BUILDING LAW REPORTS

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BUILDING LAW REPORTS

EDITED BY

Humphrey Lloyd, MA, LL B (Dub)
one of Her Majesty's Counsel

and

Colin Reese, MA (Cantab)
of Gray's Inn, Barrister-at-Law

VOLUME
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Theme

Claims against Third Parties

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Introduction

A contractor's obligation to his employer for the proper and timely completion of building work is normally unaffected if he sub-contracts part of the works. If on the other hand the sub-contractor is selected for him by nomination under a PC or provisional sum, the employer may not be able to hold a contractor liable as if the sub-contractor had not been nominated. *Bickerton v North West Metropolitan Regional Hospital Board* [1970] 1 WLR 607 drew attention to the essential disadvantages of the system of nomination under the 1963 JCT form and provided little guidance as to how to solve the legal problems created by that decision as it affected that form.

Milton v Greater London Council is the first case in this volume and for the first time since *Bickerton* requires an answer to one of the questions raised by that decision: who is to bear the immediate financial consequences of a failure of a nominated sub-contractor before a new sub-contractor is found? The Court of Appeal held that the 1963 JCT form (as used by the Greater London Council) did not make the employer liable to loss liquidated damages for the period of delay or to pay the contractor compensation for that period.

The House of Lords will hear an appeal from this decision but it is of sufficient importance for it to be reported at this stage.

The second case in this volume comes from Singapore but it deals with an issue which arises frequently enough in England to justify its inclusion: does it matter that a notice terminating a contractor's employment was not sent by registered post or recorded delivery even if it was otherwise duly served? The Court of Appeal of Singapore in *Central Provident Fund Board v Ho Bock Kee* (at page 21 of this volume) held that it did matter and in so doing preferred to follow the decision of a judge in New South Wales (in the case of *Eriksson v Whalley* [1971] 1 NSWLR 397) rather than the decision of Stephenson J (as he then was) in the English case of *Goodwin v Fawcett* (1965) 175 Estates Gazette 27.

The next three cases are relevant to the "theme" chosen for this volume or are concerned with the liability of a third party to meet a claim made against him by a person who has already been held liable. We think that the first two of these cases and the authorities referred to in them may be helpful in resolving some of the problems that commonly arise where such claims are made.

In the first case, *Fletcher and Stewart Ltd v Peter Jay & Partners* (at page 38 of this volume) the Court of Appeal decided that a sub-contractor could not be held liable to pay an amount paid by the main contractor in settlement of a claim by the employer unless the main contractor established that the sub-contractor was in breach of his sub-contract and that the sum that had been paid constituted the

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damages flowing from that breach. Both in this case and in the next case — *Comyn Ching & Co Ltd v Oriental Tube Co Ltd* (at page 47 of the volume) the Court of Appeal considered the leading case on this topic, *Beggin & Co v Permanite Ltd* [1951] 2 KB 314. *Comyn Ching* is also important in providing a salutary lesson as to the meaning and effect of "guarantees" in this instance given by a manufacturer to a nominated sub-contractor.

The third case, *R & H Green & Silley Weir Limited v British Railways Board* (at page 94), raised facts similar to those considered by *Swanwick J in County & District Properties Ltd v Jenner* [1976] 2 Ll Rep 728; 3 BLR 41, namely whether the existence of an idemnity clause had the effect of avoiding the application of statue on limitations. Dillon J came to the same conclusion as Swawick J and his decision therefore is relevant to the interpretation of clause 3 of the NFBTE/FASS sub-contract as well as to clause 5.1.2 of the 1980 sub-contract agreement (NFC/4) and other similar contracts widely used in the construction industry.

William Cory & Son Ltd v Wingate Investments Ltd (London Colney) Ltd (at page 104 of this volume) is a decision of the Court of Appeal following the trail blazed by earlier cases reported in Building Law Reports: *Radford v Defroberville* 7 BLR 35; *Bevan v Blackhall and Struthers* 11 BLR 78, and *Dodd Properties (Kent) Ltd v City of Canterbury,* 13 BLR 45, and demonstrates the new and flexible approach to the time for the assessment of damages to which we drew attention in our commentary on *Dodd Properties.* In *Wm. Corey* Walton J summed up the present position in memorable words (at page 118 below):

> "I now turn to the time for assessment. In Good King George's golden days, when Britain really ruled the waves and the currency was stable, assessment as at the date of breach was the obvious and doubtless theoretically correct solution. In any event the rule often related to foreign currencies which were notoriously unstable and invariably depreciated against the strong pound sterling. How are the mighty fallen! but, *cessante ratio cessat ipsa lex*, and in modern times a more flexible rule has been adopted ..."
>
> "I think the true rule now is that the date of assessment of damages is one that must be judged by considering all the facts of this case including in particular the conduct of the defendants ... "

