terms for driving the piles at this date.

2. There was no apparent purpose to the purported incorporation of the provisions of Edition 5b since *Piling Contractors* was acting as a subcontractor and the document was completely inappropriate to such a situation. Edition 5b is predicated upon the basis that the proprietor has retained an architect. Indeed, cl. 3 of Edition 5b imposes an obligation upon the proprietor to appoint a new architect in the event that the original architect ceases to be the architect for the purposes of the contract. Any attempt to notionally remove the architect from Edition 5b renders the document meaningless.
3. The purported incorporation of the provisions of Edition 5b was very much a subsidiary matter. If cl. 13(c) could be ignored it could be still said that the parties had a meaningful arrangement.
   It is well established that where there is agreement upon all substantial terms, the Court may disregard a subsidiary term on the grounds that it is meaningless.
4. This was an appropriate case for application of the principle in *Nicolene Ltd v Simmonds* (1953) 1 QB 543, i.e. where a clause is so vague and uncertain as to be incapable of precise meaning and is clearly severable from the rest of the contract, the contract should be held good and the clause ignored.
   Independent of the attempted incorporation of Edition 5b, to which it was impossible to give any meaning, the parties had a comprehensive and intelligent agreement.
   Clause 13(c) of Piling Contractors General Working Conditions was meaningless and should in the circumstances be rejected.

Accordingly, Piling Contractors had not established a submission to arbitration and the appeal was allowed.

- John Tyrril

14. Contract - Penalty Clauses

Contracts frequently provide that upon one party committing a breach of contract, the other party can terminate the contract and recover damages. Should the damages be limited to the loss resulting from the breach, or should they include the loss resulting from the termination?

This problem was discussed by the High Court of Australia in *Esanda Finance Corporation Limited v Heinz Plessnig and Anor* (9th February, 1989). In that case, a finance company had terminated a hire purchase agreement on account of a breach, which was not serious enough to constitute repudiation of the contract.

The agreement provided that, upon termination, the finance company would be entitled to recover certain liquidated damages calculated according to a formula which included the value on sale of the repossessed equipment.

The Court found that the liquidated damages were not a penalty. The Court took into account the loss of benefit of the contract resulting from the finance company's election to terminate. The finance company was not limited to recovering only damages resulting from the breach of contract.

One basis upon which it was claimed that the liquidated damages clause was void as a penalty was that it did not include a provision that would require the finance company to make a refund to the hirer, if the value of the repossessed equipment on sale exceeded the finance company's loss from early termination of the contract. The absence of such a provision did not render the liquidated damages clause void. Deane J. mentioned that had in fact the finance company obtained an excess on the sale of the equipment, the hirers may have argued "under principles of unjust enrichment operating in all the circumstances of the case" to recover the amount of the excess.

Whilst the High Court's decision will make it difficult to challenge the validity of a liquidated damages clause on the ground that in particular hypothetical circumstances it could result in a windfall for the claimant, nevertheless, if a windfall should occur, then it may be worthwhile claiming back the windfall relying upon principles of unjust enrichment, mentioned by Deane J.

The case is of particular relevance in the interpretation of Clause 44 of the National Public Works Conference General Conditions of Contract. Under Clause 44, the Principal may, upon default of the Contractor, take over the work and recover the extra cost, if any, of completing the work. There is no provision for refund to the Contractor of any surplus.

- Philip Davenport

15. Copyright - Copying Concept or Idea

Ownit Homes Pty Ltd & Ors v *D. & F. Mancuso Investments Pty Ltd & Ors.*, Federal Court of Australia, Queensland Registry, 29 April, 1988.

Osman drafted plans for a display home by adapting two previous designs (known as Envoy Series Two). Osman was the managing director of Daudi Pty Ltd ("the draftsman"). That company had produced drawings for Ownit Homes Pty Ltd, ("Ownit"), including the Envoy Series Two design. Ownit constructed a display home using the Envoy Series Two design.

Mr and Mrs Mancuso ("the owners"), intended to build a house and visited the Envoy Series Two display. They obtained brochures containing details of the design. The owners took the brochures to a draftsman Mr Caruso. Mr Caruso drew plans of a house incorporating some of the basic concepts in the Envoy Series Two design. The owners requested changes to render the ultimate design closer to the Envoy Series Two.

Mancuso Investments Pty Ltd ("the Owners") then erected the house using this last design.