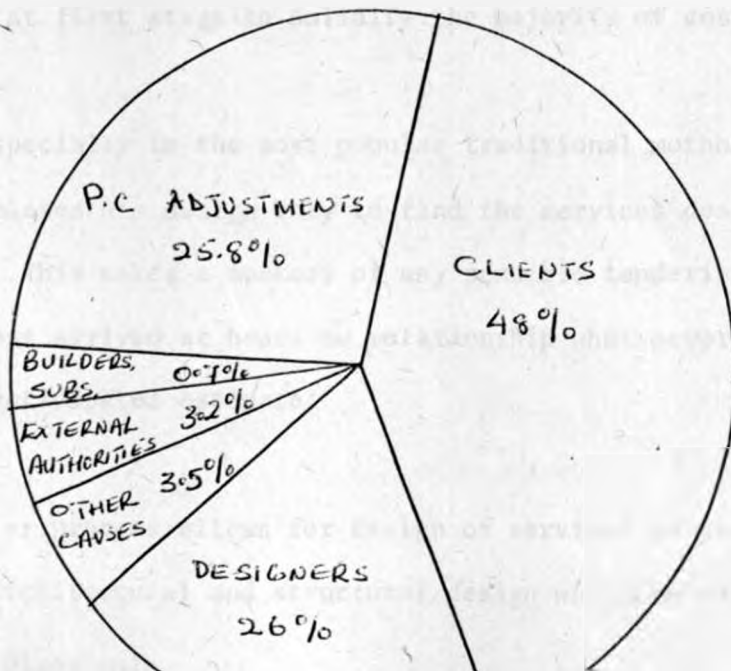
(The figures are obtained from 25 projects and the percentage expressed refers to the gross variation in value occasioned by the variation).

Nature of Variations in 25 Building projects

% expresses gross value.



Sources of Variations



Due to the nature and magnitude of variations encountered in a majority of building contracts, the two tier system treats all tender documents as approximate.

The first tier documents explain the scheme in outline and carry conditions of the building contract. The purpose of the first tier is to select a contractor who will participate in the compilation and negotiation of the second tier. The first tier documents explain the conditions to be met by the contractor and carries items to be covered under preliminaries, major items such as excavations, brick or block work, structural steel and steel members and as many rates as possible for joinery, finishing trades services etc. This reduces negotiation on the second stage to a minimum.

The selection of the contractor at the first tier makes the contractor available for suggesting alternative methods of carrying out the works and to assist in keeping the costs within budget. As 80% of the total value of say an office block is about 20% of the items in a typical bill of quantities, it should be possible to make a reasonable effort at first stage to solidify the majority of costs.

Very often especially in the most popular traditional methods, the architect completes his design only to find the services design in outline form. This makes a mockery of any sensible tendering process and the cost arrived at bears no relationship whatsoever with the final or the anticipated estimate.

The second tier process allows for design of services to proceed equally with the architectural and structural design with the contractor playing a more involved role.

This system serves two useful purposes:

- (i) it allows the contractor to take possession of the site and start work earlier than would have been the case with the conventional method. The contractor's participation in design eliminates the possibility of major variations which are often sources of conflict.
- (ii) Secondly, the process facilitates smooth flow of serial contracts without the unnecessary wastes of time and money in tenderings for jobs of a similar nature. The welding together of a team, both consultants and contractors, their familiarity in working together and solving design and construction problems together is an advantage the industry should wake up to.

(b) Construction Management:

Over the last decade or so, it has been recognised that management is the key to success or failure of any economic enterprise. Construction management is thought to be one effective method of satisfying the owner's building needs by treating the project, design and construction phases as integrated tasks within a construction system. The tasks are assigned to a construction team consisting of the owner, the construction manager, architects, engineers and all other consultants. The team works together from project inception to completion. The construction manager's responsibilities range from co-ordinating the work of all trade contractors, ensures conformance to design requirements, provides current cost and progress information as the work proceeds and performs other construction related services as required by the owner.

In the traditional single contract fixed price approach the burden of adjudicating conflicting claims of sub-contractors and suppliers and other conflicts resulting from overlapping responsibilities, unclear specifications or errors of misinterpretation of the tender documents is placed upon the architect. In the absence of litigations most of these conflicts have gone undetected. The placing of the entire contract burden upon the general or head contractor accords the sub-contractor the benefit of his own default. With the construction management approach, the construction manager ensures that no overlapping responsibilities occur and any default by one or more of the trade contractors does not cause undue delay in the general performance of the others.

With the traditional tendering systems, it is not unusual for quantity surveyors when evaluating the tenders to qualify each tender with comments. Some of these comments are especially valid but the fact that they are raised at a very late stage in the documentation process.

Construction management endeavours to ensure that nothing is left to chance. The fact that design and construction teams work together right from start to finish ensures that the flow of information is not hindered by designers keeping their work secret from the construction team so as not to give them extra advantage over other tenderers.

CHAPTER THREE

BUILDERS' LIABILITIES.

General

According to Webster's Dictionary, a contract is defined as 'an agreement between two (2) or more parties in which one party binds himself to perform or to forebear some act and each party acquires the right to what the other promises.' The effect is that the contract aims at achieving an end result which is of mutual benefit to both parties.

When terms are drawn by the parties to a contract it is not the intention of such terms to cause a conflict of interest nor is it the aims of the parties to create a dispute. This is only possible in an ideal situation and very difficult to achieve in our day to day commercial dealings.

These terms are not drawn in anticipation of disputes but rather they are intended to settle a dispute should one arise during the performance of the contract. This is not always the case. Experience has shown that the stipulated conditions in the standard forms of contract do not always achieve this aim. Twelve years ago, the Tavistock Institute, in an investigation of problems in the building industry in Britain observed that; "the industry is one in which misunderstandings, delays, stoppages and abortive work result from failures in communications and impressions of confusion, errors, and conflicts, have provided the starting point for an analysis of the

operational characteristics of the building process".

In specific terms, a contract is binding only on the parties to it. The contract, unless specifically expressed confers no rights or obligations to a third party who is foreign to the agreement.

Most standard forms of contract expressly prohibit the builder from sub-letting or assigning the contract without prior consent the employer. But close examination of this provision indicates that this refers to assignment of liabilities and rights under the contract, not the actual performance.

The builder is responsible for the employment and supervision of all site operatives. Most builders will sub-let portions of the work, sub-contract with tradesmen and trade sub-contractors. Though a building contract is thought to be personal in nature, that is a contract entered into with Builder A, cannot be performed by Builder B in the absence of a novation, there is no authority that prohibits vicarious performance. In the case of *Tolhurst v. Associated Portland Cement Manufacturer's* (1903) 2 K.B. 660, Collins M.R., said' "it is I think quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor onto those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to somebody else; this can only be brought about by the consent of all three and involves the release of the original debtor".

This right however does not prevent vicarious performance. The provisions of the system of nomination of sub-contractors and suppliers under the head contract is a recognition of this condition if not express approval. Though this is permitted, it does not absolve the builder from liability since the purported assignee cannot sue on the contract and neither can he be sued.

The major problem arising out of this condition in the industry is that it is not unusual for Builders to assign monies due to them under the contract usually in consideration of the provision of credit facilities or some other financial accommodation by the assignee (such as a bank). There is no objection to a contract of assignment that the monies assigned are not yet due and when the expectancy falls into possession the assignment will operate effectively and bind the subject matter of the agreement to assign.

With the present system of payment of all sub-contractors and suppliers through the builder this right as conferred by law, does not protect the sub-contractors and suppliers. Though the employer has the right to object to the builder assigning any part of the contract, he cannot object to the builder's right to assign all monies due under the contract to his creditors.

Though authority is lacking on this point, there does not appear to be any objection on the builder's part if the employer vicariously undertakes to pay the builder or if he assigns his right to occupy the building to another party.

In general terms therefore, the principle is that vicarious performance will not be permitted if the result will be to prejudice or to alter the obligations or rights of any party to the contract.

While, therefore, a considerable degree of sub-contracting is permissible including parts of the works billed to be executed by the builder there are obligations particularly in large contracts which a builder cannot transfer. This is especially so in negotiated contracts where the identity of the builder is paramount. If this view is correct, a trustee in bankruptcy or insolvency cannot be able to complete the works without the consent of the employer. This situation is difficult and has not been fully considered by the courts neither has the standard forms contemplated its occurrence.

The Building Environment

The environment in which the builder operates is one of high sensitivity. On one hand there is the architectural professions with visions and concepts of creation which he has to bring to reality. Behind the architect is a client who has actual needs and economic restraints, which restrain the architectural vision. The confined vision involves a host of other associated professions (engineers, quantity surveyors etc) who have a direct influence on what the builder can do or not do. The number of experts who have a direct input into the building is increasing with each new innovation or technique.

Secondly, the builder is at the centre of an equally vast number of labour organizations. Building trades are too vast in number to

enumerate. The forces of conflict, disputes, administration of awards are day to day pressures with which the builder must cope.

Thirdly, the builder has to comply with local government authorities' requirements in matters involving safety, health, water, electricity and the like.

Fourthly, and the worst of all, the builder is at the centre of a complex financial relationship. The cost of money due to inflation and the general global energy crisis and resulting instabilities have been on the increase over the last decade or so, and still rising.

These situations, seen within the law, impose on the builder heavier obligations under the contract than the forms might stipulate. The building industry has an exaggerated trade cycle and governments use it to stimulate or depress economic activities rather than attempt to even out the booms and slumps.

The builder meets his market demands by way of the tender system. A normal manufacturer can meet his market demand by incremental or decremental changes in his output to meet a given situation. A builder usually works in big lumps, and marginal adjustments are impossible to achieve.

Given this state of complex affairs it is of utmost essence that all the elements communicate homogeneously and effectively. This is rarely achieved in the building industry. The builder weighed down by the described external and internal forces has been lowered to a state of a highly skilled puppet. He has to dance to wires pulled by a myriad of other people. He has been forced to

assume a sub-servient role in an industry in which he has always been dominant.

3rd Parties

In the legal circles, the builder has always been covered by the principle of 'caveat emptor' as expressed in the case of *Bottomley v. Bannister* (1932) 1 KB 458 which held that in the absence of express contract a vendor of real property is not liable to his purchaser for defects in the house, even if these are due to his faulty construction.

This decision was re-affirmed in *Otto v. Bolton and Norris* (1936) 2 KB 46 where it was held that a builder who builds a house for sale is under no duty to build it carefully and that if a person was injured as a consequence of the negligent execution of the work by the builder that person could not recover.

Both of these cases were based on the principle that no one who was not a party to a contract could sue on it or anything arising out of it. The only duty of care was that imposed by the contract. Though the unfair consequences of those decisions have been evident for a long time, the argument for them has been that; "If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason we should not go fifty".

Since the case of *Donoghue v. Stevenson*, the builder's immunity began to disintegrate and though the courts still held *Bottomley v. Bannister* and *Otto v. Bolton* and *Norris* as leading authorities, recent court decisions have held the contrary view and builders can no longer claim immunity from actions brought by third parties.

In the case of *Batty v. Metropolitan Pty. Realizations Ltd.* (1978) 2 ALL ER 445; a builder bought some property from a local authority in 1960. He in turn sold it to a Development Company.

The land consisted of a plateau and a steep slope which dropped down from it at a slope of 1:3 to a stream.

Representatives of the builder and the Development Company examined the land with a view of establishing whether the land would be suitable for development.

Thereafter the Development Company and the builder agreed that the builder should construct a number of houses on the land and the Development Company would finance the buildings and find purchasers for them.

By 1971, the houses had been completed. The contract of sale between Mr. and Mrs. Batty and the Development Company was for a lease of 999 years and included the use of the adjoining garden.

The house and part of the garden were on a plateau. The rest of the garden was on the slope. The contract contained a warranty that the house had been built "in an efficient and workmanlike manner and

of proper materials and so as to be fit for habitation".

After the lease had been granted the Development Company sold in reversion to the builder.

In 1974, there was a severe land slide of the natural strata of the hillside. The slide did not damage Mr. and Mrs. Batty's house or its foundations but it caused direct damage to part of the garden.

Mr. and Mrs. Batty brought an action against:

- (a) the Development Company
- (b) the local authority
- (c) the builders

on the following grounds:

- (i) Development Company's negligence and breach of contract,
- (ii) Local authority's negligence and breach of statutory duty in respect of failure to ensure in respect to the ground on which the house rested, and
- (iii) builder's negligence and breach of warranty.

The plaintiffs were claiming damages for actual and consequential losses personal and arising thereof.

In his ruling the trial judge made the following observations:

- (a) the house had firm foundations. The materials in every respect were of good quality and standards and workmanship was excellent,
- but
- the house was doomed from the outset and therefore was unfit

for habitation and unsaleable because the land on which it relied for support was unstable due to the presence of varved clay in the boulder clay of the hillside.

The presence of the varved clay was the principle cause of the 1974 slide and at sometime after the date of the trial the movement on the hillside on the slope adjacent to the house would cause the house to collapse;

- (b) If the builder and the Development Company had sought the advice of an expert soil mechanic or engineer, the expert would have discovered that the site was unsafe and the house would certainly not have been built.