Finally, at page 125, we have included the clear and highly per-

suasive judgment of Nourse J in *Re Arthur Sanders Ltd* in which he held that nominated sub-contractors under the NFBTE/FASS "green" form of sub-contract were entitled to recover from the employer under the 1963 JCT form their due proportion of retention money held by the employer. In so doing, he followed the decision of Vinelott J in *Rayack Construction Ltd v Lampeter Meat Co Ltd* (1979) 12 BLR 30. It appears from these decisions that an employer (even a local authority) must, called upon by the Contractor (or a nominated sub-contractor), set aside and hold in trust retention money in a separate account.

H.J. Ll. and C.R.

22 Old Buildings,
Lincoln's Inn, WC2

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Index prepared by Darryl Royce, BA, of Gray's Inn, Barrister-at-Law

PERCY BILTON Ltd v THE GREATER LONDON COUNCIL

27 February 1981 *Court of Appeal*

Stephenson and Dunn LJJ and Sir David Cairns

On 25 October 1976 Percy Bilton Limited ("Biltons") entered into a Contract with the Greater London Council ("GLC") for the construction of 182 dwellings and ancillary works at an estate at Swains Road, Merton. The Contract incorporated the GLC Conditions of Contract which were substantially the same as those then published by the Joint Contracts Tribunal. The original completion date was 24 January 1979, within 27 months of the order to commence.

W.J. Lowdell (Nuthurst) Limited ("Lowdells") were nominated under Clauses 11 (3) and 27 of the Contract Conditions for mechanical services and Biltons duly entered into a Sub-Contract with them.

On 28 July 1978 Lowdells withdrew their labour and went into liquidation. By this time Lowdells were behind programme with some 40 weeks of their Sub-Contract period to go. On 31 July 1978 Biltons determined Lowdells' employment. At this date the date for completion of the Main Contract had already been extended to 9 March 1979.

On 31 July 1978 Biltons were instructed to employ Home Counties Heating & Plumbing Limited ("Home Counties") to carry out some of the mechanical services work on a temporary basis. On 14 September 1978 Biltons were instructed to enter into a Sub-Contract with a new nominated Sub-Contractor, Crown House Engineering Limited, but on 16 October 1978 that company withdrew their tender.

On 31 October 1978 Biltons were instructed to enter into a Sub-Contract with Home Counties as the new nominated Sub-Contractor for Mechanical Services but it was not until 22 September 1978 that Biltons concluded their negotiations and agreed to enter into a Sub-Contract with Home Counties.

On 9 May 1979 the architect extended time for completion from 9 March 1979 to 14 June 1979, a period of 13 weeks, under Clause 23

(f). On 29 June 1979 Biltons claimed an extension of time to cover delays up to 31 December 1978. The claim included a claim for an extension to cover delays arising through the change of Sub-Contractor from Lowdells to Home Counties. On 16 August 1979 the architect extended the time further to 10 September 1979 under Clauses 23 (b) (d) (e) and (i). On 11 January 1980 the time for completion was extended to 1 February 1980 under Clause 23 (b) (e) and (l).

On 4 February 1980 a Certificate was issued under Clause 22 of the Contract Conditions certifying that the Contract ought reasonably to have been completed by 1 February 1980. Thereafter the GLC deduced liquidated damages from money certified due to Biltons.

Biltons commenced proceedings to recover the sums so deducted by the GLC and in their action they claimed the repayment of such items and a declaration that on the true construction of the Contract and in the events which had occurred time was at large and the Certificate of 4 February 1980 was invalid. The GLC contended, amongst other things, that the Certificate was valid as Clause 23 (f) provided for the situation which had occurred. His Honour Judge Stabb QC held that Clause 23 of the Contract Conditions did not contain any provision for extending the time for completion to cover the delay caused by the repudiation of the third nominated Sub-Contractor and the necessity for the re-nomination of the second Sub-Contractor and, since the completion of the Contract had been delayed at least in part by the fault of the GLC, any Certificate issued under Clause 22 purporting to extend the time for completion for a reason not covered by Clause 23 was invalid and there was no basis for a claim for liquidated damages.

[The parties' contentions other than those relating to the interpretation of the Contract are not the subject of this report although they are referred to in the judgments of the Court of Appeal.]

The Defendants appealed.

