

# Clause 5

## Summary

**Clause 5 defines a ‘nominated Subcontractor’ as either a Subcontractor who is stated in the Contract as being ‘nominated’; or who the Engineer instructs the Contractor to employ as a Subcontractor under clause 13. The Contractor may object to employing a nominated Subcontractor. A number of grounds are deemed to be reasonable for objecting and these include: where there are reasons to believe that the Subcontractor does not have sufficient resources, competence or financial strength to complete the subcontracted works; where the Subcontractor refuses to agree to indemnify the Contractor for any negligence; or where the Subcontractor does not agree to carry out the works so as not to put the Contractor in breach of its own obligations. If the Employer requires that the Contractor employ a nominated Subcontractor where a reasonable objection has been made then it must agree to indemnify the Contractor.**

**The Contractor is required to pay to the nominated Subcontractor the amounts which the Engineer certifies to be due in accordance with the Subcontract. This sum is then added to the Contract Price as well as any amount for overheads and profit as stated in the appropriate schedule or Appendix to Tender. However, before issuing a Payment Certificate to the Contractor the Engineer may ask for evidence that previous payments have been made to the nominated Subcontractor. If evidence is not provided by the Contractor or the Contractor does not satisfy the Engineer that there are grounds for withholding payment then the Employer may at his discretion pay the nominated Subcontractor directly.**

## Origin of clause

The clause had its origins in the 3<sup>rd</sup> edition of FIDIC’s Red Book at clause 59 and was repeated in the 4<sup>th</sup> edition, except that assignment was moved from sub-clause 59(6) in the 3<sup>rd</sup> edition to sub-clause 4.2 in the 4<sup>th</sup> edition.

There is a significant difference between the definition of nominated Subcontractor in the FIDIC 99 contract and that found within the Red Book 4<sup>th</sup> edition. In the FIDIC 99 contract the definition is restricted to persons named in the contract as being nominated Subcontractors and those whom the Contractor is instructed to employ by the Engineer. Under the old Red Book 4<sup>th</sup> edition the definition was much broader and included: “all persons to whom by virtue of the provisions of the Contract the Contractor is required to subcontract;” so that where there was a specified product referred to in the Contract, which could only be supplied from one supplier, that supplier would be a nominated subcontractor.

## Cross-references

Reference to clause 5 or to a Subcontractor is found in the following clauses:-

- clause 1.1.2.7 (Definitions – Contractor’s Personnel);
- clause 1.1.2.8 (Definitions – Subcontractor);
- clause 4.4 (Subcontractors);
- clause 4.5 (Assignment of Benefit of Subcontract);
- clause 4.21 (Progress Reports);
- clause 8.3 (Programme);
- Clause 13 (Variations and Adjustments)
- clause 13.5 (Provisional Sums);
- clause 15.2 (Termination by the Employer);
- clause 17.3 (Employer’s Risks);
- clause 18.4 (Insurance for Contractor’s Personnel);
- clause 19.1 (Definition of Force Majeure); and
- clause 19.5 (Force Majeure Affecting Subcontractor).

Clause 1.1.2.8 provides that a Subcontractor “means any person named in the Contract as a subcontractor, or any person appointed as a subcontractor, for a part of the Works; and the legal successors in title to each of these persons.” Where a reference is made to a Subcontractor then, in the absence of any specific reference, this will mean both a “domestic” Subcontractor and a “nominated” Subcontractor.

### **Sub-Clause 5.1      Definition of “nominated Subcontractor”**

On occasion the Employer will wish to nominate a Subcontractor in order to undertake specific works. In particular this may occur where the Subcontractor will be required to design part of the works or where a specialist will be needed for the works. Clause 5.1 defines a nominated Subcontractor as being a Subcontractor: “(a) who is stated in the Contract as being a nominated Subcontractor, or (b) whom the Engineer, under Clause 13 [*Variations and Adjustments*], instructs the Contractor to employ as a Subcontractor.”

In the United States the situation often arises where an employer will stipulate a list of names of subcontractors, one of whom the contractor is then required to employ. In this case the subcontractor appointed is not a nominated subcontractor as he would not fall within the definition of a nominated Subcontractor under Sub-Clause 5.1 of FIDIC 99. Similarly, a clause which requires the approval of the Employer for any appointment of a subcontractor does not mean that the subcontractor will be a nominated Subcontractor.

