Case No 606/96

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between

THE MINISTER OF PUBLIC WORKS AND

LAND AFFAIRS
APPELLANT

AND

GROUP FIVE BUILDING LIMITED
RESPONDENT

BEFORE: HEFER, NIENABER, MARAIS, SCHUTZ AND PLEWMAN JJA

HEARD: 13 MAY 1999

DELIVERED: 28 MAY 1999

SCHUTZ JA

Building contract - nominated sub-contract works form part of works under main contract - main contractor responsible for such works being according to specification - commencement of prescription of claim for remedying defective work.

J U D G M E N T

SCHUTZ JA:

Some years ago the old Roeland Street gaol in Cape Town was converted into a State archive. The main contractor was the respondent Group Five Building Limited ("the contractor"). The government is represented in the appeal by the appellant, the Minister of Public Works and Land Affairs. I shall refer to the government as "the employer". Because of the use to which the building was to be converted it was important that a proper fire-alarm system be installed. This work was to be done by a specialist nominated sub-contractor. The company ultimately nominated was KPL-ETSA (Pty) Limited ("the sub-contractor"). For ease of exposition I shall refer to these three persons using pronouns appropriate to natural persons.

Various disputes led to a trial between the employer and the contractor. The only dispute ventilated on appeal relates to a damages counterclaim brought by the employer against the contractor. It concerns the cost to the employer of putting right defective work done by the sub-contractor. Contrary to the specification, the field wiring had numerous joints when it should

have been continuous, and certain conductors had differently coloured tracer strips. Van Zyl J in the Cape Provincial Division held that, although the sub-contract works formed part of the entire works which the contractor had to deliver to the employer, the contractor was not liable to the employer for the defective work, in that there was no duty upon the contractor to supply "technical supervision" of the sub-contractor's work, as opposed to his acknowledged duty to co-ordinate the works and provide general supervision. Leave to appeal having been refused by Van Zyl J, it was subsequently granted on petition. Both in the trial and on appeal questions of *quantum* were left over.

The institution of the nominated sub-contract has long been known to our building trade and our law. Its first essential quality is that the employer reserves to himself the right to nominate as sub-contractors particular persons to perform specified parts of the overall works. A common reason is that he wishes to have control over the selection of the persons who will perform specialised and skilled work. But another reason, becoming

increasingly common because of increasing specialisation and use of sub-contractors, is to obtain competitive tenders for sub-contracted works. A second essential feature is that the contractor is obliged to accept the nomination, subject to a limited but nonetheless important right of challenge. A third is that the contractor must enter into a sub-contract with the person nominated, usually one containing the same terms, particularly as to performance, as those contained in the main contract. A fourth is that there is no privity of contract between the employer and the sub-contractor. From this flows a fifth, that the employer compels performance of the sub-contract not directly, but through his remedies against the contractor under the main contract. A sixth is that in a bills of quantities contract a figure is inserted in the bills for the nominated sub-contract works which is called a provisional sum, provisional because when a payment certificate is prepared this sum is struck out and replaced by the contract price derived by multiplying the actual measured quantities by the appropriate unit rates in the bills. A common further feature is that the terms of the

sub-contract are settled only after the main contract has been concluded. This description is a broad one, and, of course, its accuracy in a particular case depends upon the terms of the particular contract. The entire machinery, evolved over many years, is designed to avoid privity between the employer and the nominated sub-contractor, whilst retaining substantial control over the sub-contract works in the employer's hands. Anyone who has had experience of the electrician driving a hole through the wall after the plasterer has completed his work, or the installer of the alarm lights putting nails into the handiwork of the waterproofer, will understand the frustrations caused by everybody blaming someone else, in the absence of a single contractor to whom one may look to sort out such matters. This is the main motive behind the avoidance of privity with sub-contractors. But the machinery does have disadvantages for the contractor, who has to put up with a sub-contractor whom he might not himself have selected. In more recent times forms of contract have been evolved which press less heavily upon the contractor, but the contract with which we are

concerned in this case is of the traditional kind, and I think that my general description is appropriate to it.

The main contract, concluded in July 1987, is a bills of quantities (or "rates") contract. The documents making it up are the tender, including conditions of tender, its acceptance, the articles of agreement, the conditions of contract (GO 677), the specification, the drawings and the bills of quantities. When the contract was concluded, the specification, drawings and bills for the fire-alarm sub-contract had not yet been prepared. Much was sought to be made of this fact.

Do the sub-contract works form part of the main contract works?

Notwithstanding that the tender form stated that the fire-alarm nominated sub-contract would later be advertised separately, it, together with other such nominated sub-contracts, was said to be part of the "works in accordance with the drawings, specifications, bills of quantities and conditions of contract". The intention was that the fire-alarm drawings, specifications and bills would be brought into existence and would form part of the

contract. Therefore, notwithstanding that the sub-contract specifications and bills had not yet been prepared, I would have thought that this provision alone puts an end to the much pressed submission that the nominated fire-alarm sub-contract works did not form part of the "Works" as defined in clause 1 (1) (n) of the conditions of contract. Essentially the "Works" are "*all* the buildings, structures or services ..... that are to be erected or constructed in terms of this contract ..." (own emphasis). Clause 3(1) requires the contractor to "provide everything necessary for the proper execution of the works, ... and carry out and complete the works to the satisfaction of the representative/agent ...." Clause 21(1) requires the contractor to deliver "the works and premises when completed .... fit for occupation and complete in every particular ...." It is difficult to think of an archive building fit for occupation without a proper fire-alarm system.

As the argument of Mr *Duminy*, for the contractor, developed, it became apparent that what he was contending for was that clause 16, headed "Nominated Sub-contractors", supplied a

self-contained contractual regime which took all nominated sub-contractual works outside the ambit of the "Works" and beyond the reach of operation of clauses 3 (1) and 21 (1), as also much of the rest of the contract. I must say that if clause 16 does have this sequestering function, that function is most artfully masked and seemingly much contradicted. However, in order to demonstrate this conclusion, and also for the purposes of the next argument, concerned with the extent of the contractor's duties even if the "Works" argument should fail, it is necessary to set out much of clause 16, which reads in part:

> "16. (1) The director-general may nominate a sub-contractor to execute work or supply or fix goods and such sub-contractor shall hereinafter be referred to as a 'nominated sub-contractor'.
>
> 16. (2) The fact that the director-general has nominated a sub-contractor shall not create privity of contract between the director-general and such nominated sub-contractor.
>
> 16. (3) The contractor shall at any time on being requested to do so by the director-general enter into a contract with a nominated sub-contractor within fourteen days of such request in respect of the work for which he has been nominated, in which contract the contractor shall, *inter alia*, secure *mutatis mutandis* for himself the same rights that the director-general has in terms of

this contract. If the contractor satisfies the director-general in writing that he is unable to enter into such a contract because -

16. (3) (a) he has an objection which is acceptable to the director-general against such nominated sub-contractor;

16. (3) (b) a nominated sub-contractor declines to enter into a contract with the contractor whereby he undertakes the obligations set above; or

16. (3) (c) a nominated sub-contractor declines to save harmless and indemnify the contractor against any negligence on the part of such nominated sub-contractor, his agents, workmen and servants or against any misuse by him or them of any materials or plant being the property of the contractor and against all claims a aforesaid or any claim under the workmen's Compensation Act, 1941, as amended,

The director-general shall be entitled to nominate another

sub-contractor.