***HELD**, allowing the appeal:*

1. The mere repudiation of the Sub-Contract by a nominated Sub-Contractor was not to be regarded as a fault or breach of contract on the part of the Employer.

2. The duty to re-nominate (arising from the decision of the House of Lords in *N.W. Metropolitan R.H.B. v Bickerton & Son Limited* [1970] 1 WLR 607) was a duty to be performed within a reasonable time.

3. Delay caused by the departure of a nominated Sub-Contractor and before the duty to re-nominate fell to be performed was not within any provision of Clause 23 of the Contract Conditions.

4. The Contractor was therefore not entitled to any extension of time in respect of such delay, with the result not that time became at large but that, at that stage, the date for completion remained unaffected by the period of delay.

5. The fact that when the duty to renominate arose the new nominated sub-contractor's date for completion was later than the contractual date for completion did not mean that time was at large since the main contractor was not obliged to accept the nomination under Clause 27; alternatively, the Employer would have had to agree to extend the time for completion of the Main Contract work to enable the Sub-Contractor to complete his work within the Main Contract period.

O. Popplewell QC and P. Lewis appeared for the GLC instructed by R. A. Lanham.
Patrick Garland, QC and R. Guy appeared for Biltons, instructed by C. M. Crichton.

Commentary:
This decision is of sufficient importance to justify its inclusion at this stage even though the House of Lords is to hear an appeal by Biltons.

P.C. or provisional sums have long been provided in building contracts for the purposes of enabling the building owner or his advisors to control the quality and price of certain parts of the work, usually parts of a specialised nature. On long term contracts their use has the additional advantage (at times abused) of permitting the building owner to postpone the need to take certain decisions that might otherwise have had to have been taken before tenders were invited. In due course when the specification and price for the work has been settled a decision will be taken as to who will do the work. An appropriate instruction will then be issued to the main contractor. Under the standard forms of building contract the main contractor will only be required to do the work if the provisions of Clause 27 (g) of the 1963 edition or Clause 35.2.1 of the 1980 edition apply; under the civil engineering (and other) standard forms the contractor may be instructed to do specialist work and can well be the person best qualified to do so (if for example he has a reputation for the work in

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question). Ordinarily, however, the system is used to nominate sub-contractors or to approve sub-contractors proposed by the contractor.

In law so long as the sub-contractor is willing to contract with the main contractor on terms which will enable the main contractor to pass on his liabilities under the main contract, the main contractor will in general not only be obliged to comply with the instruction nominating or approving the sub-contractor but will thereafter (whatever the terms of the sub-contract actually made by him) be as responsible for the performance of the nominated sub-contractor as he is for other work for which he is responsible under the terms of the main contract: *Hampton v Glamorgan CC* [1917] AC 13; *Young and Marten v McManus Childs Ltd* [1969] 1 AC 454; 9 BLR 77; *IBA v EMI* [1980] 14 BLR 1 (see especially per Lord Fraser of Tullybelton at page 44). The law favours the creation and preservation of a chain of legal responsibility.

Modern contracts in the construction industry in part reflect the complexity of the work as well as the percipience of their proponents and so tend to dilute or qualify the parties' primary obligations: the contractor's obligations to execute and complete the whole works undertaken within the time stipulated; the employer's obligation to pay the price promised. Yet for all their length such contracts do not generally deal specifically with problems that commonly arise in relation to nominated sub-contractors or give guidance as to how they should be solved in law. For example, in *Bickerton v North West Metropolitan Regional Hospital Board* [1970] 1 WLR 607 the Joint Contracts Tribunal were urged to amend the Standard Form of Building Contract to deal with the question that the House of Lords had to solve. No doubt because agreement could not be reached on the underlying issues of policy no change was made until a new edition was published ten years later, in 1980. Even this edition does not provide any clear answer to the problems raised by *Bilton's* case.

The arguments advanced in *Bilton's* case basically require a decision as to whether any delay caused to the main contractor by the lack of an immediate nomination of a new sub-contractor (consequent upon the failure of the previous nominated sub-contractor) constitute an "act of prevention" on the part of the employer. "Act of Prevention" is not easy to define but historically it has come to mean "virtually any event not expressly contemplated by the Contract and not within the Contractor's sphere of responsibility"—see *Hudson* on Building Contracts 10th edition, page 624 where the subject is treated fully. From the cases illustrated it may be seen that it is generally first necessary to determine whether there has been a breach of contract on the part of the employer or some other positive act or omission thereby preventing the contractor from completing the contract work by the due date and, secondly, whether the contract

did not make any express provision for extending time in such circumstances.

