Murray J. held that property in the materials delivered onto the site remained in the plaintiff builder and the plaintiff was not entitled to the full cost of the materials but was entitled to claim damages upon the same basis outlined in respect of materials paid for by the plaintiff builder but not delivered to site. This, Murray J. believed, would result in the amount claimed by the plaintiff as being due under the claim for progress payments being reduced and the amount of the plaintiff's claim to general damages being increased by the probable loss suffered.

- Lesley Minns, Solicitor, Minter Ellison, Solicitors, Melbourne. Reprinted with permission from the Building Dispute Practitioners' Society Newsletter.

9. "Common Interest" Privilege

The bounds of legal professional privilege are normally restricted to communications between a party and his/her professional legal adviser or their agents. They relate to communications made to or by the professional adviser in his/her professional capacity with a view to obtaining or giving legal advice or assistance (see *TPC v Sterling* (1979) 36 FLR 244. The privilege normally extends to include communications between the legal adviser and a third party for the sole purpose of use in litigation. However, what can be said about communications between a third party who has the self same interest as the first party (e.g. an insurer of the first party) and a fourth party? Does legal professional privilege extend to afford protection to the communication between the third party and the fourth party, if it is in the hands of the first party?

This question was considered by Giles J. of the New South Wales Supreme Court in *Bulk Materials (Coal Handling) Services Pty Limited v Coal and Allied Operations Pty Limited* (unreported) 14 July 1988. His Honour recognised the existence of "common interest" privilege, the effect of which is that each of those with the common interest can avail of the legal professional privilege enjoyed by the other, and the documents or copy documents containing the information are privileged from production in the hands of the other.

The principle is perhaps best explained by quoting a passage from the judgement of Lord Denning M.R. in *Buttes Gas & Oil Co v Hammer No 3* (1981) 1 QB 223 which was cited by His Honour:

> "There is a privilege which may be called a "common interest" privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him - who have consulted lawyers on the self same points as he - but these others have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsels' opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation - because it affects each as much as does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.
>
> In all such cases I think the courts should - for the purposes of discovery treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation".

- Philip Dawson, Partner, Clayton Utz, Solicitors, Sydney.

10. Contract - Economic Duress

The situation faced by the defendant in *Atlas Express Ltd v Kafco Importers and Distributors Ltd* (1989) 3 W.L.R. 389 is so familiar that it is surprising that there is so little law on the subject.

The plaintiff agreed with the defendant on a price of 1.10 pounds per carton to deliver basketware to the Woolworth chain of stores. However, the plaintiff then discovered that the price was uneconomic and sought to negotiate a minimum charge of 440 pounds per trailer load. No agreement was made on the minimum charge.

The plaintiff was a well known carrier in the United Kingdom and the defendant was a small company which had secured a large order from Woolworth. It was essential to the defendant's commercial survival that the defendant should be in a position to make deliveries to Woolworth on time. It would have been difficult if not impossible for the defendant to obtain an alternative carrier in time to meet delivery dates.

When the plaintiff's driver arrived to collect the goods, he brought a document (the revised contract) which had written on it the minimum charge of 440 pounds per trailer load. The driver said that if the defendant did not sign it, the driver would take the trailer away unloaded. The defendant tried unsuccessfully to contact the plaintiff's manager. Believing on reasonable grounds that it would be very difficult if not impossible to negotiate with another carrier, the defendant signed. Woolworth would have sued the defendant had the defendant been unable to supply the goods. The plaintiff had the defendant "over a barrel".

The plaintiff sued for the greater amount allegedly due under the "revised contract" and the question for the Court was whether the defendant was bound by the "revised contract".

The judge held that the "revised contract" was not binding for two reasons, namely economic duress and absence of consideration. The judge said:

> I find that the defendant's apparent consent to the agreement was induced by pressure which was

illegitimate and I find that it was not approbated. In my judgment that pressure can properly be described as economic duress which is a concept recognised by English law and which, in the circumstances of the present case, vitiates the defendant's apparent consent to the agreement. In any event, I find that there was no consideration for the new agreement. The plaintiffs were already obliged to deliver the defendant's goods at the rates agreed under the terms of the original agreement. There was no consideration for the increased minimum charge of 440 pounds per trailer.