In finding for the plaintiffs, the trial judge held that:

- (a) the Development Company was liable in breach of contract but not in tort of negligence,
- (b) the local authority was not liable in breach of statutory duty and were therefore dismissed,
- (c) the builder was liable in negligence.

In apportioning the damages, the Development Company and the builder were liable for:

- (i) £13,000 direct damages to *Mr. and Mrs. Batty*, and
- (ii) £250 to *Mrs. Batty* for the effect of her foreseeable disaster on her health and peace of mind.

On appeal, the builder contended that:

- (a) his duty of care to a potential occupier of a house which he built was limited by reference to his statutory duty

- under the building regulations to defects in or observeable on the actual site on which the house was built,
- (b) he was not required by the terms of the contract to look for or take action in relation to any defects that might exist on neighbouring land which was not available to him in connection with his operation and was not otherwise owned by him or in his possession,
 - (c) if his duty of care extended to neighbouring land, the duty only applied to defects which were discoverable without sub-soil investigation (since the contract imposes the suitability of support as a warranty made by the employer to the builder, (*See clause 3.03 MBWI)
 - (d) the duty of care was no higher by reason of the particular relationship between them and the Development Company arising from their joint inspection of the site and the arrangement in regard to the building on it, than that attaching to any other builder who built for a development company under a normal building contract,
- and
- (e) his duty arose only in respect of damage to the house itself due to defective materials or workmanship which presented imminent danger to the safety or health of the occupier.

In dismissing the appeal, it was held that:

- (a) the builder owed a duty to a potential occupier to act as a careful and competent builder would have acted in

examining and investigating the land on which they proposed to build the house. The existence of this duty does not depend on whether defects affecting the site were on land in possession of the builder or not,

- (b) in the circumstances the builder's duty extended to the land adjoining the house and included a duty of making a sub-soil investigation,
 - (c) the builder had an obligation in inspecting the site and ascertaining for himself that the land was suitable for building on since the decision to build was jointly made between the builder and the Development Company, and, therefore he could not rely on the inspection made by the Development Company's representatives to absolve him from liability,
 - (d) at the time the action was brought, there was imminent danger to the health and safety of the occupiers,
- and
- (e) the landslide had caused physical damage to part of the property if not the house itself.

Obvious difficulties arise out of the Batty's case in attempting to define the liability imposed by the warranty. . . ."so as to be fit for human habitation".

The builder's warranty under contract refers to proper materials and competent workmanship. Under the conventional building contract with the architect supervising, specific provisions exist which give the architect powers to ensure that the materials and workmanship are of the respective standards as required by the contract documents.

This would tend to indicate that the builder's warranty refers only to the actual building and the duty is owed only to the person with whom the builder has entered into the contract.

The second warranty referring to the fitness of purpose is owed by the vendor to the purchaser under the Sales of Goods Act. This warranty though made by the owner to the purchaser may be thought to stem from the fact that the builder's compliance with the requirement that he shall build the building in a workmanlike manner and using proper materials as precedent to the building being fit for the purpose of which it was built. It would therefore seem to appear that the two warranties though separate are co-ordinate with one another.

There is an obvious unfairness in the principle since the builder's warranty refers only to the actual object and not the uses to which the object would be put. At least this is the view held by the Australian High Court in the case of *Cable Ltd. v. Hutcherson Ltd.* (1969) 43 A.L.J.R. 321 in which a contract was entered into for a design, supply, erection of a storage hopper on the basis of a specification and drawings provided by the employer's engineers. None of the engineer's drawings related to foundations.

The tender documents provided that irrespective of the information provided on the specification and drawings, tenderers should take the responsibility for the supply and erection and efficient operation of the project for 12 months after completion and handing over of the project.

The contractor supplied drawings of foundations to which the engineer required some amendments to be made. The tender was accepted and a final set of drawings (as amended) provided by the contractor. The engineer approved the drawings.

A formal agreement was entered into whereby the contractor undertook to execute and complete the works as shown upon the drawings, described by or referred to in the specifications, and subject to the conditions of contract to the satisfaction of the engineer.

When work was nearing completion, it transpired that the foundation would be adequate for the hopper until completion, but once filled, there would be subsidence due to the nature of the sub-soil, and that a piled foundation was necessary. (The contractors design was for a ring beam type of foundation).

The contractor refused to execute the piling work without additional payment and was consequently dismissed.

It was held by the High Court of Australia that although the contractor had supplied the design in the first place and notwithstanding the wording of the specification, the contractor had promised no more than to carry out the work in a workmanlike manner.

Under the Sale of Goods Act, the contractor will be held liable under an implied term for suitability of design whenever it can be shown there was substantial reliance on his skill and judgement with that regard.

Unlike a warranty of good workmanship a warranty that the works will answer the purpose for which it was intended is not implied in every contract for work.

The essential element for the implication of such a term is that the employer should be relying on the knowledge of the contractor, his skill and judgement and not upon his own or those of his agents. At the same time, while the knowledge of the person providing the design is essential it is not in itself conclusive.

The question of suitability becomes relevant only when a builder can show compliance with all the express requirements of the drawings, specifications and bills of quantities. If he cannot he is beyond any doubt in breach of contract.

Arbitration

The inclusion of the arbitration clause in most building contracts is aimed at providing the means of settling disputes which arise during the performance of the contract. In terms of cost and time, arbitration is thought to provide the following advantages:

(a) the arbitrator is familiar with building terms and practices.

He does not have to rely on experts so much as a judge does.

This has the effect of shortening proceedings and ensures that a mistake is not made in relation to technical matters,

(b) arbitrations tend to be more informal and the arbitrator is entitled to rely on his own knowledge of the industry,

and

(c) the fact that the dispute is settled within the industry affords

the parties privacy and any decision reached is out of public scrutiny and saves the parties from public attention and any subsequent embarrassments.

While the settlement of disputes outside the courtroom has the foregoing advantages, the privacy of the settlement deprives others of relying on the experiences of the dispute. At the same time, arbitration has its own limitations and as is illustrated below, it is a process not very well understood and respected by some people in the industry and outside. This is illustrated in the case of *P. and M. Kaye Ltd. v. Hosier and Dickson Ltd.* (1972) 1 All E.R. 121 and (1972) I.W.L. 148, in which:

A contract was signed in June 1966 between the contractors and employers for the erection and completion of a warehouse and offices. The contract was in RIBA form of contract and included an arbitration clause (cl.35) which provided that ..."any dispute arising as to the construction of the contract or as to any matter or thing arising there under or in connection therewith...." was to be referred to an arbirtator.

By June 1967, work was substantially completed to the warehouse and the employers with the conscent of the contractors had taken possession of the warehouse, in April 1967.

Interim certificates were issued by the architect in April and July 1967 following which the employers paid sums on account leaving an unpaid balance of £14,861 on the grounds that work to the warehouse was faulty.

The contractors thereby relaid the floor and by August 1967, they had finished rectifying the defects. In September 1967, the contractors started proceedings in an attempt to recover the £14,861.

In defence the employers claimed that the floor was still faulty and that the previous defects had caused them a loss of £13,500 in profits.

In October 1967, both parties concurred in the appointment of an official referee. The alleged defects in the floor were never remedied. According to the contractors, they could never repair the floor because the employers were too busy using the warehouse and it was never convenient for them to carry out the repairs.

In September 1968, the contractors wrote to the architect stating in effect that there was nothing essentially wrong with the floor of the warehouse and that they should be paid.

Following further correspondence, quality surveyors were instructed to do a valuation. They calculated the value of the work done as amounting to £68,393 and deducting all previous payments arrived at a balance of £2,360 payable to the contractors.

Clause 30(7) provided that; "Unless a written request to concur in the appointment of an arbitrator shall have been given. . . . by either party before the issue of the final certificate. . . . the said certificate shall be conclusive evidence in any proceedings arising out of this contract. . . .that the works have been properly carried out and completed in accordance with the terms of this contract".

On September 25, 1969 the employers asked the contractor to concur in the appointment of an arbitrator. The contractors pointed out that it was too late, and in October, 1969 they issued a writ for the amount due on the final certificate.

The question of the 1967 interim certificate was still in file, not yet resolved. Thereby the official referee consolidated the two actions and directed that the following issue be tried: i.e., "Whether the issue of the final certificate stopped the employer from relying on clause 30(7) to determine whether he could still claim £13,500 loss of profit".

It was held that on the wording of the final certificate, the employers could not rely on clause 30(7) and had therefore forfeited their claim.

On appeal the employers claimed that;

- (a) when the contractors issued a writ for £14,831, they had waived their right to rely on clause 30(7) and therefore, this particular clause ceased to be of any effect when the writ was issued,
- (b) even if the clause was still effective, the wording "the said certificate shall be conclusive evidence" should be understood as being limited to proceedings begun after the issue of the final certificate,

and

- (c) if proceedings in a court of law were pending a final certificate was not conclusive evidence, and although clause 30(7) made the final certificate conclusive as to the state of affairs existing at the date of its issue, it had no effect as regarding pre-existing

and vested rights to damages including particularly consequential damages arising in respect of breaches of contract before that date.

The court of appeal held that:

- (a) the employers argument could not be admitted because it raised a doubtful and difficult question of construction on a point of fundamental importance to building contracts,
- (b) the words of clause 30(7) "conclusive evidence in any proceedings arising out of this contract" were wide enough to cover proceedings commenced before as well as after the date of the final certificate. To limit the words to proceedings commenced after the date of the final certificate would involve writing a limitation into clause 30(7) which was not there,
- (c) Clause 30(7) did not have the effect of ousting the jurisdiction of the courts. By the terms of the contract the question whether the work done and materials used conformed to contract requirements was to be determined by the criterion of whether they were to the satisfaction of the architect; since on these questions it was the architects standards which were relevant. There was no objection to a clause which provided that as regards these matters the architects certificate was to be conclusive evidence; the courts retained the ultimate control in seeing that the architect acted properly, honestly and in accordance with the terms of the contract, but the method of proof chosen by the parties was legitimate and by its terms binding,
- (d) on the facts of the case, it was impossible to find any agreement between the parties to vary the contract by the exclusion of

clause 30(7) or any waiver by the contractors of their rights to rely on that sub-clause or any basis for alleging that they were stopped from doing so.

Lord Diplock, dissenting, held the view that; the contention raised by the employers was sound and ought to be admitted, since it raised a pure point of construction of words which formed part of only a single paragraph of the whole clause. The dispute did not involve a single paragraph but the whole of the clause. He said. . . ". .it would be intellectually baffling to attempt to construe the remainder of clause 30(7) on the assumption that one of the most important phrases in it meant something different from what it said".

The provision of the clause 30(7) that ". . . the final certificate shall be conclusive evidence that the works have been properly carried out and completed in accordance with the contract" dealt not with the activities of the contractor but with the state of the works at the time of the issue of the certificate resulting from the activities of the contractors.

The issue of the final certificate was not to be taken as conclusive evidence that at no time previously had there been defects in the works which required remedying. It was merely conclusive evidence that any remedial measures which had been necessitated by reason of defects in the works had been executed by the time of its issue.

The final certificate was irrelevant to any claims for consequential damage in respect of defects which had been found after the employers had

taken possession and before the issue of the final certificate. Accordingly the employers should not be barred from pursuing their claims for consequential loss of profit."

Lord Diplock's argument seems the most valid although the court held that the appeal must be dismissed. The court seems to have relied on the fact that in a building contract which uses a standard form to govern its administration, it is the parties who write their own law. The courts can only give it effect. The obvious incompatible provisions of the final certificate's effects on the parties rights to arbitrate a previous dispute and its inconclusiveness under certain provisions brings the question of whether the said certificate refers to the completion of the works or to the actual fulfillment of the contractual provisions.

Under MBWI the final certificate is not conclusive evidence but is evidence only that works have been satisfactorily completed. It does state that the said certificate shall also be evidence that the provisions of the contract had been complied with, and in the absence of any of the provisions which would make it inoperative, that is dishonesty, fraudulent concealment, etc., it does not solve the fundamental question of whether the said certificate is evidence that the works have been satisfactorily completed if there was a breach of contract prior to its issue.

Partial Occupation

In major building and engineering contracts, it is not unusual for the employer to take possession of part or parts of the project

before the whole works have been brought to practical completion.

Though the employer has reversionary rights to the site and the works, the contractor's possession of the site in absence of contrary provision is the exclusive occupier under the 'Occupiers Liability Act'. Most contracts provide for partial occupation though the contractor's consent is required and must be given in writing before such partial occupation can be effective.

Usually, the employer becomes responsible for the insurance of the relevant part but a number of other matters still remain unresolved. In certain major building works this part can be a substantial part of the contract. The builder, though relieved from the liability to insure is not relieved of the entire responsibility to complete the whole works in accordance with the contract. In the absence of express provisions the builder's liabilities will run as if no such occupation has taken place. To leave the parties free to negotiate the effects of such partial occupation defeats the purpose of having the standard form as an instrument that defines the rights, liabilities and remedies of the contracting parties at the outset of the contract.