16. (4) The contractor furthermore undertakes -

16. (4) (a) as against the director-general, to carry out his obligations to the nominated sub-contractor under the nominated sub-contract and to co-ordinate the nominated sub-contractor's work and the work under the main contract *and to ensure that the nominated sub-contractor carries out and completes the work under such sub-contract* to the director-general's satisfaction;

16. (4) (b) in case of default by the nominated sub-

contractor, to take steps against the nominated sub-contractor similar to those set out in 24 hereof if and as requested to do so by the director-general or, if requested to do so by the director-general, to cede to the director-general any rights that the contractor may have against such nominated sub-contractor arising from such default;

16. (4) (c) to institute action against the nominated sub-contractor to enforce compliance by the nominated sub-contractor with such sub-contract or to claim damages for non-compliance or breach of such sub-contract or to take such other steps or to claim such other sums as may be taken or may be claimable under or arising from non-compliance or breach of such sub-contracts or from any indemnities given by the nominated sub-contractor to the contractor. If requested to do so by the director-general or, if requested to do so by the director-general, to cede to the director-general any rights that the contractor may have against such nominated sub-contractor arising from such non-compliance or breach;

16. (4) (d) if requested to do so by the director-general, to apply for the sequestration of the nominated sub-contractor's estate (or for the liquidation thereof in the case of a company), to prove claims against such estate and to take all such steps as may be necessary for the recovery of amounts due under or arising from such sub-contracts or any indemnities given or, if requested

to do so by the director-general, to cede to the director-general any rights that the contractor may have against such nominated sub-contractor.

16. (4) (e) in the event of the liquidation or sequestration, as the case may be, of the nominated sub-contractor's estate or the abandonment by him of his contract or of the termination of such contract, to enter into a contract with another contractor nominated by the director-general to complete the work under such first mentioned contract; and further agrees that all the provisions of this contract shall apply *mutatis mutandis* with equal force to such fresh or any substituted nominated sub-contracts;

16. (4) (f) to advise the director-general immediately in the case of the sequestration of the estate of the nominated sub-contractor (or of its liquidation, in the case of a company) or of any breach of contract by such nominated sub-contracts or of his failure to pay any damages or the amounts due under or arising from such sub-contractor and of the steps he proposes to take to carry out his obligations as set out above;

16. (4) (g) that his failure to carry out any of his obligations under 16 hereof shall constitute a default as contemplated under 24 hereof and that the director-general shall be entitled to exercise the rights therein set out and, in addition thereto, to claim from the contractor any damage, loss or costs that the director-general may

suffer as a result of such failure, to determine such damage, loss or costs and to deduct the same from any amounts due to the contractor under this contract or any other contract heretofore or hereafter entered into between the government and the contractor.

16. (5) Payment shall be made to a nominated sub-contractor by the contractor within seven days of his receipt of a progress payment under 23 hereof which includes the value of such nominated sub-contractor's work.

(6) . . ." (Own emphasis).

In clause 16 (4) (a) conceivable support for the contractor's argument may be found in the distinction drawn between the nominated sub-contractor's work and the work under the main contract, but I think that all that is in fact achieved is a convenient means of distinction between the particular sub-contractor's work and all the other work, particularly as the "work under the main contract" must include work done by other nominated sub-contractors. This is so because the contractor does not dispute that he must co-ordinate the work of all sub-contractors as well as his own work. There are in fact other nominated sub-contractors. The result is that no significant support can be derived from the phrase

in question. On the other side there are numerous clauses which would be unworkable, or practically so, if the work done by nominated sub-contractors did not form part of the works. Among them are 6 (5), 6 (6), 6 (7), 9, 10 (2), 13 (2) and 22 (1). To take two examples. Clause 6 (7) entitles the employer's engineer to instruct the contractor to remove "any part of the Works" which he decides is not in accordance with the contract. This is a right fundamental to the proper performance of the contract, and it is difficult to conceive of its being hedged around in the case of sub-contractors. Clause 9 entitles the engineer to be notified by the contractor whenever "a portion of the Works" subject to measurement is to be covered up. Is the work of a nominated sub-contractor, whose work must also be measured, to be excepted? More generally, the exclusion of such work from the "Works" would be quite contrary to one of the essential features of the institution of nominated sub-contracts.

Faced with such difficulties, *Mr Duminy* was driven to concede that what the contractor had to deliver under the main

contract was a building with a fire-alarm system and not a building devoid of one. This concession, inevitably made, I think, cannot be successfully qualified, as *Mr Duminy* tried to do, and the ineluctable conclusion is that work to be performed under the fire-alarm nominated sub-contract also constitutes part of the "Works" under the main contract. This conclusion agrees with van Zyl J's judgment up to this point.

Is the contractor responsible for the quality of the sub-contract works?

The next main argument was that, even if this be so, it was not part of the contractor's duties to exercise or provide "technical supervision" (as opposed to administrative or co-ordinating supervision). Consequently, so it was contended, the contractor cannot be held liable for defective work of this nature done by a nominated sub-contractor being paid for. Faced by questions as to where technical specialist skill ended and where ordinary builder's skill began, *Mr Duminy* adapted his argument so that his submission is that the contractor is relieved from examining the quality of *all*

nominated sub-contract works, regardless of the level of skill required to test their sufficiency. This broadening of the submission was again, I think, inevitable, in the light of an example such as this. Suppose that the contractor is an ordinary builder who is going to do the brickwork, but the employer has decided that the foundations are to be laid under a nominated sub-contract. I do not think that any real distinction in the degree of skill is perceivable, so that a distinction cannot be made on that ground. Hence the line of distinction has to become nomination or no nomination, leading inevitably to the submission mentioned earlier that the works of *all* nominated sub-contractors are excluded from the works. Pausing at this point, I find the notion that the contractor in the example given is not liable for the quality of the foundations a startling one.