The older cases were largely decided in relation to contracts where little or no provision was made for extending the time for completion so as to keep alive the Contract Completion Date and thus preserve the right to liquidated damages. Contracts nowadays generally contain extensions of time clauses drafted so as to cover the eventualities likely to constitute "acts of prevention" and are in many cases meticulous in their definition of the risks and responsibilities assumed by each party.

It is submitted that in a modern contract such as the Standard Form of Building Contract the correct analysis of events which may delay completion should not be between "acts of prevention" and "other acts" but rather between matters for which the contractor in law assumes the risk and matters for which he does not assume the risk. Such an approach is based upon the proposition that by undertaking to complete the work within the time stated a contractor assumes the responsibility of surmounting all risks other than those constituting breaches of contract or fault by the employer. It is sometimes useful to consider this apportionment of risk in terms of the "fault" of one party or the other, although "fault" is an emotive word. For example, His Honour Judge Fay, QC said in *Henry Boot Construction Limited v Central Lancashire New Town Development Corporation* [1980] 15 BLR 12, apropos of Clauses 23 and 24 of the Standard Form of Building Contract (upon which the Contract in Bilton's case was based):

> "The broad scheme of these provisions [Clauses 23 and 24 (i) (a)] is plain. There are cases where the loss should be shared, and there are cases where it should be wholly borne by the Employer. There are also cases, those cases which do not fall within either of these Conditions and which are the fault of the Contractor, where the loss of both parties is wholly borne by the Contractor. But in the cases where the fault is not that of the Contractor the scheme clearly is that in certain cases the loss is to be shared: the loss lies where it falls. But in other cases the Employer has to compensate the Contractor in respect of the delay, and that category, where the Employer has to compensate the Contractor, should, one would think, clearly be composed of cases where there is fault upon the Employer or fault for which the Employer can be said to bear some responsibility."

In that case Judge Fay had to deal with delay on the part of statutory

undertakers carrying out work for which they had been engaged by the employer. The learned judge concluded his judgment as follows:

> "In carrying out those statutory obligations they no doubt have statutory rights of entry and the like. But here they were not doing the work because statute obliged them to; they were doing it because they had contracted with the New Town Development Corporation to do it.
>
> To my mind this view of their work, bringing it within [Condition 23 (h)] and not within (l), is in conformity with the general scheme of Conditions 23 and 24, as I have adumbrated them. If the Employers contract with the statutory undertakers, they can contract to provide for what is to happen if the undertakers are guilty of delay, just as they can so provide if they employ an artist or a tradesman, and it is just that they should bear this risk, which they had the opportunity of safeguarding themselves against. If, however, without having a contract the undertakers, using their statutory powers to fulfil their statutory obligations, came on the scene and hindered the works and caused delay, then the consequential loss would be one like *force majeure* which can be laid at the door neither of the Employers nor of the Contractors, and so under paragraph (l) the loss would lie where it falls."

Judge Fay therefore also looked at the issue in terms of whether it was just that a certain risk should be borne.

If the issues raised by Bilton's case are considered in the context of the "risk" as set out above then the risk in question will not be that a nominated sub-contractor may become insolvent and thus unable to complete the sub-contract works, but rather that the nominated sub-contractor may repudiate the sub-contract. Insolvency or financial difficulty need not of itself mean that the nominated sub-contractor will default: it may be in the interests of the creditors that the business should be carried on so that the sub-contract works are completed on their behalf by the Liquidator or the Receiver. And it is not unusual for a solvent nominated sub-contractor to repudiate a sub-contract for reasons which he considers to be good and in his own best interests.

Bilton's case therefore could be described as raising the questions: who is to bear the risk of a nominated sub-contractor repudiating his sub-contract? Is such a risk to be regarded as somebody's "fault" and if so whose? Is this risk to be regarded as a matter for which the contractor is contractually responsible (because, for example, by

contract he has "the opportunity of safeguarding" himself or is it a risk falling within the category in respect of which the employer may have to compensate the contractor a category which Judge Fay thought "should . . . clearly be composed of cases where there is fault upon the employer for which the employer can be said to bear some responsibility?" Or is the risk one in which it is appropriate that the loss should lie where it falls: the employer will have to pay the additional costs of securing completion by nominating a sub-contractor; the contractor may have to bear some costs of delay in consequence of the original failure of the sub-contractor for whom he would otherwise have been as responsible as if the sub-contractor had not been nominated?