As illustrated by the example below, partial occupation affects the following provisions in the contract; insurance, retention, liquidated and ascertained damages and defects liability period. While the questions of insurance and defects liability period are dealt with in detail under MBWI, retention and liquidated damages provisions are left open for the parties to negotiate. A difficult question is liable to arise if a breach of contract occurs after partial

occupation or either of the parties determines the employment of the contractor under the provisions of the contract. It would be unequitable to expect the builder to pay the liquidated damages in full while the affected part is only a part of the entire contract.

Example

Contract sum	\$1,000,000.00
Insurance of works including professional fees	\$ 100,000.00
Retention Fund (as % of contract sum) say 5%	\$ 10,000.00
Liquidated and ascertained damages	\$ 500.00 per week
Defects liability period	6 months

Assuming that the project is a commercial development, the employer starts to generate income as soon as he takes over.

It is hereby suggested by the author that a full valuation of the occupied part (referred to as the relevant part) should be made within a stipulated period. This valuation should then form the basis on which all the other sums mentioned above are adjusted for a more equitable contract.

Assuming the value of the relevant part amounts to \$800,000.00 the following should be the respective rights and liabilities of the parties:

Insurance

The insurance should be adjusted such that the amount of insurance bears the same ratio to the full amount in the appendix (\$100,000) as the insured part bears to the contract sum subject to any adjustments.

i.e. (x = amount to be insured)

$$\frac{x}{100,000} = \frac{(1,000,000 - 800,000)}{1,000,000}$$

$$\underline{\underline{x}} = \underline{\underline{\$20,000.00}}$$

Liquidated Damages

The amount payable as liquidated and ascertained damages should be reduced to a value that bears the same ratio to the amount in the appendix as the remaining part of the work bears to the contract sum.

$$\begin{aligned} \text{i.e. } \frac{x}{500} &= \frac{200,000}{1,000,000} \\ &= \underline{\underline{\$100 \text{ per week}}} \end{aligned}$$

Retention Fund

The normal practice in a building contract is for the employer to release a moiety of the retention fund after the issue of the certificate of practical completion, the other moiety being released after the expiry of the defects liability period or after the issue of the certificate of making good defects whichever is the latter.

By the same token, a moiety of the retention fund should be released on partial occupation and such a moiety should bear the same ratio to the amount of total retention fund as the value of the relevant

part bears to the contract sum:

$$\text{i.e. } \frac{\frac{1}{2}x}{10,000} = \frac{800,000}{1,000,000}$$

$$x = \$80,000$$

$$\frac{1}{2}x = \underline{\underline{40,000.00}}$$

The second moiety of \$40,000 should be released upon the expiry of the defects liability period of the relevant part or upon the issue of making good defects whichever is the latter.

This system of adjustment has been adopted and incorporated in the standard forms published by the East African Institute of Architects/Joint Building Council.

The formula provides a workable format by which the parties can provide at the outset of the contract their respective rights and remedies with regard to partial occupation.

It also ensures that the employer does not receive the benefit of the part he has occupied and yet have the right to recover liquidated damages in full amount should the contractor be rendered incapable of completing the remaining part of the project. The head contractor is also obliged to adjust any retentions held with respect to nominated sub-contract works should the same be included in the relevant part such as Electrical, air conditioning and hydraulic sub-contractors.

The formula also provides the means of settling any disputes related to the relevant part without necessarily forcing the parties

to go to arbitration.

Defects

Another major area of likely conflict in a contractual arrangement is defining what defects are and how these defects affect the contract during and after contractual performance. Certain difficult issues arise especially where such defects have the effect of rendering the final certificate inconclusive. Defective work is in itself ab initio a breach of the contract. The costs are not only in remedial work but in other areas as well.

The range of possible defects or allegations of defects are very wide. They range from work which is sometimes rough and uneven through to situations where the works are structurally unsound and have to be demolished. Factual complaints relate to the way the works have been carried out and at times opinions differ from one expert to another. In relatively small contracts neither the builder nor the employer expect a dispute to occur either during or after the execution of the works. Therefore neither bothers to examine in detail the resulting consequences contemplated by the conditions of contract arising from their respective omissions or acts of some relatively small routine matters which in the aggregate are expensive to reconstitute.

The rectification of defects during actual performance and during the defects liability period has the result of maintaining status quo to the works. The owner expects to pay for work which has been executed in accordance with the contractual requirements. The builder employs methods best known to himself to achieve this result. Though the works

may satisfactorily be executed by another method, it is unlikely that a claim for defects will succeed unless it can be proved that the builder's methods created a divergence from performance as shown and described in the contract documents. Where a contract requires work to be executed to the satisfaction of the architect, the builder should note that this refers in addition to other obligations and not in substitution thereof.

The law relating to defects is not only governed by particular clauses in the contract but is also covered by common law duty.

Parties may proceed and negotiate the standards of materials and workmanship but this will always be subject to compliance with a host of statutory and health regulations. In absence of express provisions in the contract, the relevant regulations and requirements of the statutory authorities will always override the provisions of the contract and such a term will always be implied. Where the regulations and restraints from statutory authorities are silent and the parties have not specifically agreed, the implied term is that work will be done to a standard in accordance with that which a competent person in the industry would attain.

Causes of Defects

In relation to the above, defects may be implied to arise from the following major causes:

- (a) departure from the agreed terms and stipulations in the contract documents,

- (b) failure to comply and observe statutory requirements and regulations,
- (c) failure to attain satisfactory standards judged by the normal usage of trade or usual competent standards in the industry.

The defects may owe their origin to any of the following major sources:

- (a) Design and/or supervision defects caused by a mistake made by the architect or engineer during the design stage, or by any other member of the design team,
- (b) variations ordered by the employer and sanctioned by the architect or engineer, which have the result of causing the builder to diverge from contract documents,
- (c) poor or sub-standard workmanship, materials or both.

Effects

The costs of rectifying defects still remains the major cause of conflict in most building contract litigations. In theory, the remedies for defects are as many and varied as the defects themselves. The question of qualifying damages is the most difficult one.

It is sometimes thought that where a building is defective, the value of the defects is the difference between the value of a building properly constructed and the defective building. In *Bellgove v. Eldridge* 90 CLR 613, the builder substantially departed from the specifications and by reason of this departure the foundations were defective rendering the building unstable.

It was held that the measure of damages was the cost of demolition, rebuilding and consequential damages arising from losses due to the non-use of the premises.

The second view expressed by *McGregor (13th Edition on Damages)* is that where the cost of remedying a defect is disproportionate to the end result to be attained, the measure of damages fall to be measured by the value of the building had it been built as required by the contract, less its value as it stands. In the Victorian case of *Burke v. Lynn (1976) V.R. 268*, the court held that in addition to the costs of rectification the building owner was also entitled to compensation for inconveniences, loss of time and costs of engaging a security guard to the defective premises.

In *Galambes and Sons Pty. Ltd. v. McIntyre (1974) A.C. L.R. 10*, the underneath portion of a house which was to be a garage and possible future habitable area was built in breach of the contract, with insufficient height to allow for future development as a habitable area. The court held the proprietor to be entitled to damages for inconveniences and loss of enjoyment of use.

Limitation

In the present day of rapidly rising building costs the point in time when defects are assessed and valued is of vital essence. The provision in the standard form of contract that the final certificate is not conclusive evidence if made in ignorance of defects which could not be discovered at the time of its issue has the effect of making the

builder liable in contract for ever. In addition, the builder is liable under common law duty to take reasonable care so that the premises do not pose a danger to health. (See *Dutton's case*). The problem of limitation has been considered in most recent cases dealing with tortious liabilities to 3rd parties but as yet, there has not been a clear definition as to when the Limitations Act begins to run.

Some judges hold the view that the cause of action starts to run from the date when the defects occur. Applied to a building project this would mean that the cause of action arises when the builder incorporates the defective material or employs sub-standard workmanship, or upon the issue of the final certificate. This of course, would mean that the builders would have nothing to fear after six years of receipt of the final certificate.

The Limitation Acts are designed to protect defendants from open-ended liability established in most of the recent decisions. Once the ordinary rules of negligence are applied to real property, the prospective plaintiff no longer needs to be in contractual relationship with the builder. It may take a number of years before the property starts to demonstrate its imperfections.

Other judges hold the most popular view that the periods of limitation only start to run from the date when the cause of action arises. i.e., when a person capable of suing receives in his hands the defective premises which a reasonable inspection would have been able to reveal.

The important thing then is to establish that date, which from the builder's point of view is vital. It is most undesirable to impose the risk of an action fifteen years after the builder has left the site. To illustrate the importance of this point it is desirable to refer to the recent cases of *Ann's v. Merton L.B.C.* (1977) 2 W.L. 1024 and *Sparham - Souter v. Town and Country Developments (Essex) Ltd.* (1976) Q.B. 848:

Ann's Case

The building was constructed in 1962 with defective foundations. Defects started to appear in 1970. The plaintiffs were all occupiers of flats or maisonettes on long leases obtained from builder/developer in 1962 or subsequently by assignments in 1967 and 1968.

The original decision was that the plaintiffs could not succeed because for the purposes of the Limitations Act, they were time barred.

After the decision of Dutton's case the plaintiffs were granted leave of appeal and the problem which faced their lordships was the attempt to define when time starts to run for the purposes of the Limitation Acts. Previous decisions favoured one date, others favoured another. The House of Lords took the view that the cause of action arose "only. . . .when the state of the building is such that there is present or imminent danger to the health or safety of persons occupying it".

As will be demonstrated in the last chapter of this report, this view is likely to cause more problems in the industry than the House

CHAPTER FOUR

SUB-CONTRACTORS

General

The growth of specialisation in the building industry has led to the widespread use of substantial sub-contracts involving not only the supply of materials and the execution of the work but also responsibility for design by the sub-contractor. Examples are the structural steel, reinforced or precast concrete frame, specialist piling and foundation work, heating and ventilation, specialist roofing and floors, metal windows, electrical works and so on.

In absence of provisions to the contrary, there is usually no objection for the builder to perform his part of the contract vicariously with sub-contractors employed by him. In general, sub-contractors can be categorized into two broad classes:

- (a) Nominated sub-contractors, and
- (b) General sub-contractors.

Contractually, no privity of contract exists between the sub-contractors and the building owner whether nominated or not.

General sub-contractors are employed by the builder to carry out works other than those done or to be done by the nominated sub-contractor. In housing, for example, there is a tendency for the builder to engage sub-contractors to carry out all works covered by his contract. The

main contractor only performs the tasks of setting out, supervision, co-ordination and other general administrative duties. As a matter of good economics as regards utilization of labour, labour costs, and administrative overheads, most builders would prefer to sublet the works rather than do it through their organizations. The employment of sub-contractors means less capital being required by prime contractors to operate their business. The continual search for maximum economy and minimum construction delays makes the employment of these sub-contractors unavoidable. However, this is a fact generally ignored by the provisions of most standard forms of contract. In some forms express provisions exist prohibiting the builder to sublet the works or any part thereof without the express consent of the architect. Clause 13(b) Edition 5b, provides; "The Builder may sublet any part of the works subject to the consent of the architect which consent shall not be unreasonably delayed or withheld." What constitutes what is reasonable or not is a matter of debate. Special difficulties are however avoided since the work of such sub-contractors is for all legal purposes the work of the main contractor and is accordingly covered by the detailed descriptions of the work and the express or implied obligations of the main contractor contained in the main contract.

All building contracts are vicariously performed due to the fact that the builders are not suppliers and suppliers are not always the manufacturers of building materials. Such vicarious performance will in practice be secured by the contractor entering into sub-contracts, some of which may be merely sub-purchases of materials or fittings from merchants and others, some sub-purchases of what is in reality building work carried out off the site in factories or workshop conditions such

as pre-cast concrete units or joinery items, while others may be for the doing of work only, or for the supply of labour only or for the doing of work in connection and together with the supply of goods such as the work of erection or installation on the site of goods or fittings supplied. Due to the complex nature of all building inputs, the placing of all responsibility as to the fitness of purpose on the general contractor provides a simpler and more workable system in as far as the law is concerned. However, numerous conflicts arise between the builders and their sub-contractors which go undetected due to lack of any recognized legal document establishing the liability of such sub-contractors and suppliers to the prime contractor. A defective item incorporated in the work, save where such an item results from work done by a nominated sub-contractor or supplier, becomes the contractors responsibility though he has no control over the manufacturers activities.

Nominated Sub-Contractors

Nominated sub-contracts have given rise to many serious anomalies and difficult legal problems for the building owner. In most standard forms of lump sum contracts, performance of specialist work is placed with sub-contractors selected by the employer under a power reserved to him in the main contract. When such a sub-contractor defaults in any way, the employer will require to have a suitable remedy to recover his loss either against the main contractor or the sub-contractor. If the main contract documents are not suitably drafted the building owner may find himself without any remedy at all, since in general he will have no direct right against the sub-contractor, not being in any contractual

relationship with him. To avoid this situation, most modern forms of contract are drafted in such a way that the main contractor is fixed with the fullest responsibility in every respect for the work of nominated or selected sub-contractors. It is viewed that any provision or interpretation of the main contract absolving the main contractor from responsibility for acts or defaults of the nominated sub-contractor would prevent the employer from recovering his loss from either party.