The general provision in clause 16 that is relevant and in itself conclusive on the question presently under consideration is that contained in clause 16 (4) (a), the pertinent part of which I repeat : “The contractor furthermore undertakes - . . . (a) . . . to co-

ordinate the nominated sub-contractor's work and the work under the main contract and *to ensure that the nominated sub-contractor carries out and completes the work* under such sub-contract to the Director-General's satisfaction". (Own emphasis). The sense in which the word "ensure" is used here is "to warrant" or "to guarantee". In other words the contractor undertakes to the employer that he will deliver the sub-contract works to the employer in terms of the specifications. The employer's position is further strengthened by clause 16 (4) (g), which makes the contractor's failure to carry out any duty under clause 16 a breach, which entitles the employer to resort to the remedies contained in clause 24. Clause 24 (1) (d) in its turn states that the contractor is in default if he fails to comply with the provisions of clause 16. Accordingly I must disagree entirely with van Zyl J's conclusion that: "[T]here is no basis for the [employer's] suggestion that the [contractor] breached the main contract by failing to ensure that [the sub-contractor] complied with its obligations in terms of the nominated sub-contract". As to how the contractor's duty was to be

fulfilled, in argument much emphasis was placed upon legal remedies. Sensible owners and builders do not conduct their business in the courts, except when it is essential. In the normal course the contractor's skilled supervisor or variously skilled supervisors should examine work soon after it is done and order sub-contractors, whether nominated or not, to remove work not in accordance with the contract and do it over properly. Had the contractor in this case equipped himself to do that, much cost, both legal and otherwise, would have been spared.

Contrary to the views I have expressed, *Mr Duminy* argued that the words quoted from clause 16 (4) (a) do not convey the generality which on their face they bear, but that they are confined and limited in their operation to the particular remedies set out in the succeeding sub-paragraphs, such as (b) (c) and (d). Further it was argued that the only initiating steps that the contractor need take are to advise the employer of the sub-contractor's breaches and other shortcomings. Thereafter he may sit back passively and await the employer's decisions to do or not to do this or that. I

disagree entirely. Clause 16 (and particularly sub-clauses (b) to (f) of it) is not a limiting and exclusive codification of the employer's rights and the contractor's duties in respect of nominated sub-contractors. It must be seen against the ample background of the common law and against the rest of the contract. The contractor has his own rights against the sub-contractor, even be he nominated, under the sub-contract as given force by the common law, and he is obliged to use his rights when indicated. The employer's position is similar, save that he relies upon the main contract, again as given force by the common law, and the power he is given under the same to require the contractor to compel the sub-contractor's performance under the sub-contract. He is not confined to the special remedies set out in clause 16 (4). These are explicit additional remedies, which may either not be available at common law, or which might arguably fall into that class. The object is to strengthen the employer's position, where he has no privity with the sub-contractor, and avoid unnecessary arguments. I conclude that clause 16 (4) (a) means exactly what it says. The contractor

must ensure that the nominated sub-contractor performs, or face liability in damages.

If the contractor does not dispose over the skills necessary to supervise specialised work then he must either acquire them or not undertake the contract. He is not entitled to make a virtue of his lack of skill to excuse himself from supplying "technical supervision". The contractor called witnesses who claimed that builders in the Western Cape did not have such skills and they were not expected to have them. According to them the contractor was entitled to rely on the employer's specialist engineer, in this case Reitz and Geithner. No trade usage to this effect was pleaded. No doubt there are several reasons for this, one of them perhaps being that on the contractor's inevitable concession a builder would, in terms of such a trade usage, also not be expected to provide "technical supervision" of foundation laying, in the example already given. Trade usage aside, this evidence is inadmissible. It is no mere background. It directly contradicts the contract. I say this because the employer's engineer is employed and paid by him to

look after his interests. He is not employed nor paid by the contractor. Nor may the contractor give him any instructions. Nor does the engineer owe loyalty to the contractor. He owes it to the employer, who is at times the contractor's adversary with the engineer his champion.

A further argument raised on behalf of the contractor is that there is no separate item for "technical supervision" in the bills of quantities. *Ergo* no duty, runs the argument. This argument stems from the notion that there is something extraordinary or unexpected, rather than integral, about such supervision, which was the view expressed in the evidence held inadmissible. I do not agree. No special rate is provided for "ordinary" supervision of sub-contractors or for supervision of the contractor's own employees. Yet such supervision must be provided. That is common cause. What has to be decided is whether in terms of the contract "technical" supervision also has to be provided. As I have sought to demonstrate, the distinction between "technical" and "ordinary" nominated sub-contracts fades away once examined.

There is therefore simply no basis for requiring special provision for supervision if supervision in either form is needed to deliver complete works complying with the contract. Nor is there any basis for requiring special provision simply because a sub-contractor is nominated, unless one starts from the premise that the contractor is not responsible for the performance of such persons, which would beg the question.

_____Accordingly, subject to the further points to be dealt with, I am of the view that the counterclaim should have succeeded.

_____I have made no mention of English cases such as *North West Metropolitan Regional Hospital Board v T A Bickerton & Son Ltd* [1970] 1 All ER 1039 (H L) and the considerable literature that they have generated, not because I am unacquainted with the same, but because, whatever tendencies may be indicated, they do not help to solve the issues before us, which involve a breach by the contractor.

<u>The effect of taking cession</u>

As was his entitlement, the employer did take cession of the contractor's rights against the sub-contractor, under clause 16 (4)

(b). This act, so it was argued, once performed constituted an election, which when made constituted a waiver of all other rights which the employer might otherwise have had against the contractor. I can find no trace of a suggestion in the clause that the taking of a cession has so drastic a consequence as to terminate permanently all the employer's remedies. He might, for instance take cession at a stage when neither he nor the contractor has means of knowing whether the sub-contractor is worth suing. Why, in such a situation, should he not be entitled to turn back to the contractor upon discovering that the sub-contractor is indeed not worth powder and shot? Cession is, to my mind, merely an additional course, not available as of right under the common law, but in some cases of value to the employer. He might, for instance, conclude that his contractor has not the means, or the special skills or even the determination to pursue litigation to a successful conclusion. Even without these factors he may simply prefer to have direct control over the litigation.

There was some cursory debate before us as to whether it

would be open to an employer who has demanded and received cession of the contractor's rights against the sub-contractor to institute and pursue a claim against the contractor without either excussing the sub-contractor or re-ceding the rights to the contractor, or without having some sufficient justification for not proceeding against the sub-contractor in terms of the cession. As the matter was not fully argued, I prefer to leave the question open. This point was not raised by the contractor either in the court *a quo* or in this court. It arose from a question put by the court. Even if the point is sound in law, if it had been raised as a special dilatory defence in the court *a quo* the employer might have been able to answer it by reference to facts which are not before the court. Accordingly, it is not open to the contractor to rely upon it now.