Sub-Clause 4.4 states that “the Contractor shall be responsible for the acts or defaults of any Subcontractor … as if they were the acts or defaults of the Contractor.” Given that the term “Subcontractor” is defined to include: “any person named in the Contract as a subcontractor” it appears that the intent of the draftsman was to make the Contractor responsible for a nominated Subcontractor’s failure to perform the works. This differs from other English forms of construction contract. In some English contracts, such as the JCT 80, 81 and 97; IFC84 and MW80 forms of contract, the Contractor will be entitled to claim for an extension of time, for “… delay on the part of nominated subcontractors, nominated suppliers which the contractor has taken all practicable steps to avoid or reduce …” (clause 25.4 of the JCT 80 main contract conditions). However, although the provision within this JCT form gives the Contractor an entitlement to claim time; it does not, as stated in *Norwest Holst Construction Ltd v. Co-Operative Wholesale Society Ltd*,<sup>1</sup> give an entitlement to claim cost. In this case the court held that: “there is no equivalent provision covering nominated subcontractors in clause 26 [the clause dealing with loss and expense] to that found in clause 25. This opens up the possibility of a subcontractor in the position of CWS recovering an extension of time for delay caused by a nominated subcontractor but not recovering additional loss and expense.”

In the absence of any clause which expressly permits the Contractor to claim time or money the English common law places the risk of delay and additional cost caused by a nominated Subcontractor on the Contractor: *Percy Bilton v Greater London Council*.<sup>2</sup> Where there is a contract that permits for the nomination of a subcontractor then the extent to which the main contractor is liable even for defects in the workmanship of the nominated sub-contractor will depend on the precise terms of the various contracts: *Sinclair v Woods of Winchester Ltd*.<sup>3</sup>

Delays and defective work caused by a nominated Subcontractor appear to be the risk of the Contractor under FIDIC 99 as there is no basis for extending time under Clause 8.4 or for claiming additional cost, unless the substantive law of the contract provides a remedy.

#### Re-nomination

Clause 5 does not deal with re-nomination. Where, for example, a nominated Subcontractor goes into liquidation then the question arises as to who bears responsibility for the delay and additional costs of the subsequent re-nomination.

The starting point is to consider Sub-Clause 4.4, which states that: “the Contractor shall be responsible for the acts or defaults of any Subcontractor … as if they were the acts or defaults of the Contractor.” It would appear that where the nominated Subcontractor cannot proceed with the works because it is insolvent then the Contractor

<sup>1</sup> [1997] EWHC Technology 356

<sup>2</sup> [1982] 1 WLR 794

<sup>3</sup> [2006] EWHC 3003 at para 30



bears the risk of any delay or additional cost. An Employer would be entitled to argue that if the Contractor were concerned about the financial standing of the nominated subcontractor then it ought to have raised an objection pursuant to clause 5.2 of the conditions.

In *The Corporation of the City of Adelaide v. Jennings Industries Limited*<sup>4</sup> the Australian High Court had to consider the re-nomination of a nominated Subcontractor. In this case there was a clause within the contract which stated:

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

The court held that the Contractor had the responsibility to re-nominate. The High Court considered the above clause and English case law and stated that:

*"As I have explained it cannot be said that in the present case the builder lacked either the authority or the responsibility to arrange for the defects in the sub-contract work to be made good either by itself or by .... There was therefore no gap such as was discerned in the contract in Bickerton requiring the implication of a term. The conditions necessary to give rise to such a step are not present here".*

Clause 4.4 [Subcontractors] of FIDIC 99 is drafted in terms similar to the above clause. It makes the Contractor responsible for the defaults of any "Subcontractor", which by definition would include a nominated Subcontractor, as if they were the acts or defaults of the Contractor himself.