Traditionally, draftsmen of the standard forms of contracts have sought to assert the undiminished responsibility of the main contractor for the nominated sub-contractors work by the use of some such phrase as "such persons are hereby declared to be sub-contractors employed by the contractor" or "shall be deemed to be sub-contractors of the contractor". This phrasing seems to have been adopted because certain decisions of the courts prior to the First World War had held the contractor as entering into sub-contracts as agent of the employer. This expression may have served its purpose until the last decade. Recent decisions in the House of Lords have thrown considerable doubt on the entire edifice and effectiveness of the system of nomination as it has hitherto been provided for in English contracts and those drafted around the English forms.

Under the present system of nomination, which is widely used and understood in the building industry, it often happens that architects obtain quotations from and negotiate with tendering sub-contractors (particularly those whose work or products are subject to long delivery dates) during the planning stage of the project when the identity of the ultimately successful tendering main contractor is still unknown.

In such cases it is well understood by the parties that the sub-contractor will in due course be required to enter into a sub-contract with the successful main contractor. Sub-contractors, even after accepting an order from the main contractor, sometimes try to rebut the usual inference of privity with the main contractor if the main contractor becomes financially embarrassed, in an endeavour to charge the building owner for their work; and it is easier to advance such an argument in cases where their original pre-contract negotiations have taken place with the architect.

The main reason why a contractual relationship with the employer will not be inferred, even if the sub-contractor has been nominated by 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 problems 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 other for speedy and economical progress.

The fact that the sub-contract comes into being by the authorization of the employer is irrelevant in privity of contract, nor is it relevant that the sub-contractor will normally be conferring a benefit upon the employer by doing the work. In cases of a sub-contractor's default, the main contractor can sue for breach of contract but he can only recover to the extent of his own damage. One obvious

anomaly in the present day nomination system is that most standard forms include a clause that protects a defaulting sub-contractor from meeting the employers losses on a delayed contract by expressly giving to the main contractor a right to an extension of time for nominated contractors delays. A remarkable result of this is seen in the case of *Jarvis v. West Minister Corporation* (1969) 1 WLR 1448. Where a sub-contractor (with a neutral contractor not taking part in the argument though a party to the proceedings) was actually asking the court to accept that delay to the works was caused by his own default within the terms of the extension of time clause (clause 23(g) on R.I.B.A.) so as to avoid his own responsibility to pay the employers liquidated damages to the main contractor for onward transmission to the employer. The facts of the case were as follows:

The employer engaged the contractor to erect a multi-story car park.

The employer nominated the sub-contractor by the provisions of the contract to perform certain piling work.

The contract was in R.I.B.A. form (local authority version) with quantities, which contained the standard clauses to the effect that:

(a) contractor pay employer liquidated and ascertained damages for delay during the time the works shall remain or shall have remained incomplete. (In this case, at the rate of £1,800 per week).

and

(b) if in the opinion of the architect "...the completion of the works is likely to be delayed on the part of the nominated sub-contractorsthe architect....shall...make a fair and reasonable extension

of time for completion of the works....."

The sub-contract between contractor and sub-contractor provided for:

- (a) the sub-contractor to indemnify the main contractor for any loss or damage caused to the contractor by failure on the part of the sub-contractor to complete the sub-contract work within the specified period. (The sub-contractor agreed to complete piling work by June 20, 1966, and purported to do so; and soon after withdrew his men and equipment from the site).

On July 13, 1966, the architect wrote to the sub-contractor authorizing him to release retention money to the sub-contractor's guarantor now that the sub-contract work was completed. On July 21, 1966, by accident, one of the piles was damaged. Closer investigation revealed that of the 65 piles the sub-contractor had erected, 18 of them were defective.

The architect then approved remedial work by the sub-contractor to replace the defective piles but in new locations. This work took another 22½ weeks.

(The result was that the works accepted by the employer were not the same as those specified in the original contract drawings).

Remedial work was completed on September 29, 1966.

During the time which the works had remained incomplete the sum owing the contractor to the employer as liquidated and ascertained damages had accumulated to £39,600, which according to the contract was deductible from sums due or becoming due to the contractor. The

sub-contractor was therefore contractually bound to indemnify the main contractor for the loss.

The sub-contractor in joint action with the main contractor (not involved in the argument) contended that no damages were deductible as the main contractor was entitled to an extension of time by virtue of clause 23(g) of the main contract.

Upholding this contention, judge Simon L.J. held that the main contractor was entitled to an extension of time for the following reason:

That the obligation on the main contractor to complete the works by the fixed date meant an obligation to complete the works in the sense in which "practically completed" or "practical completion" are used in the contract. It means according to Simon L.J. "completion to all practical purposes, that is, for the purpose of allowing the employer to take possession of the works and use them for the intended purposes. If completion meant completion to the last minute detail, the clause (on liquidated damages) would be a penalty and as such not enforceable. Practical completion by the main contractor was in fact delayed and this delay was occasioned by the fault of the sub-contractor".

He held that the remedial work was done as an agreed method of bridging the works to practical completion and since this was reached at a later date than originally stipulated, the contractor was entitled to an extension of time and not liable to pay the liquidated damages.

The employers appealed against this decision contending that the main contractor was not entitled to any extension of time as this would protect the sub-contractors from facing any consequences occasioned by their own defaults.

The appeal was allowed and the court of appeal held that the sub-contractor was not in any delay because:

- (a) On June 20, 1966, he had achieved apparent completion to the reasonable satisfaction of the architect and the main contractor,
- (b) delay in this context was not synonymous with sloth or dilatoriness and
- (c) remedial work accepted by the employer was designed to mitigate the damage done by failure to perform the work in accordance with the sub-contract.

Lord Hodson:

"Delay on the part of the sub-contractor can only occur while the sub-contractor is still in the process of performing or purporting to perform the sub-contract.....that the discovery of defects constituted a breach of sub-contract and not delay and therefore extension of time could not be granted".

Lord Viscount Dilhorne: (concurring)

"It is indeed curious that in this form of contract issued by the R.I.B.A. and approved by so many other bodies one should find a provision under which a sub-contractor can benefit from his own default".

Lord Wilberforce: (also concurring)

"....provision for the extension of time forces the parties to a paradoxical position. The sub-contractor whom it is clear was making every effort to complete the sub-contract work in time, and at one point firmly contending that it had done so now appears as an advocate of his own delay. The employer whose concern was to establish contractual responsibility for a serious delay in completion of the contract appears as contending that there was no delay. Such an illogical consequence suggests that the condition, which creates it, has been inserted and drafted without any clear appreciation of its purpose or scope.... ..indeed, I cannot believe that the professional body realising how defective this clause is will allow it to remain in its present form".

The appeal was therefore allowed and the sub-contractor held liable for damages (contractors indemnity). That single point alone to be clarified by the courts took well over four (4) years.

At around the same time as the *Jamvis case* was being battled, another similar legal dispute was raging in another courtroom. This time the point involved the contractors liability to complete the works as shown upon the contract drawings and specifications including the sub-contract work (as most standard forms require). The contract was again in the R.I.B.A. standard form 6th Edition. This case helped to define the architects responsibility in respect of instructions concerning nominated sub-contractors work though no amendments to some standard forms have been effected to the present. This is the

celebrated case of *Brickerton and Son v. The Northwest Metropolitan Hospital Board* (1969) 1. W.L.R. 607, the facts of which are as follows:

In October, 1964 employers entered into an agreement with the main contractors for the erection of a building in the terms of the R.I.B.A. standard form of contract 6th Edition. (With quantities).

The Contractors obligation:

The contractor undertook subject to the conditions of contract to carry out and complete the works shown upon the contract drawings and described in the contract bills and to comply with all instructions issued to him by the architect.

Condition 11(3) of the contract provided that ". . .the architect. . . shall issue instructions in regard to the expenditure of prime cost sums. . . .included in the contract bills".

Condition 17 prohibited the contractor from sub-letting any portion of the works without the consent of the architect and the employer.

Condition 27(a) provided that the prime cost sums should be expended in favour of such persons as the architect should instruct.

Condition 30(5)(c) required that the amounts paid under the sub-contract pursuant to clause 11(3) and 27(a) be set against the relevant prime cost and the balance or deducted from the contract sum as the case may be.

The bill of quantities formed part of the contract documents, and included a prime cost item for the mechanical installation. The main contractor was required to provide for payment for mechanical installation executed complete the sum of £6,680. The bill of quantities also provided that; "All work. . . .covered by prime cost sums. . . .will be. . . .executed by firms to be selected by the architect".

In accordance with instructions issued to him by the architect, the main contractor entered into a sub-contract with a nominated sub-contractor to do the mechanical installations referred to in the bills for the sum of £7,389. The sub-contract was in the terms of the tender submitted to the employer by the sub-contractor. (The main contractor had no say in fixing the sub-contract price). The sub-contractor made a collateral contract with the employers that in consideration of their being nominated the sub-contractors, they would make good defects from any defective design, materials or workmanship developing within twelve months from completion of the works.

In December, 1964 the sub-contractors went into voluntary liquidation and the liquidator refused to proceed and complete the sub-contract, which was subsequently repudiated. The employers accepted the repudiation. Considerable amount of work had been done under the main contract but the sub-contract work had barely been started.

A request by the contractor to the employer to nominate another sub-contractor was denied and the employers relying on the wording of

clause one of the main contract called upon the main contractor to complete the sub-contract work at the sub-contractor's price. The employers had ignored the contractors tender of £8,210 for the work. Acting reasonably the main contractor executed the sub-contract work competently and claimed on a quantum merit basis for the extra amount above the sub-contract price as part of the amount he had reasonably expended on the sub-contract.

The employers disputed this liability to pay the additional sum contending that the main contractor was obliged to execute the sub-contract work. They conceded that under the main contract, initially, the main contractor was not entitled to carry out prime cost work unless he had successfully tendered for it and that by virtue of clause 11(3) of the contract, initially, the employers were obliged to nominate sub-contractors for prime cost work.

Finding in favour of the employers the courts expressed the following views: (Justice Nelds).

- (a) the main contractors obligation was based on the entire contract and not in part thereof,
- (b) the sub-contractor owed the same obligation to the main contractor as the main contractor owed to the employer. The contractor could therefore not claim from the employer what he ought to claim from the sub-contractor,
- (c) there was no condition expressed or implied in the contract to suggest that the architect or the employer was under any duty to nominate a second sub-contractor on default of the original sub-contractor. "Indeed, if such a duty existed, it was more of

a right than an obligation on the architects or on the employers part".

and

- (d) the main contractors remedies were stipulated under the sub-contract and it was therefore their responsibility to complete the sub-contract in an acceptable manner and claim the extra cost from the sub-contractors.

The contractors appealed against this judgement on the following grounds:

- (a) On the true construction of condition 11(3) it was the architects duty to issue instructions for prime cost work whenever it is necessary to do so and not merely at the outset of the contract, and accordingly, the architect was under a duty to nominate a substitute sub-contractor to carry out the mechanical installation work when the original sub-contractor was discharged.
- (b) On the true construction of the entire contract, and in particular conditions 11(3) 17, 27(a) 30(s) (c) relating to the expenditure of prime cost sums, the obligation of the main contractor in relation to the sub-contract work even when the sub-contract has ceased to exist, was confined to carrying out that work not done by a nominated sub-contractor.
- (c) Since the main contractors had executed work of the sub-contractor when they were under no duty to do so, they were entitled to a remuneration for the work on a quantum meruit basis. They were also entitled to damages for breach by the employers (through the architect) of condition 11(3).

The appeal was allowed and the court of appeal led by Lord Sachs L.J. made the following observations:

- (a) though the primary responsibility of the main contractor is "to carry out and complete the works as shown upon the contract drawings and as described and referred to in the contract bills....", the main contractors were obliged to await instructions in all cases involving the expenditure of the prime cost sums.
- (b) By virtue of condition 11(3) if the architect was under no duty to nominate another sub-contractor and the main contractor was under no personal obligation to execute the prime cost work, then a vacuum existed in the provisions of the contract; and seeing the main contractor had no say in fixing the sub-contract price, he should be allowed the benefit of doubt.

It should be appreciated that one of the objectives of using the standard forms of contract is to avoid the employers having such privity of contract with sub-contractors as would put them under a liability to the latter. Secondly, a standard form of contract ensures that there is unified control of the work on the site through the agency of the architect. But on the other hand, there seems no reason why the employers should not in consideration for nominating the sub-contractor to obtain from them collateral contractual undertakings which could be in wider terms than the employers received in this particular case.

The nomination of sub-contractors enables the employers to have as regards specialists work, the services of some firm which they (or the architect) regards as the most suitable for that speciality. The speciality may and very often does relate to work which the main contractor

would not normally be competent to execute and which the employers would certainly not wish him to personally execute.

Whilst the main contractor is entitled before the sub-contractor is selected to object to the nomination of any sub-contractor (on reasonable grounds) he cannot successfully object merely because he considered that the price was too low. Low prices can be, and indeed are, very frequently quoted by reputable and sound sub-contractors who have a special wish (maybe for prestigious reasons) to be allowed to do the work on some particular set of premises. Again this may be a desire to fill in a gap in their works programme or to help a favoured client.