- Philip Davenport

11. Contract - Exemption Clause

In *Nissho Iwai Australia Ltd v Malaysian International Shipping Corporation, Berhad* (1989) 86 ALR 375 the Australian High Court considered the construction of an exemption clause in a bill of lading.

The claimant sued the carrier for damages for non-delivery of a container load of prawns. The container was stolen shortly after it was discharged from the ship at Glebe Island terminal, Sydney.

The contract of carriage, the bill of lading, provided that the carrier was exempted from liability in respect of:

> ... any loss or damage to or in connection with goods arising or resulting at any time from ... any cause or event which the carrier could not avoid or the consequences of which the carrier could not prevent by the exercise of reasonable diligence.

The claimant argued that the main object of the contract of carriage was the delivery of goods to the owner at Sydney and that to construe this provision as exempting the carrier from liability for loss or damage for non-delivery would defeat the object. He argued that "loss or damage to or in connection with the goods" did not cover non-delivery.

The Court rejected the notion that an exemption clause should be construed so as not to apply to an event which defeats the main object of the contract and held that "loss ... in connection with goods" in this contract should be read as covering "loss caused by loss of goods".

The Court held that the word "carrier" as defined in the contract was not intended to include a subcontractor or agent of the carrier. Hence, the carrier could rely upon the exemption clause and avoid liability even though one of the carrier's own employees or a subcontractor could have prevented the loss.

- Philip Davenport

12. Contract Formation

Australian and New Zealand Banking Group Ltd v Frost Holdings Pty Ltd [1989] VR 695 is not directly related to the construction industry, but is relevant as it deals with the problem of contract formation. Problems with contract formation frequently arise in the construction industry, particularly in relation to the engagement of subcontractors.

Frost Holdings, a publisher, made a proposal to the *ANZ Bank* that reproductions be made of original paintings by Australian artists in the form of calendars to be sold by the Bank.

The publisher brought an action for damages against the *ANZ Bank* for repudiation of the agreement, which it asserted was entered into. The *ANZ Bank's* position was that the agreement was not legally binding or enforceable and was no more than an agreement in principle to proceed with further investigations and the development of a proposal and that the parties' respective rights and obligations were not defined or agreed with sufficient certainty or particularity to give rise to an enforceable contractual relationship between the parties. The publisher upgraded the proposed calendar format, which involved changes in size, quality and price. The *ANZ Bank* subsequently advised the publisher that it did not wish to proceed with the project.

The trial judge found that the parties made an enforceable agreement whereby the publisher would produce and supply to the Bank 50,000 good quality calendars at a cost of $8.80 each, or at a higher cost as would be reasonable in the event that the *Bank* stipulated a larger or better quality calendar. Damages were awarded. The *Bank* appealed.

The basic question in the appeal was whether the parties had entered into a binding and enforceable agreement for the sale of 50,000 calendars at the unit price of $8.80.

The Full Court of the Victorian Supreme Court found that the parties had not reached agreement upon the essential contractual terms of their bargain. They had not fixed the price per unit, nor agreed to matters of design, style, quality, size of paper, content of the calendar and the number of calendars to be supplied. It was held that these were not merely specifications but were matters which constituted the subject matter of the negotiations. Differences about these matters were not capable of resolution by implication.

In reaching this decision, support was found in the following judgments:

> *Thorby v Goldberg* [1964] 112 CLR 597, Sugarman J. at p 607:
>
> > "It is a first principle of the law of contracts that there can be no binding and enforceable obligation unless the terms of the bargain, or at least it essential or critical terms have been agreed upon. So, there is no concluded contract where an essential or critical term is expressly left to be settled by future agreement of the parties."
>
> *May and Butcher Ltd v R. (H.L.)* [1934] 2 KB 17 at p 21 where Viscount Dunedin said:
>
> > "To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it