Circumstances surrounding termination of sub-contract as a defence

I mention this subject also because it was argued, not because I think that it is an issue. It arises in this way. After repeated attempts had been made to obtain satisfaction from the sub-contractor without avail, the contractor wrote to the employer

requesting instructions to terminate the sub-contract. (In passing, thereby impeccably recognizing the long-established order of things as between employer, contractor and sub-contractor). On 2 December 1991 the employer responded by instructing the contractor to do so, which he did on the next day. Also on 2 December the employer nominated two new persons to complete the sub-contract, stressing the urgency of the situation. The contractor was asked to confirm the re-nomination. This the contractor declined to do, on 4 December, giving as his reason that it had not been given sufficient information as to the basis on which the new nominees were to be appointed. With a dispute as to the financial implications of the first sub-contractor's default in prospect, the contractor seems to have required the employer to surrender his rights against him as the price of acceptance of the new nominees. This may have been a breach on the contractor's part. It seems as if it was. *Mr Duminy*, however, contends that it was the employer who was in breach. Who was in breach was not an issue below, and even if it were possible for us to resolve the

question, which I think it is not, I fail to see what bearing it has on the decision of the issues which are before us. Supposing that the employer should have stayed his hand in making the appointments and was for that reason in breach, I do not think that the administration of the contract is to be treated as the equal of playing a game of forfeits, where one wrong move entails losing all. The postulate for purposes of this defence is that there had been a breach by the sub-contractor, for which the contractor was responsible, and that the employer had consequently suffered damage. It is possible that the extent of the damage, i.e. the cost of putting right, might have been less if the process of re-nomination had run its full course, rather than that the employer should have engaged the two nominees as his direct contractors, which is what happened when the contractor adopted the stance already mentioned. If so, this might be a matter for mitigation when *quantum* has to be decided (I express absolutely no opinion on the matter). The employer's conduct might also once have given rise to a claim by the contractor for the profit that he would have been

entitled to as a percentage of the ultimate price of the provisional sum (the sub-contract price). But these are all things that would have had to be raised and I fail to see that their possible existence in the past detracts from the fact that the employer has suffered a loss for which the contractor is accountable if the appeal succeeds in other respects.

Prescription

Finally, the contractor contends that, all else failing, the employer's counter- claim has become prescribed. The issue is when prescription began to run. The relevant facts are that the employer became aware of the defects by not later than 30 May 1991. The sub-contract was terminated on 3 December 1991. The employer's counterclaim was delivered on 1 December 1994.

In terms of s 12 (1) of the Prescription Act 68 of 1969 prescription commences to run as soon as a debt is due. A debt is deemed not to be due until the creditor has knowledge of the facts from which the debt arises: s 12 (3). If the employer's claim in this case began to prescribe only some time after the date on which the

employer gained such knowledge, then the date of gaining knowledge, which is to be taken to be 30 May 1991, would be irrelevant. My conclusion is that that is in fact the case. I accept the employer's argument that the earliest possible such date is 3 December 1991, which falls within the prescriptive period. The basis of the argument is that the employer would not have been entitled to bring its damages claim merely upon the defective work originally delivered being discovered. This is so, as it is of the nature of a building contract such as this one, that the defaulting party usually has an opportunity and indeed a duty to put right initially defective work. Clause 6 (7), already mentioned, entitles the employer's engineer to require defective work to be done over, and under the sub-contract the contractor has the same right against the sub-contractor. These are not the only provisions that are relevant, but it is unnecessary to refer to more. The sub-contractor's breach, once committed, is not set in stone. The relevant engineer can require the works to be broken up and the breach to be remedied. But a stage is reached when the defaulter is

entitled to no more chances. That is the very earliest stage at which the employer's damages claim could conceivably have become due. In the present case it could, at the earliest, only have been on the date on which the sub-contract was cancelled, 3 December 1991, which falls within the prescriptive period. The matter is complicated by the dispute about the nomination of new nominated sub-contractors, but this does not detract from the fact that the very earliest date on which prescription could possibly begin to run was 3 December 1991. The onus of proving that prescription had run rested on the contractor and he has failed to do so.

For these reasons I consider that the contractor has not proved that the counterclaim has become prescribed.

The appeal is allowed with costs, such costs to include those consequent on the employment of two counsel.

The following order is made in terms of an agreed draft:

1 Paragraphs 1, 5 and 6 of the order of the court *a quo* are set

aside.

2 It is declared that respondent should bear the additional costs incurred as a result of the employment of the sub-contractors Visiotronic (Pty) Ltd and Whip Fire Protection Services (Pty) Ltd including the related supervision costs of the consulting engineers J D Reitz and Geithner.

3 The matter is referred back to the court *a quo* for a determination of the quantum of the claim in reconvention.

W P SCHUTZ
JUDGE OF APPEAL

CONCUR
HEFER JA
NIENABER JA

PLEWMAN JA

I have had the benefit of reading the judgment of Schutz JA in this matter. I am, with respect, constrained to a different conclusion for reasons which make it necessary to expand upon the nature of the contract in issue. Construction contracts for the erection of large buildings or the execution of substantial works are normally (and probably necessarily) complex documents. One reason why this is so is that experience has taught that despite every effort to describe the work to be performed with great exactitude construction work entails uncertainties which necessitate that such contracts incorporate provisions which permit the omission of, the addition to, or the variation of the works. In the form with which this appeal is concerned the contract is that classified in our law as *locatio conductio operis*. Several forms of contract are in common use. Lump sum contracts cater in one way for the apportionment of the risks inherent in construction work. Contracts based on Bills of Quantities do so in another way. The choice between these two forms (and indeed others) will be dictated by what the parties consider desirable in their circumstances. Contract forms for both types have over time been developed on an industry basis such as those prepared and approved by the Institute of South African Architects or the Association of South African Quantity Surveyors and the Building Industries Federation, or in Great Britain a form published by the Royal Institute of British

Architects. These documents are the subject matter of the standard text books in this field. They have very similar basic structures. Why they are complex is because of the desire to define the work to be done in such a manner as to reduce the uncertainties as far as possible. As is pointed out in the judgment of Schutz JA, often provision is made for the use of specialist subcontractors. This can add to the complexities. Then too, terms are often included to allow payment to be made to the contractor as the work progresses. This is usually done on the basis of interim valuations and measurements. Control of the standard of the work must then be exercised at the time of the grant of certificates authorising payment. It is with a contract in this general form that this appeal is concerned.