Nominated sub-contractors are often selected after the main contract has been entered into. The main contractor after the main contract has been made, may know little or nothing at all of the technical content of the sub-contract or of the sub-contract prices. Furthermore, under the main contract, he is not given any right to object to any of the details in the specifications in the sub-contract any more than the sub-contract price. It is evident from the provisions of the contract that the main contractor's sole right to objection goes no further than the personality of the sub-contractor to be nominated.

The system of nominating sub-contractors is therefore an artificial product of the factors mentioned above and according to *Sachs L.J.*, "if the employers want the prime cost work done, they are bound to make an initial nomination of a sub-contractor". This contention may not go far enough when a definite prime cost item is concerned as opposed to a provisional prime cost item. When a nomination is not done in

reasonable time, the contractor cannot earn the profit to which he is entitled under a definite prime cost item, neither can he do the work as he is expressly forbidden to do by the contract. No standard form as yet says expressly and in plain language that there must be a nomination of a substitute sub-contractor once the initial sub-contractor has ceased to be a sub-contractor for the purposes of the contract, except MBWI but only when the sub-contractor goes to liquidation.

Some hidden problems are also inherent in these standard forms and it will probably require another court decision to clarify at least the following issues:

- (a) through no fault of the contractor, the sub-contractor is discharged and there is no available sub-contractor qualified to do the sub-contract work,
and
- (b) through no fault of the contractor, the sub-contractor utterly refuses to carry out the sub-contract work for there is normally no question for specific performance being available against such sub-contractors.

Though the first problem may draw reference from *Bickertons case* whose implication is that the main contractor is utterly under no legal obligation (despite contention to the contrary by the wording of clause one of the standard forms) to undertake any prime cost work, and is therefore upon the employer to find alternative performance of the sub-contract work; the second problem may have to wait for legal clarification. It is not yet clear if the contractor should take it upon himself to execute work which he may not be competent to execute or whether he should assume the task of nominating a sub-contractor himself.

Another major problem would probably arise when the design or craftsmanship are essentially a matter for the employers choice and where no one other than the nominated sub-contractor holds the licence to use some patented product or process. If such a sub-contractor defaults, there is no provision in the standard forms which allows the contractor to be paid when there is no subsisting sub-contract.

In such instances the courts seem to have relied on the particular terms of the contract instant at the time of the dispute. There are two categories of decisions based on similar cases but with somewhat different circumstances.

The first set of cases namely: *Leslie and Co. Ltd. v. Metropolitan District Managers* (1901) I.L.G.R. 862 and *Mitchell v. Guildford Union Guardians* (1903) I.L.G.R. 857; where in each of these cases, the main contractor claimed damages against the employer for delay caused by the failure of the nominated sub-contractor to execute their work within reasonable time. Both claims failed on the grounds that according to the terms of the respective contracts, the main contractor could not be said to have entered into the sub-contract as either agents or trustees for the employers.

The second set of cases namely: *K. Cross (Doncaster) Ltd. v. York County Council* [(1966) (unreported)] and *J.M. Reilley Ltd. v. Belfast Corporation* [(1968) (unreported)], where in each case the sub-contractor had become insolvent at an early stage in the work and there being no question of his executing any part of the work. In neither case did the R.I.B.A. form on which both contracts were based contain the equivalent clause requiring the architect to issue

instructions with regard to the expenditure of the prime cost sums. In both cases it was decided that the main contractor was personally liable for the execution of the sub-contract work and that there was no duty implied or otherwise requiring the architect to make a second nomination on the default of the first nominee.

These conflicting decisions makes it almost impossible to come up with a system of nomination that would pass without much criticism, but the standard forms as drafted to date are no consolation and neither do they provide any workable answers to the problems inherent in the system.

The position of the builder with respect to nominated sub-contractors under the standard forms is further endangered by the provision which gives the employer the right to pay direct to the nominated sub-contractors thereby denying the contractor any right of redress to defaulting sub-contractors. Most standard forms contain the provision that before issuing any certificate under the relevant clause, the architect may request the main contractor to furnish to him reasonable proof that all amounts included in the calculation of the amount stated as due on previous certificates in respect of the total value of work done, materials or goods supplied by any nominated sub-contractor have been duly discharged, and if the main contractor fails to comply with any such request the architect shall issue a certificate to that effect and thereupon the employer may themselves pay such amounts to any nominated sub-contractor concerned and deduct the same from monies due or to become due to the contractor.

If this provision is expected to be equitable, then perhaps, it ought to be expected that when the employer assumes the right to pay a sub-contractor direct, he should also assume full responsibilities for the sub-contractors work, in which case the builder should be relieved from liability on the work performed or to be performed by the sub-contractor.

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CHAPTER FIVE

NOMINATED SUPPLIERS

General

Like sub-contractors, suppliers also come in two broad categories:

- (a) those who in the ordinary course of their business supply materials and goods to the contractor and are generally referred to as ordinary suppliers. These suppliers are also manufacturers of their products in certain areas. As such most of them are in competition and the liability to ensure that the goods or materials conform with the contractual requirements is left to the builder. These stem from the fact that each single commodity may have as many as a dozen producers or suppliers whose activities may be virtually impossible to police. It is therefore left upon the builder to select his own suppliers and the clients architect need not intervene in any arrangement reached between the builder and such suppliers. If the materials do not conform with the contractual requirements and the architect so certifies, the builder must find his own ways of recovering his loss from the supplier.

(b) Nominated Suppliers

Occasions however do arise when the client requires the use of some specific materials or goods in the works. The nature may be so specific that the client cannot obtain satisfaction unless such materials were only obtained from a specific source. Since the client has a reversionary right to the works on completion he

cannot be legally denied the allotment of some specific part of the works to persons of his own choice as long as such allotment does not legally prejudice the position of the contractor.

In any case, such sums to be expended on the nominated suppliers is usually stipulated in the bills of quantities long before the contractor is called upon to place his tender. Furthermore, the acceptance of such a tender must be made without any qualifications to be legally binding.

Most standard forms of contract therefore contain a provision giving the client express powers to nominate suppliers for specific items stipulated in the bill of quantities. Legal anomalies have evolved following the manner in which this provision is drafted. When a building contract is examined in total, the builder is clearly responsible for good workmanship and the materials used should be fit for their intended purposes. Any material incorporated in the works which does not fulfil the contractual requirements constitutes a breach of the implied warranty by the builder that the materials conform to the contract. In fact this was the argument presented in *Gloucester County Council v. Richardson (1968) 2 ALL L.R. 1811*, in which:

A contract was entered into for an extension of a technical college incorporating the conditions of the R.I.B.A. form of standard contract. A prime cost sum of £7,000 was provided for concrete columns to be supplied by a firm nominated by the client (via the architect).

Such suppliers were nominated by the architect and undertook to supply the columns at a sum of £1,941. Under the terms of contract the

contractor was bound to accept the suppliers quotation, which had a limiting liability provision for defective goods and excluded liability for consequential loss or damage. After sometime the columns developed defects which became apparent when the columns were erected. The contractor notified the engineer who in turn orally instructed the contractor to suspend all the work connected with the columns on or before 21st August, 1961. Following this instruction as he was bound to do under the terms of the contract, he proceeded and finished all other work except that which he had been instructed to stop. In spite of his written requests, no further instructions were issued concerning the fate of the defective columns.

On October 23, 1961 and November 6, of the same year, the contractor gave notice purporting to repudiate the contract on the grounds of:

- (a) the works having been suspended for more than one month (4 weeks),
- (b) the architects failure to issue instructions as required by the provisions of the contract.

The provision dealing with the nomination of sub-contractors provided that no nominated sub-contractor could be employed against whom the contractor made reasonable objection or who would not undertake to indemnify the contractor against any loss or proceedings arising out of the sub-contractors default. The clause dealing with nominated suppliers made no such provision for the protection of the contractor. It actually provided that all specialists nominated to supply materials and goods were thereby declared or deemed to be suppliers to the contractor.

In the course of proceedings by an official referee, it was conceded that the contractor could not determine the contract because the architects instruction to suspend the works was occasioned by the contractors breach.

The contractor dissatisfied with the finding of the official referee brought the action. Dissenting from the official referees finding Lord Pearson argued that:

The contrast between the nominated sub-contractors and the nominated suppliers provisions in the conditions of contract, and in view of the circumstances that the design, material specification, quality and price of the columns was fixed by the employers and the suppliers without reference to the contractor, and in view of the restriction of the extent of remedy against the suppliers contained in the contract with them that the contractor was obliged to accept any warranty by the contractor of the quality of fitness of the columns supplied by the nominated supplier was excluded. And therefore the contractors concession made in the course of the action did not exclude him from relying on the provision of the contract to determine.

Also,

on the facts that there had been an architects instructions made pursuant to the provisions of the contract, which instructions caused delay notwithstanding that the root cause was discovery of defects in the columns, the contractor was entitled to give notice to determine the contractor's employment within the provisions

supply and fix materials or to execute any work on the site;

(a)all specialists. . . .who have been nominated are hereby declared to be sub-contractors employed by the contractor and are referred to in these conditions as "nominated sub-contractors", provided that no nominated sub-contractor shall be employed. . . .in connection with the works against whom the contractor shall make reasonable objection orwho will not enter into a sub-contract providing:

(i) that the nominated sub-contractor shall indemnify the contractor against the same obligations in respect of the sub-contract as those for which the contractor is liable in respect of this contract;

(ii) that the nominated sub-contractor should indemnify the contractor against claims in respect of any negligence by such sub-contractor.!"

Clause 22 - Where prime cost. . . .sums are included in the bill of quantities in respect of any materials or goods to be fixed by the contractor:

(b) "all specialists. . . .who have been nominated or selected by the architect to supply such materials or goods are hereby declared or referred to as nominated suppliers and are declared to be suppliers to the contractor. . . .all payments by the contractor for such materials or goods shall be in full and shall be paid within 30 days of the end of the month during which delivery is made less only a cash discount. . . .if so paid.!"

of the contract.

The employers appeal was based on the fact that he (the contractor) contracts to do work which in every respect conforms to the contractual requirements. Any defective workmanship or material constitutes breach and any finding to the contrary protects the contractor from his own default.

When the contractual provisions were examined in total the following observations were made in favour of the contractor:

Clause 18 - "If in the opinion of the architect the works be delayed. . . . (v) by reason of the architects instruction made in pursuance to clause 1 of these conditions or (vi) because the contractor has not received in due time necessary instructions from the architect for which he shall have applied in writing. . . . then in any case the architect shall make a fair and reasonable extension of time for the completion of the works. . . ."

Clause 20 - ". . .if the whole or substantially the whole of the works. . . .is delayed (for one month) by any or more of the causes. . . .which are named in clause 18 of these conditions, the contractor may without prejudice to any other rights or remedies thereupon by notice by registered post to the employer or architect, determine the employment of the contractor under this contract".

Clause 21 - "Where prime cost. . . .sums are included in the bill of quantities for persons to be nominated. . . .by the architect to

supply and fix materials or to execute any work on the site;

(a) . . . all specialists. . . who have been nominated are hereby declared to be sub-contractors employed by the contractor and are referred to in these conditions as "nominated sub-contractors", provided that no nominated sub-contractor shall be employed. . . in connection with the works against whom the contractor shall make reasonable objection or . . . who will not enter into a sub-contract providing:

- (i) that the nominated sub-contractor shall indemnify the contractor against the same obligations in respect of the sub-contract as those for which the contractor is liable in respect of this contract;
- (ii) that the nominated sub-contractor should indemnify the contractor against claims in respect of any negligence by such sub-contractor."

Clause 22 - Where prime cost. . . sums are included in the bill of quantities in respect of any materials or goods to be fixed by the contractor:

(b) "all specialists. . . who have been nominated or selected by the architect to supply such materials or goods are hereby declared or referred to as nominated suppliers and are declared to be suppliers to the contractor. . . all payments by the contractor for such materials or goods shall be in full and shall be paid within 30 days of the end of the month during which delivery is made less only a cash discount. . . . if so paid."

As Sellers L.J. observed: "the contractual obligation will only work satisfactorily if the risk of nominated suppliers failing to fulfil his contract falls on the contractor. This is the intention of the parties as stipulated by the conditions. It would be a most unbusinesslike arrangement if the nominated suppliers could with virtual impunity supply materials of bad quality and the employers would have no remedy.

If the contractor had the obligation to supply materials of good quality, the supply of concrete columns which were defective (though the defects were latent) constituted a breach of contract. The architects instruction to cease work on the concrete columns resulted from that breach. Then by virtue of the concession referred to above, the contractor must be considered not to be entitled to rely on clause 18(v) as justifying his determination of the contract under clause 20. He is however not prevented by his breach of contract from relying for this purpose on clause 18(vi) the words of which are '*because the contractor has not received in due time necessary instructions from the architect for which he shall have specifically applied in writing*'. But since the initial cessation of the work was not caused by an architect's instruction but by breach of contract and by the parties pursuing the course agreed to by all of them, the contractor has no established grounds to determine his employment under the terms of the contract".