The alternative view, as expressed in the English case of *North West Metropolitan Regional Hospital Board v. T.A. Bickerton & Son Ltd*<sup>5</sup> and in "A Practical Legal Guide" to the FIDIC Red Book 4<sup>th</sup> edition, was that despite the wording it remained the responsibility of the Engineer to specify a replacement nominated Subcontractor. The provisions in the FIDIC Red Book 4<sup>th</sup> edition are similar to those in FIDIC 99 but not identical. The reasoning for this conclusion within "A Practical Legal Guide" was as follows:

1. That if the matter was entirely the Contractor's risk, then it should follow that the Contractor would be entitled to execute the works himself.
2. That as the Subcontractor has been specified in the Contract or named by the Engineer then the obligation to employ them is a contractual requirement and this can only be changed by a Variation.

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<sup>4</sup> [1985] HCA 7

<sup>5</sup> [1970] 1 WLR 607

3. Where the nominated Subcontractor is the subject of a Provisional Sum then the expenditure of a Provisional Sum can only be done on the instruction of the Engineer.

The conclusion is that although the Contractor takes the risk of a nominated Subcontractor's default any delays caused by the re-nomination of the Subcontractor would entitle the Contractor to claim an extension of time. Furthermore, while consent is not required for the appointment of the nominated Subcontractor it appears that it might be for a replacement. Clause 4.4 (b) states: "the prior consent of the Engineer shall be obtained to other proposed Subcontractors."

In *North West Metropolitan Regional Hospital Board v. T.A. Bickerton & Son Ltd.*<sup>6</sup> the contract contained the following wording: "*Such [PC] sums shall be expended in favour of such persons as the architect shall instruct.*" The respondent argued for the implication of a term in the contract to the effect that if the nominated Subcontractor fails to perform its obligations under the subcontract then the architect is under an obligation to nominate another subcontractor to complete the work. Such a term was implied by the House of Lords. The point of the case was stated by Lord Reid at p. 613:

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

At Sub-Clause 13.5 [*Provisional Sums*] of FIDIC 99, in relation to the expenditure of Provisional Sums, it is stated that: "Each Provisional Sum shall only be used, in whole or in part, in accordance with the Engineer's instructions". There appears to be no material difference in the wording between the JCT and FIDIC and one would assume that an English court would therefore conclude that it was for the Engineer to re-nominate a new nominated Subcontractor where the original nominated Subcontractor dropped out. Whether the insolvency of a nominated Subcontractor would also fall within the broad definition of "Force Majeure" should be considered, though whether insolvency can be considered as "an exceptional event or circumstance" is doubtful.

It is also the case that where a nominated Subcontractor has to be replaced then the costs of completing the subcontracted works by a second nominated Subcontractor will have to be borne by the Employer in accordance with Sub-Clauses 5.3 and 13.5 [*Provisional Sums*]. The Contractor will also be able to object to the replacement nominated Subcontractor if it cannot complete the subcontracted works so as to allow the Contractor to complete by the Time for Completion.<sup>7</sup>

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<sup>6</sup> [1970] 1 WLR 607

<sup>7</sup> *Rhuddlan Borough Council v Fairclough Building Ltd* (1985) 30 BLR 26



The FIDIC 99 contract therefore leaves it unclear as to who has the obligation to re-nominate where the nominated Subcontractor becomes insolvent or drops out. It is something which should be clarified when FIDIC 99 is amended.

In addition there is nothing within the Clause 5 which deals with the termination of a nominated Subcontractor. In one case, which considered the FIDIC 4<sup>th</sup> Red Book, it was argued that it is only the Engineer and not the Contractor who can terminate the subcontract.<sup>8</sup> However, the right to terminate will be dependent on the wording of the nominated subcontract. If the Contractor was not able to terminate (with or without the consent of the Employer) it would place the Contractor in an unduly onerous position if the nominated Subcontractor was not performing, despite the indemnity that the nominated Subcontractor is required to give.

### **Sub-Clause 5.2      Objection to Nomination**

Sub-Clause 5.2 deals with the objection by the Contractor to the nomination of a Subcontractor. The Red Book Guide suggests that: “If the Contractor wishes to object to the nomination, he must do so promptly, describing all the grounds on which his objections are based.”

The wording in Sub-Clause 5.2 states that the “Contractor shall not be under any obligation to employ a nominated Subcontractor against whom the Contractor raises reasonable objection by notice to the Engineer as soon as practicable”. Under clause 1.3 a notice to be given under the Contract shall be in writing. However, the clause gives no indication as to what is meant by (1) “as soon as practicable;” and (2) what sanction arises if there is a failure to serve a notice “as soon as practicable”.