The appellant used its own standard contract forms. The problem which arose related to the employment of a specialist to instal a fire alarm system. It will be convenient to refer to appellant where it is appropriate as “the employer”and the respondent as “the contractor” (or, where the context so requires, “the main contractor”). The parties entered into a contract in July 1986 for the conversion of the old Roeland Street gaol in Cape Town into a building to house the State Archives. The Department of Works’ standard tender and contract forms were those used. The contract, as is always the case

with such projects, was constituted by a number of separate documents. These were:

i) A tender.

ii) An acceptance of tender.

iii) A formal contract.

iv) A set of Conditions of Contract.

v) A Bill of Quantities.

vi) Drawings and Specifications.

The structure is familiar. The fact that a multiplicity of documents was to be used called for an order of precedence to be laid down because the standard forms could (and did) lead to a conflict between separate parts thereof. What is fundamental to the case and to the proper construction of the contract is that the contract is a Bill of Quantities contract. It is so described in the standard form used and its provisions clearly take that form. The provision determining the order of precedence is found in the Bill of Quantities (the Bill). It provides:

> "Indien daar enige teenstrydighede bestaan tussen hierdie voorbereidsels en die kontrakvoorwaardes (GO 676) geniet eersgenoemde voorrang."

In short the Bill carries the day in any case where conflicts arise between its provisions and those in any other of the contract documents.

Another feature of the contract is that it makes provision in Section 6 of the Bill for prime cost items and provisional sums. These are the subject of clauses 15(1) and (2) of the conditions of contract. Clause 15(2) is relevant to the dispute. It reads:

> "15(2) A provisional sum as indicated in the tender documents for work to be performed by a Nominated Sub-contractor or for material to be supplied and fixed shall be expended at such times and in such amounts in favour of such persons as the Representative/Agent shall direct. Such amounts shall be payable by the Contractor or by the Director-General in terms of 16 (5), 16(6) or 16(7) hereof as the case may be without discount or deduction (accordingly all provisional sums are net). At the settlement of an account the amount expended shall be set against such provisional sum and the balance shall be added to or deducted from the Contract Sum, as the case may be; provided that no deduction shall be made by or on behalf of the Director-General in respect of any damages paid or allowed by any Nominated Sub-contractor to the Contractor, the intention being that the Contractor and not the Director-General shall have the benefit of any such damages. The Schedule Rates providing for profit and attendance on any provisional sum shall be adjusted on a value pro-rata basis."

The provisional sums are introduced in the Bill by the following provision:

> "<u>VOORLOPIGE BEDRAE EN BOUERSWERK IN VERBAND DAARMEE (ALLES VOORLOPIG)</u>
>
> Alle voorlopige bedrae is netto en dek voorsiening van materiaal

> en toerusting en installasie waar van toepassing deur spesialis firmas. Voorlopige bedrae sluit nie bouersafslag in nie, maar die tenderaar mag onder die 'Profyt'-item toelaat vir profyt soos hy nodig ag.
>
> Die Kontrakteur word verwys na Klousules B7.1 en B7.2 van die 'VOORBEREIDSELS' afdeling vir definisies en verstelling van 'Bediening'."

I need not quote B7.1 and B7.2 but they do not place any obligation on the contractor to supervise the work of nominated subcontractors. What is more, in paragraphs G, H and I provisional sums are stated in respect of fire alarms and, as I shall show, in fact provide a provisional sum for "Bediening".

Two features of the contract are important. One is the power of the employer to vary the work by omission, addition or variation. Clause 18(1) provides that "no variations, additions, omissions and substitutions whatsoever by the Director-General shall vitiate this Contract". This is a provision which can only effectively exist when it is coupled (as it is in this case) with provisions which determine changes in the price where the scope of the work changes. To accommodate this the final price in this contract is determined only after completion of the work.

Although much of what follows is set out in the judgment of my brother Schutz it will also be convenient for me to recount certain facts. After the

conclusion of the contract, and clearly in terms of what the parties contemplated, tenders were invited and obtained for the fire alarm installation. As a result the employer appointed a firm KPL-ETSA (Pty) Ltd (the subcontractor) to do this and instructed the contractor (in terms of clauses of the contract to which reference will presently be made) to conclude a contract with the subcontractor to supply the necessary materials and to instal the fire alarm system.

What has given rise to the litigation is the fact that it became clear at some point that the subcontractor was not performing its obligations. In particular it was not installing field wiring as specified. On 2 December 1991 the contractor (after having been instructed to do so by the employer) terminated the subcontract. The subcontract work was at that time incomplete and in part defective.

The sequence of events (upon which some argument was based in this Court) was as follows. On 2 December 1991 the employer wrote to the contractor as follows:

> "According to your letter, the nominated subcontractor - Messrs KPL-ETSA (Pty) Ltd - is in default.
>
> ..... you are hereby instructed to terminate your contract with KPL-ETSA (Pty) Ltd.

> The Department hereby nominates the following subcontractors to complete the work - copies of quotations attached."

(The names and the estimated value of the work and an estimated completion date as well as the need to carry out the work in phases as required by the employer's consultants are then set out.)

On 4 December 1991 the contractor wrote to the employer, in relation to the newly nominated subcontractors, declining, for reasons given, to enter into contracts with them. It is unnecessary to deal at any length with this because it is irrelevant to my reasons for differing from Schutz JA. The final outcome was that the employer wrote to the contractor on 9 December 1991:

> "The Department is of the view that your refusal to employ the subcontractor's ... constitutes a breach of contract.
>
> As the matter is one of extreme urgency, the Department has no alternative but to conclude contracts directly with the aforementioned subcontractor. All the Department's rights as against yourselves are reserved.
> You are also required, in terms of clause 16(4)(b) and (c) of the contract, to cede to the Department, forthwith, all your rights against Messrs KPL-ETSA (Pty) Ltd."

(This letter too featured in an argument before this Court.)

The employer then employed the two replacement subcontractors to remedy and complete the installation. It averred that it had incurred expense exceeding the original subcontract sum in an amount of R755 484,53, mainly

because this sum had been unnecessarily paid to the original subcontractor. It claimed this from the contractor and (by way of an instruction to the Quantity Surveyor) deducted it in the final account prepared (in terms of clause 23(4) of the contract conditions). A final account is only prepared when the work is complete.

This was the state of affairs when the litigation commenced. The first area of disagreement related to the deduction in the final certificate of the sum of R755 484,53 and the second to a claim by the contractor for extra remuneration under the contract because (so it was contended) it was given "late instructions" and suffered delays. In the first claim the contractor sought a declarator to the effect that the employer was obliged to bear all the costs related to the employment of the second subcontractors and, in the second claim a declarator that the employer was obliged to compensate the contractor for its losses as a result of other delays and the "late giving of instructions". The latter claim was dismissed by the court *a quo* and there is no appeal against that order. An order was also sought requiring the employer to rectify the final account by deleting the deduction therein of the above amount. This is merely consequential relief flowing from the first claim. The plea put all these matters in issue. The employer at some later time (precisely when cannot be determined

from the papers) introduced a counter claim for damages in the amount of R755 484,53 on the grounds of an alleged breach by the contractor of the main contract (thereby reintroducing the amount deducted in the final certificate in a different guise).