Other High Court Judges held contrary to Sellers L.J. as illustrated below:

(a) *Lord Pearce:*

"...the contractor in any field of business when engaged to do certain work and supply materials implicitly warrants that the materials will be of good quality, unless the particular circumstances of the case show that the parties intended otherwise.

Here the parties entered into an R.I.B.A. contract, a complicated and sophisticated document. There is no express acceptance by either party of liability for the quality of the nominated materials. The contractor must comply with the instructions of the architect. He must accept the architect's nomination in respect of such nominated suppliers and sub-contractors. The omission in clause 22 for the suppliers to indemnify the contractor. . . in my opinion is not unintentional. It points to an intention that the contractor is not undertaking liability for materials provided by a nominated supplier, otherwise he must have been given an opportunity of making reasonable objection and a right to insist on an indemnity from the supplier.

Materials are selected without giving the contractor any right to express his views and the employers expert (the architect) has decided that the nominated goods are suitable for the purpose and has made his own provisions and arrangements with the suppliers during or prior to the contract.

The employer arranges price which is reflected on quality and only he alone can insist on checks and tests of quality. All circumstances of nomination appear to exclude any reliance on the contractors skill and judgement; he only receives instructions and

a controlled profit for attendance and co-ordination of delivery and fixing.

On the other hand, if the contractor had no liability on materials supplied by nominated suppliers, the employer is left without remedy for faulty materials. Clause 21 indicates that the nominated supplier has a contractual relationship only with the contractor. The employer pays the contractor who in turn pays the nominated supplier. To hold the contractor as having no liability for nominated suppliers is to go against one of the most important reasons for the general rule that there is an implied warranty of good quality in materials and labour.

However the contrast between clauses 21 and 22 points to the view that the contract shows an intention to exclude a warranty by the contractor in respect of nominated suppliers. At the same time, the engineer without consultation with the contractor prepared detailed designs of the columns and nominated a firm and the architect presumably satisfied and without discussion with the contractor instructed him to sub-contract with the suppliers.

The employers through their architect instructed the contractor to buy from a manufacturer who had substantially limited his own liability, and would therefore be unreasonable to suppose that the parties were intending the contractor to accept an unlimited liability for columns, the manufacture of which he had no control whatsoever. The defects in the columns were not a matter for which the contractor was liable or at fault. The works were

therefore delayed by reason of the architect's instruction given pursuant to clause 1, of the conditions.

The delay as found by the official referee was not due to defective columns but the result of the given instructions. The delay caused by the architect's instruction (one month) entitles the contractor to determine the contract in pursuance to clause 20. The delay was caused by obedience to the architect's instruction though occasioned by defective work in breach of clause 1"

(b) *Lord Upjohn:*

". . . . it seems clear to me that from the date of the letter accepting the contractor's tender both proceeded on the footing that the contractor was not merely authorized but bound to accept the nominated supplier's tender and on the terms of their standard terms of sale.

Ultimately after the abandonment of the works the defects were diagnosed as a failure by nominated suppliers to manufacture columns in accordance with the specifications. The contractor did what he was instructed to do. He contracted with the nominated suppliers as he was authorized. There is no implication that the contractor warranted to the employers the quality or fitness of purpose of the goods supplied by the nominated supplier".

Lord Wilberforce concurred with the above contentions and dismissed the appeal.

CHAPTER SIX

THE ARCHITECT'S OBLIGATIONS

The Architect

The time has now come for it to be recognized that following the recent case of *Sutcliffe v. Thackral* in England and the numerous criticisms the standard forms of contracts have attracted from the courts, architects and legal advisers recommending the use of these forms without appropriate modifications to suit the particular circumstances of the job, are in serious danger of actions for professional negligence.

A number of serious weaknesses have become evident in most standard forms of contract in use. While the architect is considered the leading authority in the building and construction field, he is not expected to be legally qualified to deal with matters of law affecting the contract. He is however involved in day to day administration of these standard forms of contract. Specific clauses are included in the standard forms which spell out the duties of the architect and his obligations under the contract. At the same time his position as the professional adviser and an agent between the employer and the contractor imposes upon him some implied duties to safeguard his employers interest under the contract.

It is therefore important that he understands the provisions of the standard forms of contract especially in matters that adversely affect his employers interest under the contract. As per Hudsons Building and Engineering contracts 10th Edition Page 146:

"A number of provisions. . . .are so self evidently utterly inimical to the employers reasonable interest, and so devoid of any commercial or moral justification, and the examples of the use to which they can be put are becoming so notorious that it can, it is submitted, no longer be consistent with professional competence or duty to recommend such a form of contract without drawing attention to its worst features".

These weaknesses are especially more serious and contrary to the employers interest under the provisions of the following clauses:

(a) Determination by contractor

Severe remedies to the contractor are imposed on the employer for non-payment without giving him the right to retain any money for bona fide counter claims or defences including even those sums for which the employer is expressly permitted to deduct when making payments under the contract.

The contractor is given the right to determine the contractors employment and at the same time accorded remedies when the works are suspended for one month due to force majeure as if such a contingency was under the control of the employer.

The contractor is also entitled to determination and remedies when the works are suspended for three months due to the occurrences covered under the provisions of the insurance clauses.

(b) Extension of time

The contractor under the provisions of the sub-contract is entitled to recover damages from a defaulting sub-contractor for non-completion or delay of the sub-contract work. While no privity of contract can be inferred between the sub-contractor and the employer, the standard forms of contract entitle the main contractor to an extension of time for unjustified delays by nominated sub-contractors and suppliers. This has been stigmatised by Salmon S.J. in *Jarvis v. Westminster Corporation*, as "unjust and absurd".

(c) Final certificate

The provision allows for the finality of the final certificate in respect of defective work which a reasonable inspection or examination at a reasonable time during the execution of the work might not have disclosed (unless accompanied by full time daily supervision by the architect), and the employer meets the costs for remedial work save for the fact that such defective work constituted a breach of contract on the contractors part.

(d) Insurances

The employer has no compensating advantage over the greatly expanded list of insured risks in case any of the stipulated contingencies happens. Any delay in occupation occasioned by any of the insured risks is passed on to the employer and in case of such delay exceeding three months, the contractor is entitled to determine the employment of the contractor with accruing remedies.

Though these particular weaknesses are inherent in R.I.B.A.

standard forms, it must be borne in mind that other forms used within the commonwealth countries (Australia included) are so closely modelled upon each other and upon English forms that they all seem to inherit the same anomalies and absurdities as their R.I.B.A. counterparts.

Apart from the foregoing, the obscurity of the standard forms and lack of clarity will not solve well-known practical problems. A number of questions being asked include some of the following:

- (i) An architect enquires from a specialist sub-contractor whether a material or process furnished by them will be suitable for incorporation in his proposed design. On the faith of careless statements made by the sub-contractor, he (the architect) selects the sub-contractor's material or process, an order is placed by the main contractor and the material or process fails in its intended purpose. Can the architect if sued for negligence by the employer, or the employer who has to order new work in substitution or suffers delay in obtaining possession, sue the sub-contractor for damages?
- (ii) A contractor undertakes that his work will conform with all the by-laws. The architect supplies him with plans of the works and expressly indicates that he is satisfied that the design complies with the by-laws. The builder has later to demolish and rebuild at his own expense. Can he recover the loss from the architect?

- (iii) An engineering contractor makes specific enquiries as to the sub-soil conditions from the consultant engineers before tendering. He is carelessly given information which is inaccurate. This misleads him in his tender. If the contractor cannot recover the additional expenses under the contract, can he recover damages under this head from the consultant engineers or the employers?
- (iv) Specialist sub-contractors are requested to design their part of the work. They prepare and put forward such a design to the architect after being informed by him of the loading requirements. The main contractor places his order with the sub-contractors in accordance with the sub-contract requirements. Can they (the sub-contractors) be sued for the employers or architects loss?

While these problems and many more have been known to exist, no relevant amendments seem to have been made on the standard forms. The armorphous and tortuous provisions of the standard forms can only be termed as nothing more than counter productive to the building industry.

The heaviest responsibility lies upon the architect to ensure that he, as the team leader, and his consultant team, are familiar with the basic provisions of any contract they recommend. While they are not expected to assume the capacity of the lawyers, they should with reasonable interest and competence be able to know as much and probably more

than a non-specialist solicitor as to the consequences and effect of the standard forms recommended by their own professional body.

Supervision

The architect must properly supervise the works and inspect them sufficiently frequently to ensure that the materials and workmanship conform to contractual requirements. While the question of what is reasonable supervision may not be clearly defined, the rule established in the case of *Jameson v. Simon (1988)* may shed some light on the matter.

In this case, the architect was employed to supervise the erection and completion of a domestic house costing £996.

The house was completed and all fees paid to the architect.

When the owner took occupation, dry rot was observed. It was discovered that the bottoming of the floor was not laid in accordance with the contract, but consisted to a large extent of miscellaneous rubble and rubbish. The architect visited the building at least once a week and without inspecting the bottom of the floor before cement was laid, authorized the plasterer to proceed with the work on the floor.

It was held that the duties of supervision meant such supervision as would enable him to certify that the work of the contractor had been executed in accordance with the contract. As per Lord Trayner, "The duty of the defendant was to give reasonable supervision. . . . before tradesmen could call for payment under the sums due under the contract".

It is accepted that the architect cannot be expected to supervise the day to day operation of the contractor. The appointment of clerks of works especially in large and complex projects enhances this duty even further. The fact that non-compliance with the contractual requirement constitutes a breach of contract by the builder and is enough grounds for the employer to claim liquidated and consequential damages, will not absolve the architect from liability unless such non-compliance is discovered by him during or after the execution of the work.

Certificates

For over 100 years the rule has been that an architect in ascertaining the amount due by the employer to the contractor under a building contractor occupied the position of an arbitrator, and as such, no action founded on the lack of care or skill could lie against him. This rule was established in 1879 in the case of *Stevenson v. Ward* (1879) A.C.P.D. 148; during which judge Denman J. remarked:

"An architect is not to be dealt with as a mere caster-up of figures, who if he makes a mistake is to be looked upon as guilty of negligence if he has cast them up wrongly".

This position was further solidified by the subsequent case of *Chambers v. Goldthorpe* (1901) 1 K.B. 624, where the above contention was upheld. To strengthen the architects position in this regard further, standard forms provide that no progress certificate issued by the architect shall be deemed evidence that any work, materials and/or goods to which such certificates relate are in accordance with the contract. (See Condition 28(f) Edition 5B).

By leaving architects free and unfettered in the exercise of their functions as certifiers, the courts gave them an independence and privilege similar to that enjoyed by barristers in their capacity as advocates. Within their professional engagement architects acquired a status more aloof than that of mere agents of the employer.

Contractors on entering into building contracts have probably acted on this assumption and relied on the fact that in the matter of certifying payments the architect has no cause to look backwards to the possibility of suit on the part of the employer if there should be any error in the certificate favouring the contractor. Commenting on the immunity of architects, Hudson on the law of contract said:—

"The rule has been adopted from the law of arbitration, where the necessity for such a rule is obvious, as no award of an arbitrator would be final if any aggrieved party was free to bring proceedings against the arbitrator for negligence, in which the evidence might in many cases amount to a rehearing of the arbitration".

The important difference between *Sutcliffe v. Thackral* and the other cases which established this rule is that the former cases dealt with final certificates while the latter involved interim valuations. As a general rule, interim valuations are at best only approximations and are not binding on the employer as an expression of satisfaction with the quality of the work or materials.

To be exact in the quantities while the work is in progress day by day would put far too heavy an onus on the architect. Generally if there is an error one way or the other no great harm is done. In the final analysis, it is the contract sum which would be paid. An overpayment is only an acceleration to the contractors payment.

In theory, interim payments involve a revaluation of the whole work and not merely the work done after the last payment. Final certificates fulfil a much higher office than interim certificates, and carry much heavier consequences. The main purpose of interim certificates is to control the cash flow to the contractor during the building progress and any amounts certified as due are in most cases subject to adjustments and readjustments on the issue of subsequent certificates. The exercise of the power to order removal of work, or the issue of variation orders, might create difficulties regarding payment. The interim certificates might then reflect an ad hoc exercise of judgement on these matters. Nothing is decided until the final certificate.

Most standard forms of contract stipulate that the final certificate once issued is conclusive evidence of the works having been duly completed, in accordance with the terms of the contract. Therefore, one can readily appreciate why a court might be inclined to attach heavier responsibilities on the architects for issuing final certificates, than for issuing interim certificates. There are three major reasons why this should be different.