The terms of the JCT Forms do not provide a clear answer to these questions. The terms of Clause 23 (g) (of the 1963 edition) or Clause 25.4.7 (of the 1980 edition) suggest that the delay on the part of nominated sub-contractors will remain within the contractor's sphere of responsibility (for it must be delay which the contractor has taken all practical steps to avoid or reduce); furthermore, in the *City of Westminster v J. Jarvis & Sons Limited* [1970] 1 WLR 637; 7 BLR 64 such provisions were described by the majority as "illogical" and "inserted and drafted without any clear appreciation of its purpose or scope" — see per Lord Wilberforce [1970] 1 WLR 649E; 7 BLR 78. Lord Hodson also said in *Westminster v Jarvis* that Clause 23 (g)

> "included as it is in a list of legitimate excuses for delay on the part of the Main Contractor, points to the conclusion that what is in contemplation is the Contractor being prevented by no fault of his own from keeping up to the agreed time for performance, that is to say completion, of its contract in due time" — [1970] 1 WLR 643D — E; 7 BLR 71.

Viscount Dilhorne said in the same case

> "It is indeed curious that in this form of Contract . . . one should find a provision under which a Sub-Contractor can benefit from his own default. All the other grounds stated in this Clause for an extension of time are grounds which the Contractor and Sub-Contractors have not been at fault and where the delay in completion of the Main Contract is due to circumstances beyond their control" — [1970] 1 WLR 645G; 7 BLR 74.

The 1980 edition, it is submitted, although it contains more elab-

orate conditions relating to nominated sub-contractors stemming from the need to deal with the legal consequences of the decision in *Bickerton* (ie that the employer is bound to nominate a new nominated sub-contractor if he wants the nominated sub-contract works completed) provides no further guide to what might be the policy underlying that edition. The speeches in *Bickerton* do little, it is submitted, to assist the solution of the problem raised by *Bilton's* case. It is of course true that Lord Reid trenchantly stated at [1970] 1 WLR 613C that

> "it will be a clear breach of contract by the employer if his failure to nominate his sub-contractor impeded the contractor in the execution of his own work."

That observation was however made in relation to the need to make a first nomination and pre-supposes a failure on the part of the employer to perform that duty: the question in *Bilton's* case is when does the duty to re-nominate arise?

Lord Hodson said in *Bickerton* that nomination was required "when necessary" (at page 617C) but went on to say that "in my opinion, the contractor, upon repudiation by the sub-contractor, was entitled to *await* a fresh nomination from the employer. He was not in breach of his contract for he could not complete the work without a re-nomination." [emphasis supplied]. Lord Guest at pages 620 to 621 did not state when the duty should arise but Viscount Dilhorne began his reasoning by the classic re-statement of a contractor's liability (at page 623H):

> "I cannot myself see that the extent of the contractor's obligation under Article 1 and condition 1 is in any respect limited or affected by the right of the Architect to nominate the sub-contractors. He has accepted responsibility for the carrying out and completion of all the contract works including those to be carried out by the nominated sub-contractor. Once the sub-contractor has been nominated and entered into the sub-contract, the contractor is as responsible for his work as he is for the works of other sub-contractors employed by him with the leave of the Architect."

PERCY BILTON Ltd v THE GREATER LONDON COUNCIL

27 February 1981 *Court of Appeal*

Stephenson and Dunn LJJ and Sir David Cairns

STEPHENSON LJ: I will ask Sir David Cairns to give the first judgment.

SIR DAVID CAIRNS: This is an appeal from a judgment of His Honour Judge Stabb QC sitting on Official Referee business in an action about a building contract.

The building owners are the Greater London Council, who were the defendants in the action, and the main contractors are Percy Bilton, the plaintiffs in the action.

The contract was for the building of a number of houses in the London Borough of Merton and the contract was in the RIBA form or, as it is now called, the JCT form.

Disputes arose because the defendants made deductions for liquidated damages from payments made to the plaintiffs under architect's certificates, and the plaintiffs contended that they had no right to make such deductions. The plaintiffs claimed in the action a declaration to that effect and claimed the sum of £24,661, which was then the total of the deductions certificate which had then been made.

The learned judge decided in favour of the plaintiffs, made the declaration sought, and ordered that the amount of the deductions, which by that time had been much increased by reason of deductions made on further certificates, ordered the amount then representing the total of those deductions to be paid into a joint account and to remain there pending an appeal. The defendants appealed.

There are two issues in the case; one of general importance and, we understand, one which is considered to be of great importance by employers and contractors in the building trade, and a second issue which depends upon some factors peculiar to this case. The first and main issue is as to the effect of the provisions in the contract about

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