#### “As Soon As Practicable”?

In *HLB Kidsons (A Firm) v Lloyd's Underwriters Subscribing To Lloyd's Policy No 621/PK1D00101 & Ors*<sup>9</sup> Rix LJ in the Court of Appeal stated that if a clause “says nothing about how a notification is to be made, other than that it must be in writing and given as soon as practicable after awareness of circumstances which may give rise to a claim. That is, on the face of it, a fairly loose and undemanding test.”

The use of the phrase “as soon as practicable” has been criticised for its lack of clarity. The Canadian government has recently published an article on time periods. In relation to the phrase “as soon as practicable” it recommended that this should be interpreted to mean that:

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<sup>8</sup> *Knowman Enterprises (Pty) Ltd v. China Jiangsu International Botswana (Pty) Ltd and Others* [2007] BWHC 214

<sup>9</sup> [2008] EWCA Civ 1206,

***“Something must be done soon - taking the circumstances into account: In this category, the thing that is to be done must be done soon, but it is permissible to do other things first if the delay is justifiable in the circumstances. The nature and importance of the thing to be done, and other objective and subjective factors, are considerations in determining how soon the thing must be done.”***

Such a definition with reference to both objective and subjective factors may be unhelpful as an objective consideration may lead to a different time period than a subjective one. It is an area where potentially there could be disputes.

#### What Sanction Arises for a Failure to Serve a Notice “as soon as practicable”?

Rix LJ also considered the question of what sanction applies where there is a failure to give a notice as soon as practicable (para 111 *et seq*). Rix LJ thought that it was important to consider whether the requirement that the notice was given as soon as practicable was a condition precedent. His Lordship stated: “*The expression ‘as soon as practicable’ taken by itself is not redolent of a condition precedent. It does not set a firm deadline and suggests an element of laxity*”. In clause 5.2 of FIDIC 99 there is nothing to suggest that the giving of notice “as soon as practicable” is a condition precedent, save that there is reference to the employment of the nominated Subcontractor.

However, in *NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd (Trinidad and Tobago)*<sup>10</sup>, the Privy Council took a differing view to the meaning of “As soon as practicable” as it applied to Sub-Clause 2.5 of the FIDIC 99 Red Book. Lord Neuberger stated:<sup>11</sup>

*“...it is hard to see how the words of clause 2.5 could be clearer. Its purpose is to ensure that claims which an employer wishes to raise, whether or not they are intended to be relied on as set-offs or cross-claims, should not be allowed unless they have been the subject of a notice, which must have been given ‘as soon as practicable’. If the Employer could rely on claims which were first notified well after that, it is hard to see what the point of the first two parts of clause 2.5 was meant to be. Further, if an Employer’s claim is allowed to be made late, there would not appear to be any method by which it could be determined, as the Engineer’s function is linked to the particulars, which in turn must be contained in a notice, which in turn has to be served ‘as soon as practicable’.”*

It would therefore appear that up until the appointment of the nominated Subcontractor the Contractor can always raise objections; however, once the

<sup>10</sup> [2015] UKPC 37;

[http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/j\\_jones/2008/cv\\_08\\_04998DD21oct2009.pdf](http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/j_jones/2008/cv_08_04998DD21oct2009.pdf)

<sup>11</sup> [2015] UKPC 37 at para 38

nominated Subcontractor is appointed that right to raise objections is lost. The effect of not raising an objection “as soon as practicable” may subsequently bar an objection.

### Grounds for Objection to Nomination

A Contractor is not under any obligation to employ a nominated Subcontractor against whom he raises reasonable objection, subject to receiving an indemnity from the Employer. A reasonable objection must be considered having regard to the circumstances of the appointment. Where a contractor raises one of the grounds listed in sub-clauses 5.2(a) to (c) then the objection is “deemed reasonable.” The grounds listed at sub-clause 5.2(a) to (c) are:

- (a) *there are reasons to believe that the Subcontractor does not have sufficient competence, resources or financial strength;*
- (b) *the subcontract does not specify that the nominated Subcontractor shall indemnify the Contractor against and from any negligence or misuse of Goods by the nominated Subcontractor, his agents and employees; or*
- (c) *the subcontract does not specify that, for the subcontracted work (including design, if any), the nominated Subcontractor shall:*
  - (i) *undertake to the Contractor such obligations and liabilities as will enable the Contractor to discharge his obligations and liabilities under the Contract, and*
  - (ii) *indemnify the Contractor against and from all obligations and liabilities arising under or in connection with the Contract and from the consequences of any failure by the Subcontractor to perform these obligations or to fulfil these liabilities.*

### Deemed reasonable

A deeming provision gives a clause within a contract an effect which it would not otherwise have without it. As stated by Lord Bingham in the Privy Council in *Containers Ltd v Tasman Orient Line CV (New Zealand)*:<sup>12</sup> “Thus the purpose of the deeming provision is to give the Rules a meaning different from that which they would have in the absence of a deeming provision.” It therefore follows that it does not matter if in fact the objection raised by the Contractor when referring to sub-clause (a) to (c) is in fact unreasonable – it will be deemed to be reasonable and the Employer must then decide whether he wants to agree to indemnify the Contractor against the risk.

### An indemnity

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<sup>12</sup> [2004] UKPC 22

If a reasonable objection is raised by the Contractor or an objection is ‘deemed’ reasonable then the Contractor will not be under an obligation to employ the Subcontractor unless the Employer agrees to indemnify the Contractor from the consequences of the matter.

An indemnity, in its widest sense, comprises an obligation imposed by contract on one person to make good a loss suffered by another.<sup>13</sup> A contract of indemnity creates a primary obligation. Therefore in the event of the nominated Subcontractor’s default that Contractor can proceed directly against the Employer for its losses rather than having to commence proceedings against the defaulting Sub-contractor.<sup>14</sup>

The wording of the indemnity that is provided by the Employer is important to determine the extent of the Employer’s potential liability. As stated in *Bovis Lend Lease Ltd v RD Fire Protection Ltd*:<sup>15</sup>

*“Where the claim is for an indemnity resulting from the default of a subcontractor, the relevant date for assessing the size of the sum to be recovered is the date on which the loss in question has been incurred. An indemnity is, in general terms, an undertaking to reimburse or pay for loss. The circumstances in which, and the loss for which, the indemnity is to be met are those defined by the wording of the indemnity itself.”*

However, there is no Form of indemnity within the FIDIC contract and disagreement may arise between the Contractor and Employer as to whether the indemnity provided by the Employer does in fact give the Contractor protection “against and from the consequences” of the Subcontractor’s default.

An indemnity will allow the indemnified party to recover the losses that it has suffered, including costs and legal fees. The rules relating to remoteness of loss do not apply to indemnities unless the agreement restricts the type of loss that may be recovered. In the "Eurus"<sup>16</sup> a majority of the arbitrators held that whereas damages for breach of contract were subject to the doctrine of remoteness and thus had to be reasonably foreseeable, the only issue under an indemnity clause was simply one of causation. It follows that a Contractor could not claim under an indemnity against the Employer in the event where a Subcontractor was in default if the default arose because the Contractor prevented the Subcontractor from performing. In these circumstances the act of the Contractor would break the chain of causation: see *The*

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<sup>13</sup> Law of Guarantees, *Andrews G and Millett R*, 2<sup>nd</sup> edn., FT Law and Tax, at page 8.

<sup>14</sup> The difference between a primary and secondary obligation highlights the distinction between an indemnity and guarantee. Under a guarantee the guarantor only has a secondary obligation and therefore the beneficiary of the guarantee must first establish a liability against the defaulting party before recovering under the guarantee: see *Alfred McAlpine Construction Ltd v Unex Corporation Ltd* [1994] 70 BLR 26.

<sup>15</sup> [2003] EWHC 939 (TCC)

<sup>16</sup> [1996] 2 Lloyd's Rep 408

*Nogar Marin*;<sup>17</sup> and *Ullises Shipping Corp v FAL Shipping Co Ltd Rev I*.<sup>18</sup>

### **Sub-Clause 5.3 Payments to nominated Subcontractors**

Sub-Clause 5.3 deals with the Contractor's obligation to pay the Subcontractor. The Contractor is required to pay to the nominated Subcontractor the amounts certified by the Engineer. In addition to the payment of the nominated Subcontractor, the Contractor is also entitled to receive a sum for overhead charges and profit as provided for under Sub-Clause 13.5 [Provisional Sums].