- (a) The architect in certifying payments is sometimes performing nothing more than clerky functions - for instance, when no work has been done on the site and the certificate relates only to materials delivered. In such circumstances, the notion that an architect is balancing the scale of justice is highly artificial.
- (b) It is not always easy to say whether or not a dispute exists which the architect resolves by his certificates. Normally, when applying for a payment certificate, the contractor submits his accounts. It is unrealistic to treat this as a reference to arbitration when the contractor is doing nothing more than backing his claim for payment. At other times architects do certify when there is a raging dispute between the employer and the contractor.
- (c) It is not in the owners interest for the architect to apply an economic squeeze against the contractor by under-certification. As pointed out in the Rimmer's Law Relating to the Architect:

"An architect who fails to give a certificate on any grounds other than those upon which he is given a contractual discretion may lead the building owner into serious trouble and expense in claims by the contractor for breach of contract, by failure of the architect to certify for a reason which is not within his discretion, nor is it within the owners interest to force the contractor into financial embarrassment by undercertifying because the original contractor is unable to complete the works, the probabilities are that the cost would be higher, apart from the delay which would result".

In the light of the new liability in issuing interim certificates, it would be contrary to human nature to expect that architects would not in cases of doubt, lean over backwards in favour of the employer.

Needless to say, the decision in *Sutcliffe v. Thackral*, places the architect in a difficult position. Though the case refers to the architect's duty to act fairly, he (the architect) would find it very hard to be entirely fair when it means that he is exposing himself to the risk of an action by the employer. The absence of privity of contract between the architect and the contractor seems to indicate that this duty is one-sided. As it happened in *Sutcliffe v. Thackral*, it is the contractor who became insolvent, and in consequence the employer suffered loss through over-certification. But it could very easily happen the other way. If there should be under-certification and before completion, the employer went bankrupt, then, as the law stands, the contractor would have no redress for the loss he suffered. This decision is likely to upset the balance of interest established between the building owners under the standard forms of contract where the architect is supervising. Whether the contractors feel sufficiently protected by the arbitration clause where there has been an under-certification is open to question. The views differ. As per Lord Morris in *Sutcliffe v. Thackral* the answer is obviously yes; for in the course of his judgement, he said; "If the contractor thought that the sum certified was too little, the contractor would call for arbitration".

It is well known and appreciated that the contractors rely heavily on the services of sub-contractors due to their slender

capital outlays. Therefore, no contractor would countenance the prospect of a contract that would limp from arbitration to arbitration before he gets paid for his claims. At the same time, arbitration is a lengthy process and there is no legal prohibition barring sub-contractors from suing the main contractor for non-payment when the dispute is undergoing arbitration.

But recent decisions in the House of Lords have now opened new avenues for contractors who may suffer loss or damage due to the negligent act of the architect or any other adviser who may have a part to play in the contract administration. Where the contractor could not sue in contracts, he can now sue in torts. This principle has been established in *Arenson v. Casson Beckman Rutley* (1975) 3W.L.R. 815; in which an uncle sold shares in his private company to his nephew with the term that upon leaving the company the shares should be re-transferred to the uncle "at a price to be fixed" by the company auditors. The price was to be fixed by the Company auditors, whose decision was to be final and binding.

A resale took place under the contract and the nephew sued the auditors in tort. It was held by the House of Lords. . . .that in this case the auditors had no immunity.

This was a case of under-certification in which the shares were valued at 1/6th their current market price. The case reinforced the possibility that contractors will now be free to sue certifiers in tort for carelessness in issuing certificates if they can prove damages. This is especially in situations where the employer goes

into liquidation and the contractor is left with no course of redress against his loss.

Another very interesting case, this time in Canada (*District of Surrey v. Church*, 1977, 76 D.L.R. 472) involved an architect employed to design a police station. The architect engaged privately consulting engineers who were not specialist soil engineers, to examine the site. The consultants twice suggested to the architect a deeper soil investigation after seeing silty clays in the test pits. The consultants were told by the architect that the owner would not authorize this. (This was in fact not true).

The consultants then prepared a foundation and structural design based on their visual estimates of the bearing capacity of the materials in the test pits. Later the building inspector asked for a soils report before giving a building permit.

On pressure from the architect (who was now getting agitated) they sent a letter to him stating what they had seen in the pits, and that the material had a substantial bearing capacity. The published geology of the site showed the sub-soil as between 100 and 150 feet consisting of soft compressible moving clay.

On completion the building settled into the clay. It was held by the British Columbia Supreme Court that the architect who knew that the consultants were not soil specialists was liable in contract for failing to obtain a deep soil survey as recommended by the consultants.

Again, the consultants who ought to have known that the owner would rely on their recommendation did not make this knowledge available to them.

Coming closer to home is the classic decision in New Zealand (*Bevan Investments v. Blackall Struthers* (1973) 2 NZLR 45); where an architect was employed to design a sports centre. He employed a structural engineer privately. The employer wanted a skating rink on the ground floor, and to get the widest span across the rink without supports the engineer employed one of the very modern techniques of precasting the entire roof of the ground floor on the ground, and then lifting it up. The roof was to be the floor slab of the first floor as well.

When it came to lifting, great difficulties were experienced, and it became quite clear that the roof was heavily overstressed, and in the end the only thing to do was to change back to a more traditional design with reinforced beams and columns.

The engineer refused to acknowledge the fact that his design could not be executed and refused to take any part in the new design.

The original design was to cost \$110,000. The new design was to cost \$160,000. The case took two years before it could be heard and involved a lot of expert evidence. By the time the courts reached the decision that the change in design was reasonable, the estimate for the new design had escalated from \$160,000 to \$210,000.

The interesting features of the case were that the owner was claiming loss of profit based on what he should have earned had he switched to some other development.

The defendants were claiming that:

- (a) loss of profit could not be assessed on a sports centre as the project was originally designed as a non-profit making venture,
- (b) the value or cost of rebuilding the sports centre should be based on the prices existing when the project was incepted not at the inflated prices of 2 years later, and that,
- (c) any damages ought to be assessed on the value of the condemned work, less the salvage value of what would be left standing, and
- (d) since there was no contract between the engineer and the building owner, he could not claim liquidated damages for breach of contract.

The Court of Appeal, however, found that though the owner might have been wrong in claiming liquidated damages and consequential loss of profit, he was entitled to a sports centre which would have cost him \$110,000 had the engineers not been incompetent. Since the centre was now going to cost him \$210,000, he was entitled to the difference.

These new cases describe a new set of liabilities between people who before were not liable at all. The architect or professional will be liable as a certifier for negligence both to his own employer

and to any person who is likely to suffer damage if he is negligent in carrying out his duty.

Until *Hedley Byne v. Heller* (1963) ALL E.R. 575, there was no liability attached to reports, statements or opinions to 3rd parties foreign to the original contract. The case of Hedley Byne has reversed this principle and any professional statement on which others are going to act is made, the professional making it will now be held liable to the persons who receive and act on the statement and consequently suffer damage, though no contractual relationship exists. This is now the position between the architect and the builder.

An architects certificate is a statement based on the opinion of the architect. It is issued professionally, and with specific persons in mind (the employer and the builder) and it is clear that money will be gained or lost. The fact that the architect undertakes to give a number of administrative functions under the standard forms of contract (as distinct from design) then mistakes of employees (such as clerks of works) which involve no professional negligence will render the architects firm liable virtually without the need for proof of anything more than the fact that there was a mistake.

As has been earlier stated, lack of legal knowledge on the part of the architect may yet make him liable to the employer for recommending a contract form without due regard to the specific conditions affecting the employers welfare.

Needless to say, the contractual relationships in design and construction are formed with the architect playing an important function in their recommendation and administration. At present, there are more than 24 standard forms of contract in Australia, each containing its own inherent problems. Some with more problems than others. When the architect assumes the role of recommending the use of any of these forms, he should ensure that he exposes the problems to the employer and leave the choice between the employer and the builder. Though authority is lacking on this point, there is no reason to assume that a defective standard form of contract should be viewed differently from a dangerously designed structure or a bad specification. Plans, specifications, conditions of contract, etc. are after all, all contract documents which the parties rely upon for the proper execution of the contract.

CHAPTER SEVENTRENDS IN CONTRACT AND TORTGeneral

Over the last decade or so, the law relating to building contracts has undergone tremendous changes both in contract and tort. In the very famous case of *Donoghue v. Stevenson*, Lord Buckmaster in a vigorous dissenting opinion said:

"There can be no special duty attaching to the manufacture of food apart from that implied by contract or imposed by statute.

If such a duty exists, it seems to me it must cover the construction of every article and I cannot see any reason why it should not apply to the construction of a house. If one step, why not fifty? Yet if a house be as it sometimes is, negligently built, and in consequence of that negligence the ceiling falls and injures the occupier or anyone else, no action against the builder exists according to English law, although I believe such a right did exist according to the laws of Babylon".

Little did Lord Buckmaster know that by the turn of the 80's, we were to catch up with the Babylonians; for the legal position is now that almost any human or commercial activity in which physical damage to person or property can be foreseen as a sufficient proximate or direct result of the negligent act or omission complained of the principal in *Donoghue v. Stevenson* (1932) A.C. 562, 577, 578 has been developed and extended beyond the limits of snails in bottles. As

per Duncan Wallace, Q.C. the position in building law is such that if anybody to do with a building project produces a condition in a building which may one day affect the safety or health of persons or property in the vicinity, then, notwithstanding that there has as yet been no damage, no failure, an action in tort will lie against the person who was negligent for the cost of putting the thing right and preventing the accident that might otherwise be anticipated. So it is like a warranty of quality.

The cases are not confined only to those situations where physical damage can be shown. Cases in New Zealand and Canada, expressly approved by the House of Lords in England, show that in all the cases so far there has been some very minor symptomatic damage though this is not necessary any more. The principle was established in the case of *Ministry of Housing and Local Government v. Sharp* (1970) 2Q.B. 223, where Salmon L.J. said (at P.278 D.E)

"So far, however, as the law of negligence relating to civil actions is concerned, the existence of a duty to take reasonable care no longer depends upon whether it is physical injury or financial loss which can reasonably be foreseen as a result of a failure to take that care";

and Lord Denning M.R. in the same case said (at P.268 H)

". . . the duty to use due care in a statement arises. . . . from the fact that the person making it knows, or ought to know, that others, being his neighbours in this regard, would act in the faith of the statement being accurate. . . . it is owed, of course, to the person to whom the certificate is issued. . . it also is owed to any person whom he knows, or ought to know, will be injuriously affected by a mistake.....".

It has been the rule in the law of tort that for an action in negligence to succeed, three basic principles must be established.

These are:

- (a) *There must be an established duty of care.* In other words, there must be a special relationship between the plaintiff and the defendant. The provider of goods and services owes a duty to the consumer, the builder owes a duty of care to the occupier, etc.
- (b) *There must be a breach of that duty.* i.e., the provider of goods and services must have failed to act in a reasonable manner or has acted in a manner unbecoming to his competence.
- (c) *There must be damage consequent to that breach of duty.* The plaintiff has to prove that he has suffered loss or damage as a direct consequence of the breach of this duty and that the damage could reasonably be foreseen as a direct consequence of this breach.

Applied to the building industry, these principles have been extended to cover wider grounds than mere injury or loss per se. The law itself does not clarify what is foreseeable damage and what is not. To illustrate this point the judges have expressed dissenting opinions and some of the decisions are based on a very thin margin.

1. *S.C.M. (U.K) Ltd. v. W.J. Whitall and Son Ltd. (1971) 1 Q.B. 337,* in which case a firm of building contractors working on a road damaged an electric cable which was laid alongside the road. A power failure resulted for seven hours and seventeen minutes. The plaintiffs

were manufacturers of typing and copying machines. They had molten metal when the power failed. To get the machines clear they had to strip them down, chip away the solidified material and reassemble the machines. In addition some machines were damaged beyond recovery. The company lost the value of those items and also the profit from one full days production. They claimed damages from the contractors for that loss.

In defence, the contractors claimed that they owed a duty of care to the electricity board which owned the cable but owed no duty of care to the factory owners. The injury was indirect and could not reasonably be foreseen.

Lord Denning said:

"....they were working near an electric cable which they knew supplied current to all the factory owners in the vicinity.

It comes straight within the principle laid down by Lord Atkin in *Donoghue v. Stevenson*. In applying that case, I hold that the contractors are liable for all the material damage done to the factory owners and loss of profit consequent thereof".

Winn L.J. said: (referring to *Hedley Byne case*)

"In my judgement there is nothing in Hedley Byne case to affect the common law principle that a duty of care which arises from a risk of direct injury to person or property is owed only to those whose person or property may foreseeably be injured by a failure to take care".

Winn L.J. found himself unable to concur in the dictum of Salmon L.J. in *Sharps case*.

2. *In Spartan Steel and Alloys Ltd. v. Martin and Co. Ltd.*, (1973) Q.B. 27,

a case based on similar facts as the above, the Court of Appeal allowed one category of financial damage (loss of profit on a batch of spoilt steel due to a negligently caused loss of electric power in a factory) but not another (loss of profit on the production of steel which could not be started until the current was restored) where the loss on production foregone was admittedly as foreseeable as the loss on spoilt production. Lord Denning justified this restriction on grounds of public policy but, Edmund Davies L.J. dissented on the grounds of the foreseeability of the damage.