A number of pre-trial conferences was held to obtain admissions and in an attempt to limit the issues. Thereafter a document called a "Statement of Case" (not taking the form of a Stated Case in terms of the rules of court) and a supplementary document called "Agreed Statement of Issues and Onera" were prepared. It was largely on the basis of the admissions and the contentions and counter contentions in these documents that the trial was conducted. The parties also introduced what were said to be "agreed documents" without their being identified and proved by witnesses. Only a very limited amount of evidence was led and what was led was the subject of an objection to its admissibility. It was however agreed that quantum should stand over. In the end the court *a quo* was asked to decide the matter on the basis of the admissions to be found in the pleadings and elsewhere, the documents which were common cause, and subject to argument on the objection, the evidence. It is not an unfair comment that the pleadings themselves are anything but models of what they should be and that it is extremely difficult to be certain what was ultimately in issue. What is

especially difficult to discern clearly is the basis upon which the damages claimed in the claim in reconvention are said to have arisen. It would seem that the amount claimed represents sums paid to the first subcontractor for work which was duplicated by the second subcontractors. Schutz JA so understood the submission made in this regard and so did I.

Without wishing to sound unduly critical of counsel's well intended efforts, what they in fact achieved seems to have been the opposite of what they intended. A considerable amount of confusion arose. In order to ensure that this Court dealt only with matters which were truly appealable counsel were required to formulate a statement of the issues on appeal which they did in the form of a draft order - being the order proposed in Schutz JA's judgment.

The appeal accordingly must be dealt with on the basis of the submissions made and contentions advanced in this Court, in the heads of argument and by counsel in argument.

The arguments revolved around the provisions of clauses 3(1) and 16 of the contract. The foundation stone in appellant's argument is the contention that the contractor is obliged by the terms of clause 3(1) to deliver (as one would in a sale or a lump sum contract) the complete works which would include the subcontractor's work. Clause 3(1) reads:

> "3(1) The Contractor shall provide everything necessary for the proper execution of the Works, comply with the provisions of the Contract and Orders in Writing and carry out and complete the Works to the satisfaction of the Representative/Agent, who may from time to time issue further or amended Drawing and/or Orders in Writing."

The contractor's counsel sought to argue that the subcontract works are not covered by this clause. It was said that as a fact no specification for any subcontract work existed at the time when the contract was concluded. It followed, so it was argued, that the subcontract works were therefore a separate form of works not falling within clause 3(1).

There is no substance in this submission. Subcontract works were clearly within the contemplation of the parties at the time of their concluding the main contract. But what is even more compelling is the fact that the contract not only made specific provision for the engagement of nominated subcontractors but it is specifically designed to permit changes in the works if such are required or desired by the employer. As has been pointed out clause 18(1) states that changes will not vitiate the contract. What finally constitutes the works is only determined at the time of delivery (but, I should add, delivery as provided for in the contract). I agree with Schutz JA's rejection of this argument.

However a further word is necessary. The appellant's claim in

reconvention is also based on a misconception of the meaning of clause 3(1). Clause 3(1) does not provide (as appellant's argument suggests) that the State Archive Building is to be handed over to the employer. The object of clause 3(1) is to saddle the contractor firmly with the obligation to execute the work in the manner provided in the contract and to clearly vest control of the manner in which and standard to which the work must be carried out in the Representative/Agent (the "agent"). It is this control which is vital to the operation of the contract. Delivery (in the sense of the pleading) is governed by clause 21. It takes place in stages. There is a "first delivery stage" and a "final delivery stage". Both are controlled and directed by the agent in terms of certificates to be issued. Delivery is subject to the agent's opinion as to when (in the case of first delivery) the works are "fit for occupation" and (in the case of final delivery) subject to all defects having been rectified. I will return to this aspect when dealing with appellant's claim in reconvention. I would only add that Schutz JA also speaks of "delivery under the main contract of a building". To do so is, with respect, to stray into the concepts of a lump sum contract where such a statement would be true. It may seem a fine point but in my view it is important to keep firmly in mind that the present contract is one for work to be executed. If this is not done relevant provisions which govern the

determination of the contractor's obligations can be misunderstood.

The other clause around which the debate centred was clause 16. Although it is set out in Schutz JA's judgment, it will be convenient to repeat it in part here. The relevant provisions read:

> "16. (1) The Director-General may nominate a sub-contractor to execute work or supply or fix goods and such Sub-contractor shall hereinafter be referred to as a 'Nominated Sub-contractor'.
>
> 16. (2) The fact that the Director-General has nominated a Sub-contractor shall not create privity of contract between the Director-General and such Nominated Sub-contractor.
>
> 16. (3) The Contractor shall at any time on being requested to do so by the Director-General enter into a contract with a Nominated Sub-contractor within fourteen days of such request in respect of the work for which he has been nominated, in which contract the Contractor shall, inter alia, secure mutatis mutandis for himself the same rights that the Director-General has in terms of this Contract. If the Contractor satisfies the Director-General in writing that he is unable to enter into such a contract because
>
> 16. (3) (a) he has an objection which is acceptable to the Director-General against such Nominated Sub-contractor;
>
> 16. (3) (b) a Nominated Sub-contractor declines to enter into a contract with the Contractor whereby he undertakes the obligations set out above; or
>
> 16. (3) (c) a Nominated Sub-contractor declines to save harmless (sic) and indemnify the Contractor against any negligence on the part of such Nominated Sub-contractor, his agents, workmen and servants or against any misuse by him or them of any materials or plant being the

property of the Contractor and against all claims as aforesaid or any claim under the Workmen's Compensation Act, 1941, as amended, the Director-General shall be entitled to nominate another Nominated Sub-contractor.

16. (4) The Contractor furthermore undertakes -

16. (4) (a) as against the Director-General, to carry out his obligations to the Nominated Sub-contractor under the Nominated Sub-contract and to co-ordinate the Nominated Sub-contractor's work and the work under the main contract and to ensure that the Nominated Sub-contractor carries out and completes the work under such sub-contract to the Director-General's satisfaction;

16. (4) (b) in case of default by the Nominated Sub-contractor, to take steps against the Nominated Sub-contractor similar to those set out in 24 hereof if and as requested to do so by the Director-General or, if requested to do so by the Director-General, to cede to the Director-General any rights that the Contractor may have against such Nominated Sub-contractor arising from such default."