### **Sub-Clause 5.4 Evidence of Payments**

The Engineer may request evidence of payments from the Contractor to the Subcontractor; however, the Guide to the Red Book suggests that this should not normally be done unless there is a reason to believe that the Contractor is in default under the subcontract. If the Contractor fails to supply this evidence or fails to satisfy the Engineer that it was reasonably entitled to withhold or refuse to pay these amounts and has notified the nominated Subcontractor of this, the Employer may at his sole discretion pay the nominated Subcontractor directly. If the Employer pays the nominated Subcontractor directly then the Contractor must repay to the Employer that amount.

### **Nominated Subcontractors and Tortious Duties**

A domestic subcontractor generally has no rights or remedies against an Employer for a breach of contract by the Employer and, in the absence of a collateral warranty from the Subcontractor to the Employer, the Employer will usually have no remedies against the subcontractor.

In certain circumstances, however, a course of dealing between a nominated Subcontractor and an Employer can be such that a duty of care in negligence will be held to exist. In *Junior Books Ltd v Veitchi Co Ltd*<sup>19</sup> it was held that a nominated Subcontractor might be liable to the Employer for the cost of repairing a defective floor together with consequential loss. Lord Roskill, who gave the principal speech, stated at p. 273:

*"I look for the reasons why, it being conceded that the appellants owed a duty of care to others not to construct the flooring so that those others were in peril of suffering loss or damage to their persons or their property, that duty of care should not be equally owed to the respondents who, though not in direct contractual relationship with the appellants, were as nominated subcontractor*

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<sup>17</sup> [1988] 1 Lloyd's Rep 412 at pages 421 – 422

<sup>18</sup> [2006] EWHC 1729

<sup>19</sup> [1983] 1 AC 520



*in almost as close a commercial relationship with the appellants as it is possible to envisage short of privity of contract, so as not to expose the respondents to a possible liability to financial loss for repairing the flooring should it prove that that flooring had been negligently constructed."*

In *Simaan General Contracting Co v Pilkington Glass Ltd (No 2)*<sup>20</sup> the Court of Appeal was concerned with a case in which it was asserted that a subcontractor's supplier owed a duty of care to a main contractor in respect of economic loss suffered by it as result of the glass supplied being of the (allegedly) wrong colour. Bingham LJ stated:

*"(4) Where a specialist subcontractor is vetted, selected and nominated by a building owner it may be possible to conclude (as in *Junior Books*) that the nominated subcontractor has assumed a direct responsibility to the building owner. On that reasoning it might be said that Pilkington owed a duty to the sheikh in tort as well as to Feal in contract."*

The Scottish courts have similarly found that there may be circumstances where a nominated subcontractor owed a duty of care to an employer. In *Scott Lithgow Ltd v GEC Electrical Projects Ltd*<sup>21</sup> the court stated that:

*"nomination is not a necessary factor before a duty of care can arise but it is in my view an important element where it exists. Where it does exist it obviously serves to point towards the degree of proximity which is required. But without it the proximity of relationship may not be established."*

The approach adopted in *Junior Books Ltd v Veitchi Co Ltd* has, however, often been distinguished by the courts. In *Kellogg Brown & Root Inc v Concordia Maritime Ag*<sup>22</sup> the court stated that a *Junior Books* type liability would be exceptional; although: "It might be justifiable on the ground that the Subcontractor was nominated for its special skill on which the Employer was reasonably entitled to rely." However, imposing such a duty would cut across and be inconsistent with the structure of relationships created by the contracts, into which the parties had entered.

Similarly, in *Muirhead v. Industrial Tank Ltd* Robert Goff L.J., stated that the *Junior Books* analysis "appears to me to be difficult to reconcile with the factual situation in that case, in which the parties had deliberately structured their contractual relationship in order to achieve the result that (apart from any special arrangements) there should be no direct liability *inter se*." The court again refused to hold that a tortious liability existed between Subcontractor and Employer in *Greater Nottingham Co-operative Society Ltd v Cementation Piling & Foundations Ltd*.<sup>23</sup> Here the court held that no

<sup>20</sup> [1988] QB 758

<sup>21</sup> [1989] ScotCS CSOH 3

<sup>22</sup> [2006] EWHC 3358 (Comm)

<sup>23</sup> [1989] Q.B. 71

tortious liability would exist where there were direct contractual warranties in place between the Employer and the Subcontractor.