The most remarkable far-ranging decision was reached in *Dutton v. Bognor Regis U.D.C.* (1972) 1 Q.B. 373. In this case a local authority had failed to appreciate that a private developers building was being constructed on made ground. The councils inspector passed trenches and foundations which a careful inspection would have shown to be insufficient to deal with this condition. The house then passed through two sets of hands. (In the meantime the builder had gone into liquidation). The house subsequently settled and developed cracks which required repair. The Court of Appeal held that the councils servants owed a duty of care to subsequent purchasers and the duty extended to economic loss. In the course of his judgement Sachs L.J. adopted the Salmon L.J.'s dictum in *Sharps case* which Winn L.J. had expressly disapproved the year before in *S.C.M. case*.

The notable point in all these recent cases is that they all invoke the principle in *Donoghue v. Stevenson*, whose decision was based on a dangerous chattel causing damage. Applied to the building industry the principle in *Donoghue v. Stevenson* implies that the defendant would be liable for physical damage to other property but not for the repair of the defective property itself.

It seems, now, at least from the decision in *Duttons case* that the plaintiff in *Donoghue v. Stevenson* would have recovered damages resulting from the consumption of the drink and the replacement of the beer bottle as well. The principle established in the *Duttons case* has overwhelmingly commercial and practical importance. It may well mean that apart from builders and developers, advisers in many fields will owe a duty in tort in regard to pure financial damage suffered by third persons. Lord Denning M.R. suggests that there may be a distinction between professional men giving advice on property or financial matters (who would owe a duty only to their clients) and those giving advice in regard to safety of buildings or machines where "the duty is to all those who may suffer (financial) injury in case his advice is bad". But as it will be shown later, this suggestion may very well be out of date, and far fetched.

CHAPTER EIGHT

CONCLUSION AND RECOMMENDATION

General

Recent trends in the building industry have seen the introduction of different organizational structures in an attempt to make the production of buildings more effective, economical and speedy.

These areas include full industrialization and management organizations. These areas are still relatively young and their legal implications are not yet tried, but assuming their applications will pick up in the years ahead, it is reasonable to assume that standard forms of contract will appear with the intention of defining the rights, obligations and remedies of the parties under such a contract.

To avoid the problems inherent in the present standard forms, it becomes essential that the implications and effects on the industry resulting from the following cases:

Dutton v. Bognor Regis U.D.C.,

Anns v. Morton London Borough Council,

Sparham Souter v. Town and County Development,

Batty v. Metropolitan Property Realisations Ltd;

should be fully realized and the necessary effect be brought to bear on such standard forms.

For one, it is no longer necessary for the building owner to sue the architect on behalf of consultants employed by him for the simple reason that a contractual relationship cannot be established,

e.g., an architect who commissions a soil survey and openly indicates that he is not the originator of such a survey and then made that survey available to the tendering contractors will not himself be liable, but the firm that carried out the survey will be. The question of lack of privity of contract is no longer a barrier to those who receive careless statements, reports, certificates and expert opinions which lead them to financial trouble and economic loss.

These decisions make it more imperative that professionals and businessmen alike require the legal knowledge especially the law that relates to the fields in which they operate, and while this knowledge will not improve their technical skills, it will have a direct bearing on their capacity to effectively identify their main areas of liability not only to the parties they are in contract with but also to third parties who may be affected by their acts or omissions in performing their part of the contract.

At the same time it must be borne in mind that contracts are part of common law and decisions which establish certain principles are not necessarily right for the industry at large. Some are counter-productive and contrary to what the parties expect, or are prepared to identify with.

The legal principle that almost anyone concerned in a building project will be held liable in negligence (which at times is difficult to separate from a technical mistake) is bound to produce undesirable ripples across the industry. It gives foreign parties limitless rights to claim damages for breach of duty or lack of care even when

the existence of such duty is not stipulated in the contract. All parties to the contract are deemed to be aware that negligent acts or omissions will not prevail over the doctrine of caveat emptor.

The major problem is attempting to define who can sue and who cannot. Lord Wilberforce in the case of *Anns* said, among other things; ". . . .As the building is intended to last, the class of owners and occupiers likely to be affected cannot be limited to those who go in soon after construction" but "A right of action can only be conferred on an owner or occupier who is such when damage occurs". While this statement attempts to put a limit to the class of plaintiffs the phrase "when the damage occurs" poses a different question altogether that is limitation. If Lord Wilberforce's views are correct and adopted as law, then for all purposes, liability does not cease until the building is demolished.

A dissenting opinion was held in the case of *Sparham Soutier v. Town Council Development (Essex) Ltd.*, on very near identical facts in which it was stated that; "The course of action did not arise before a person capable of sueing discovered, or ought to have discovered, the damage".

It therefore seems that a new principle has to be devised that clearly establishes the class of plaintiffs and the time during which the purported claim for damages can be brought. The possible theory may be that this type of damage is not suffered until the responsible property owner himself becomes liable to others for the safety of the premises.

The second alternative is to revert back to the earlier principles which held that no duty of care was owed in the absence of a contract. This would make subsequent purchasers and occupiers more stringent in examining the property before occupation. If their surveyors provide them inadequate information which causes them financial loss or damage, then an action could lie against such a surveyor. It is unreasonable and contrary to public policy to expect a builder to be liable for ever without corresponding rights. The builders rights terminate at the receipt of the final certificate and has no rights whatsoever once he vacates the site at the end of the project, unless to carry out repairs to defects.

While the intention of these decisions may be based primarily for the protection of the consumer, their effects will have to be met by the consumer they are intended to protect.

While the Building and Construction Industry has been involved over the recent years in both intensive and extensive research on ways and means of streamlining operations, improving communications and harmonizing the production of buildings to meet the social demands for all types of accommodations, their efforts may be frustrated by uncertainty and fear of legal actions for anything they do or say.

These possible impacts are summarized below:

The Architect

The decisions in *Sutcliffe v. Thackral* and *Arenson v. Casson*, saw the demise of the long-standing principle that when an architect exercised his powers under a building contract, he occupied the position of an arbitrator and no action could be brought against him for negligence.

Lord Reid destroyed this belief when he stated that there is nothing judicial about an architect's function in exercising his powers in a building contract. The architect is not engaged jointly by the parties to come to a determination on any matter under a building contract. All the architect does is to make his own investigations and come to his decision based on the facts he finds.

An architect carries out his duties for reward and is therefore bound as anyone else in similar circumstances to bring to the exercise of his business reasonable skill and diligence in the interests of his employer. Failure to do so makes him liable for breach of contract and an action for negligence could arise.

This fact is enough to cause the architect under a building contract to lean more and more to the side of the employer in exercising his powers. On the right of such circumstances the builders' confidence on the impartiality of the architect may very well be expected to wane.

At the same time, the issue of certificates which are in effect financial statements gives the builder the right to sue the architect if such statements cause the builder to suffer financial loss.

The case of *Sutcliffe v. Thackral* did not specify the degree of defective work included in the architects valuations, and it seems likely that this is irrelevant. All that needs to be proved is that there is defective work in such a certificate.

Similarly for the builder, the road is open for him to sue the architect if he can prove that there was an under-valuation of his work. This contention would become relevant in cases where the employer becomes bankrupt, determines the employment of the builder or takes partial occupation of the project.

This contention is not limited to builders alone. Nominated sub-contractors and suppliers can safely be assumed to be accorded the same remedy. This is because when the architect gives instructions affecting the sub-contractors and suppliers through the builder, he is acting as an agent of the builder and the sub-contractor and/or supplier.

This may have special connotations in cases where the employer may opt to pay such nominated sub-contractors and/or suppliers direct rather than through the builder. A sub-contractor and/or supplier who suffers some financial loss because the architect has failed to ensure that all monies owed to such sub-contractors and suppliers by the builder is not paid as provided by the head contract, may choose to sue the architect in negligence. Such cases would be expected to

be common when a builders employment is determined or when he goes into liquidation.

Most design defects become apparent when the building is being built or after it has been built. (See *Beevan Investments v. Blackall*, and *Cable v. Hutcherson Ltd.*). Some may go undetected for a long time, (*Anns case* and *Duttons case*). When the builder cannot be traced, the architect will be held liable when such defects are detected regardless of how long it takes.

It can therefore be expected that these decisions will have a profound effect not only in architectural associations taking measures to protect their members but also in the day to day dealings with others in a building contract.

There is a lesson to learn from the "*North American love of finding all professionals guilty of malpractice at the drop of a hat*". The number of malpractice suits run into thousands per year.

The result from the society's point of view is desperate. It is estimated that in the state of California a doctor has to earn \$50,000 per year just to pay the premium on his insurance. The charge to the patient has to be high.

While this may not be the result in the architectural profession it may not take long before insurances (in professional indemnities) reach a near mark.

Who shall foot the bill but the public?

Construction Management

There is a mythical belief in the industry that construction management, project management or whatever name we design for the technique is the answer to most problems inherent in the traditional contractual arrangements.

The integration of design and construction into one continuous function may be an improvement in attempting to reduce conflicting interests between designers and constructors. From the systems point of view, it is the most desired contractual system. From the owners point of view, its desirability is dependent upon time and financial savings realised by the arrangement.

The system also brings to bear upon the parties the various experiences and difficulties of the others functions in the building process. The builder is more exposed to architectural problems and the architect is more exposed to actual construction problems. As long as this appreciation exists, the building owner has more to benefit than he would under the traditional arrangements.

However, from the legal point of view, the system represents a pooling of responsibilities and liabilities to those who will occupy the building after it has been completed. While legal problems might be avoided during the design and construction stages, the same might not be avoided once the building has passed into the hands of the

occupier. The question of whether all the parties are collectively liable to subsequent occupiers will only be proved by test.

But following what the courts have established in the recent years the following areas should be given due attention before such a system is adopted:

Duty of Care

The law will recognise a duty of care to exist to owners and subsequent purchasers or occupiers. The existence of a contract between the construction management team and such occupiers, in the eyes of law, is irrelevant.

Local authorities are also liable in ensuring that reasonable inspection is done and that the building does not pose imminent danger to health and safety of the occupier.

Damages

Some management organizations purport to extend their functions beyond managing design and construction phases of the project to actual commissioning and letting of the premises. In the case of *Hedley Byne v. Heller and Partners Ltd.* (1964) A.C. 465, where the plaintiffs who were advertising agents, wished to establish the credit worthiness of a company they wanted to contract with. They instructed their bankers to approach the defendants, who were the bankers of the company with whom they intended to contract, to obtain the relevant information.

The defendants knew the information would be relied upon. They issued favourable information but soon after, the company went into liquidation, causing the plaintiffs (the seekers of information) to suffer loss of £17,000. They sought to recover this loss from the defendants.

Although the plaintiffs failed, because the defendants had issued a disclaimer to the effect that the information they supplied did not hold them responsible for its reliance, the courts made it clear that the doors were open to actions based on negligent statements which caused financial damage.

It can therefore be inferred that the occupier who relies on the statements made by any expert in the building industry and thereby suffers financial loss, has a course of action to recover his losses. Whether a disclaimer will be sufficient defence in such cases is a matter for the courts to decide.

The second class of damages are losses arising out of defective premises. Already, there is sufficient authority to the effect that damages recoverable range from damage caused to persons or property by the defective article to damage suffered through having to repair the defective article itself, plus such loss as may be consequential thereof.

Class of Plaintiffs

As the law stands at present, there is no limit to the class of plaintiffs who can sue for damages. *Duttons case* established the principle that the builder of any premises will owe the same duty of

Care to subsequent owners and occupiers. Perhaps, in time, the view expressed by Lord Denning in *Sparham-Souter v. Town and Country Development (Essex) Ltd.* may clear the problem of the deficient limitation Acts. He said; "...the cause of action arises when a person capable of suing discovered, or ought not to have discovered, the damage". The word "damage" if read synonymously with "danger" may help clear the issue of Limitation Acts.

Likely Effects on the Industry

When each of these decisions is read in conjunction with the Revised Trade Practices Act 1977 (Sections 45 and 52) it will be appreciated that the law is leaning more and more to the consumer and against the interests of the professionals, the builders, surveyors and local authorities.

Most of these decisions have the effect of shattering long-standing assumptions in the industry which when examined more closely have had no foundations at all. The most burning problem will be to define how wide the liability in negligence is going to be, and the limit to the consequences for which the negligent person is going to foot the bill. In most of these cases the words "foreseeable damages" are repeatedly used.

Since 1967 the test for remoteness, or the test for recoverability of damages, has been what damages could reasonably have been foreseen as likely to result from the breach of the duty of care in question.

Prior to 1967, the test was what damages were the "natural and probable" - i.e., the direct physical consequences of the negligent act. This test, though arbitrary, gave the courts a wider scope to refuse a claim of damages when justice dictated that such a claim went beyond the reasonable foresight of the defendant.

When the case is one of direct physical consequences, such as repairing a defect, the limits are easy to define and the parties can protect themselves accordingly. When the case is one of 'reasonable foresight' or 'reasonably foreseeable consequences', there is no limit. Any limits imposed are too artificial and not reliable.

As has been predicted before, the natural tendencies are for the people affected by such a one-sided system to take reasonable cover to protect their short and long term interests. Builders, construction managers and the like, if they are expected to assume the risk for ever will be expected to take long-term insurances for the projects in which they are involved. The costs of such premiums will be passed on to the consumer in one form or the other.

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