Contractor's counsel argued that clause 16 provides a separate regime for nominated subcontractors (at least so I understood him). In my view that proposition is overstated. Clause 16 is clearly interlinked with many other provisions in the contract. What is true, however, is that just as with all other contracts, particular clauses have to be considered in the light of specific problems. For example matters relating to prime cost items must be considered

fundamentally in terms of clause 15 and variations in terms of clause 18. In this sense clause 16 is the primary clause to which reference must be had. But of course it must be read in conjunction with other provisions in the contract.

In the case of clause 16 it must also be read in the light of the scheme of the contract as a whole. This is particularly so with clause 16(4)(a). It is in this clause that Schutz JA finds an obligation resting on the contractor to supervise (in the fullest sense) the work of the subcontractor. I, for reasons I give below, believe that the word "ensure" must be read in a much more restricted sense. The scheme of the contract is one in which the work is defined; it is performed under the control of and to the satisfaction of the agent; it is paid for at a unit price on the basis of the amount of such work as has actually been executed and paid for in terms of a system which values and measures monthly what has been satisfactorily completed. In the case of work for which provisional sums are provided in the Bill(be it work to be performed or material to be supplied or fixed) the sums so provided may only be expended at times and in amounts as the agent directs. This is so stated in clause 15(2). What is more is that payments of any amount are made (and can only be made) on a certificate based on the value of the work which has been "satisfactorily executed" in the opinion of the agent. This is so stated in clause 23(2)(b)(i).

While the contractor is obliged to pay for subcontract work the reality is that the subcontract work is not work which the contractor itself executes. In saying this I do not question the fact that there is contractual privity between the main contractor and the subcontractor. But what the reality underscores is that the contractor is only to perform such work in relation to the subcontract as is clearly provided for in the main contract as work he must do. This connotes work described and priced in the Bill. He cannot be asked to do work for which he has not stipulated a price because he and the employer have not agreed thereon. The mechanism provided in the present contract is a common one. In *North West Metropolitan Regional Hospital Board v T A Bickerton & Son Ltd* [1970] 1 All ER 1039 (HL) it was said by Lord Reid at p 1043 d-e:

> "The scheme for nominated sub-contractors is an ingenious method of achieving two objects which at first sight might seem incompatible. The employers want to choose who is to do the prime cost work and to settle the terms on which it is to be done, and at the same time to avoid the hazards and difficulties which might arise if they entered into a contract with the person they have chosen to do the work. The scheme creates a chain of responsibility. Subject to a very limited right to object, the principal contractor is bound to enter into a contract with the employers' nominee, but it has no concern with the terms of that contract, for those terms are settled by the employers and their nominee. I can find nothing anywhere to indicate that the principal contractor can ever have in any event either the right or the duty to do any of the prime cost work itself. That would, I think, be contrary to the whole purpose of the scheme, and it would be strange if the contractor could have to do work for which it never

tendered and at a price which it never agreed."

The ingenuity and success of the scheme may be a matter for opinion. I myself do not have any enthusiasm for this device but Lord Reid is undoubtedly correct when he says that the contractor is not bound or entitled to do such work. Experience shows that technical persons such as Quantity Surveyors seem, in general, not to experience difficulty with the manner in which the subcontract work is incorporated into the main contract. This no doubt is because they concern themselves with realities, namely, that it is work performed for the employer by a person selected by the employer at a price agreed to by the employer and in terms of a contract dictated by the employer. Lawyers however find the concept of contractual privity more absolute. The result is that courts are left to reconcile the conflicting pieces of paper in accordance with ordinary interpretive aids so as to discern what the true intention of the parties was. One such interpretive guide is that the courts should endeavour to interpret contracts in a manner which will give them business efficacy. To attempt to compel a contractor to do work which he has not priced would hardly do that.

Before dealing further with the construction of clause 16, I should outline appellant's case in the claim in reconvention. As originally pleaded the employer's case was that the contractor was obliged by clause 3(1) to deliver

the entire work and that the contractor breached "his obligations" (sic) in three respects. In paragraph 5 of the claim the contractor was said (i) to have failed to ensure that KPL-ETSA carried out and completed the work under the contract properly, (ii) to have failed to ensure that KPL-ETSA complied strictly with the conditions of the contract, and (iii) to have failed to enforce compliance by KPL-ETSA with the subcontract. The pleading goes on to make averments as to the consequences of such breaches.

In the course of pre-trial procedures and discussions and at a late stage (the date cannot be determined from the record) a further allegation was added. This is pleaded as para 6 bis. (Why it was added to para 6 (which contains the averments as to the consequences of the breach) is obscure.) However, it reads:

> "6 bis By virtue of the defects in the work done by KPL-ETSA as set out above (the contractor) breached clause 3(1) of the Conditions of Contract in that it failed to carry out and complete the works to the satisfaction of the (agent)."

I understood appellant's counsel to base his argument four square on this proposition. The pleadings as a whole, however, reveal a curious situation. In the particulars of claim it is alleged:

> "10. The Works as defined in the contract including the fire detection and protection services and carbon dioxide installation, have been completed and handed over to the Defendant."

This allegation is admitted in the plea. A fact admitted in a pleading is eliminated as an issue in any action. Why, in these circumstances, appellant was permitted to introduce paragraph 6 (bis) is not clear. The question of course is how the matter is to be dealt with now. Since I am of the view that the ambit of clause 3(1) has been misconceived (by both parties) it would, I think, be preferable to overlook the technical difficulty which arises and deal with what was argued. In a case where the pleadings seem to have played very little part this ought not to be unduly harsh on the contractor.

The averment in paragraph 6 bis renders the plea circular because one simply comes back to ask in what respect the contractor is said to have failed to carry out and complete the works. This was a question repeatedly put on the contractor's behalf at the pre-trial stages of the case. At one of the many pre-trial conferences the answer was that clause 16(4)(a) "reiterated the contractor's obligation to complete and deliver the works and accordingly places the risk of any default on the part of any nominated subcontractor on the contractor". It is this proposition which must be considered. It turns, it would seem, on the word "ensure" in clause 16(4)(a). I therefore return to consider whether a duty of supervision is imposed by this word. In Schutz JA's judgment this proposition is considered on the basis that the contractor had to equip himself to supervise

the subcontract work. The difficulty with that proposition is that the Bill does not provide that the contractor is to do such work. In fact it defines his duties quite differently as the quotation from the Bill set out above makes clear. In terms of the Bill no duty of supervision of the subcontract works was placed on the contractor. Indeed the section of the Bill listing the provisional items makes it clear that "bediening" of the installation of the fire alarm system was to be by a nominated subcontractor. Items G and I in section 6 under "Brand Alarms" read:

> "G. Voorsien die bedrag van R520 000 vir brand alarm installasie.
> ...
> I. Laat toe vir bediening R10 400."