### **Contracts (Rights of Third Parties) Act 1999**

Under English law a third party to a contract may in certain circumstances obtain rights under that contract because of the Contracts (Rights of Third Parties) Act 1999. Clause 1 of that Act states:

*“... a person who is not a party to a contract (a “third party”) may in his own right enforce a term of the contract if—*

*(a) the contract expressly provides that he may, or*

*(b) subject to subsection (2), the term purports to confer a benefit on him.*

*(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.”*

Clause 17.1 of Red Book provides that:

*“The Employer shall indemnify and hold harmless the Contractor, the Contractor’s Personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of (1) bodily injury, sickness, disease or death, which is attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer’s Personnel, or any of their respective agents, and (2) the matters for which liability may be excluded from insurance cover, as described in subparagraphs (d)(i), (ii) and (iii) of Sub-Clause 18.3 [Insurance Against Injury to Persons and Damage to Property].”*

As the definition of “Contractor’s Personnel” encompasses Subcontractors it appears that under a FIDIC contract, which is subject to English law, a nominated Subcontractor will be entitled to bring proceedings against an Employer in certain circumstances envisaged by Sub-Clause 17.1.

### **Unjust Enrichment and nominated Subcontractors**

The general rule is that a Subcontractor will have no action against an Employer in the event that the Contractor does not pay him.<sup>24</sup> This is because there is a chain of contracts determining the rights and liabilities of the parties and a claim for unjust enrichment will not be permitted to circumvent these contracts.<sup>25</sup> Further, although an Employer may have received a benefit from the Subcontractor’s work it will be

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<sup>24</sup> *Knowman Enterprises (Pty) Ltd v. China Jiangsu International Botswana (Pty) Ltd and Others* [2007] BWHC 214

<sup>25</sup> *Benedetti v Sawaris* [2013] UKSC 50



difficult to say he has been enriched "unjustly". In *Seaco Inc v Islamic Republic of Iran*. Case No. 260 Award No. 531-260-2 - FINAL AWARD, 25 June 1992 an arbitral tribunal concluded that a subcontractor generally has no right to recover for unjust enrichment against the party that has contracted with the main contractor. The tribunal held that in the ordinary case the link between the subcontractor's provision of goods and services and the ultimate purchaser's receipt of them is not direct; rather, the main contractor stands as an intermediary between the two. The tribunal therefore held that the subcontractor's detriment and the ultimate purchaser's benefit generally do not "arise as a consequence of the same act or event."

In the case of *Schlegel Corp v. National Iranian Copper Indus. Co.*, 14 IRAN-U.S. C.T.R. 176, 183 (1987 I), the tribunal recognized an exception to this general rule. In this case the respondent, NICIC contracted with Fassan to have Fassan serve as the general contractor on a water development project. Fassan engaged the claimant Schlegel to provide and install lining material in a reservoir. Although Schlegel fully performed, Fassan failed to pay. Schlegel then sought to recover against the NICIC based upon unjust enrichment. The tribunal noted the general rule but concluded that there was an exception and found in favour of Schlegel. It held that there was a link between Schlegel's performance and the NICIC's enrichment which was "sufficiently direct". In reaching this determination, the tribunal stressed three considerations: (1) that NICIC had dictated the reservoir liner specifications into the original contract; (2) that NICIC's consulting engineers had ordered Fassan to make Schlegel a "nominated subcontractor" as defined in the contract; and (3) that NICIC's consulting engineers supervised Schlegel's work. When Schlegel had performed its work, the tribunal concluded, the result was that NICIC had acquired a reservoir lining to its specifications provided by a company it had effectively nominated to do work, supervised and approved by its own engineers. However, the enrichment must still be unjust. In *Schlegel Corp* it was found that NICIC had never paid Fassan the balance due for Schlegel's work and therefore it was unjust for them to retain the benefit of the work.

**By Andrew Tweeddale**