These are both provisional sums.

If "ensure" is to be construed as imposing a supervisory duty on the contractor there is then a conflict between the Conditions of Contract and the Bill. The Bill would consequently either override the conditions or the word "ensure" would have to be given a different significance in section 16(4)(a). One must also have regard to the realities which the parties would have had in mind. In the nature of things (with works with which the contract is concerned) it would scarcely be expected that someone stand over all the workmen involved and supervise the insertion of every screw or bolt. Common sense

tells one that supervision would take the form of periodic inspections and tests. This is precisely what happened: experts were engaged by the employer and defects were picked up. No one at that stage suggested that the contractor was in breach of the contract in not himself having done so. What was required of him is precisely what is provided for in clause 16(4)(b). The subcontractor's failure amounted to a default and the contractor was instructed to invoke his contractual rights and, if necessary, all that he could then do was to enforce the subcontract by normal civil proceedings and thereby "ensure" that the subcontract work was performed. When it became apparent that the subcontractor was not capable of performing the only other remedy was invoked.

It does not seem to me that clause 16(4)(a) can envisage anything more than this. Its wording is singularly inapposite to convey an intention that the risk of the consequence of any default by the subcontractor fell on the contractor (as the employer's pleaded contention goes). In my view when clause 16(4) is read in the light of the other provisions of the contract and of the scheme it provides, it means no more than that compliance is to be brought about by means appropriate to the circumstances - that is by normal legal procedures. This does not result as is suggested that the contractor is

conducting his business in the courts.

What supports this conclusion is the fact that control of the works is maintained by the agent and that no payments can, if the contract is correctly administered, be made by the agent for defective work. What has not been correctly done must be redone before it can be certified for payment. There is therefore no call for extreme (and unpriced) measures of supervision. It is all in fact taking place in terms of various clauses in the contract.

There are thus several defects in the employer's case as I have outlined it. Firstly it seeks to recover payments which, on the facts, one must assume had been incorrectly certified. Certification is not the contractor's obligation. It is the agent's. The claim in reconvention was misconceived because no breach was established and because the damage arose (or can only have arisen) because payments were incorrectly certified and not from any other cause. Importantly the contractor was not under a duty to supervise the subcontract works in the manner suggested.

There are some additional difficulties. When the contractor sought instructions from the employer as to how to deal with the subcontractor the employer's response was not to charge the contractor with a failure to provide supervision. Nor was any such allegation made thereafter, not even in cross-

examination of Mr Wright the contractor's director in control of the contract. All that was put to him was "... and I put it to you that the contract was for the construction and delivery of everything that went into this archives (sic) building". The answer (after an intervention) was - "that's correct, as defined in the contract". The matter was left there. The case argued was thus not put to Mr Wright. His evidence was "... our responsibility initially was to elicit from the specialist nominated subcontractor, an indication that his works were ready for inspection and thereafter to solicit that inspection and approval by the consultants. That having been achieved it would be our responsibility to hand over the completed contract to the department". There was no challenge of this. I accept that to the extent to which the witness may in part of his evidence have purported to construe the contract it was inadmissible. But the point of the quotation is that the case (subsequently) argued was not put. One further piece of evidence also seems to me to answer the criticisms implicit in Schutz JA's judgment. In cross-examination the terms of a letter written by the contractor at a time before the termination of the subcontract was put to Mr Wright. I quote a portion thereof. "[we] ... have been closely monitoring and expediting the performance of this critical subcontractor ... we believe in this that we and the consultants have gone beyond what could normally be expected. ..." What the

purpose of the cross-examination was and why the facts were not investigated in re-examination is not clear to me. But this seems to stand as evidence of strenuous efforts to ensure that the subcontract work was carried out. By contrast the employer led no evidence.

For these reasons I would dismiss the appeal. This renders it unnecessary for me to deal with the arguments based on the cession, alleged breaches surrounding the renomination instructions or prescription though I would state that I am in agreement with Schutz JA on both the issue of the cession and prescription. The order I propose is:

The appeal is dismissed with costs.

C PLEWMAN

MARAIS JA . . .

MARAIS JA:

I have had the benefit of reading the judgments of Schutz JA and Plewman JA. I agree with the judgment of Schutz JA and with the order he proposes. I agree too with both of them that the taking of a cession of the contractor's rights against the sub-contractor does not amount to a waiver or abandonment of the employer's rights against the contractor.

My preference for the view of the contractor's obligations taken by Schutz JA is based upon the following considerations. The contrary view does

not, in my opinion, take sufficient account of the full amplitude of the contractor's obligation under clause 16(4)(a) "to ensure that the nominated sub-contractor carries out and completes the work under such sub-contract to the Director-General's satisfaction". Nor does it accommodate the undeniable fact that the contract postulates that the contractor is to

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be liable for the sins of the nominated sub-contractor. I say that because of the existence in the contract of clauses such as cl 16(7) and cl 17(8) which absolve the contractor of such liability but only in particular circumstances. If no liability was intended to exist in any circumstances these clauses would have been superfluous. The omission of any generally applicable clause expressly excluding the liability of the contractor for the shortcomings of nominated sub-contractors is also surprising if that was indeed what was intended. No less surprising, if sec 16 was intended to amount to a *numerus clausus* of the employer's rights when defective work had been done by a nominated sub-contractor, is that there is not a simple statement to that effect in the contract.

The absence of any specific provision in the Bills for "supervision" of the particular sub-contract is, in my view, too slender a basis for approaching the matter on the footing that there is an inconsistency between the Bills and the contract so that the Bills are to prevail. I do not think anything turns on the provision in the Bills for "bediening" in respect of fire alarms. I do not understand that term to be synonymous with "supervision". That item in the Bills caters for attendance upon the sub-contractor in order to co-ordinate the

sub-contractor's work with his own and for the provision of that which the sub-contractor may need on the site to do his work, which are not the same thing.

What Schutz JA has said about the contractor being able, if so minded, to procure appropriate supervision of technical and complex nominated sub-contract work was said, I think, to make the point that the contractor is not helpless and vulnerable in that respect. As I read it, the real thrust of his judgment is that the contractor is effectively a guarantor of the performance of the nominated sub-contractor. If the contractor chooses not to supervise or to procure appropriate supervision of the nominated sub-contractor's work, that is his prerogative. But if his confidence in the sub-contractor turns out to be misplaced, he may (depending upon which of the remedies available to the employer the employer invokes) have to suffer the consequences.

_____

R M MARAIS

HEFER)
NIENABER JA) **CONCUR**