The Court held that, subject to any contractual provision to the contrary, such an implied licence would "extend to the use of the plans for the purpose of the construction work, to such extent as the owner may decide, and involves no implied restraint on the carrying out of work which departs from those plans."

This was because a breach of copyright would occur if there was a reproduction "in material form". Ironically therefore, the greater the work departs from the plans, the less likely it is that it will reproduce those plans.

The Court raised the possibility that the implied licence may be revoked in a case where the owner wrongfully terminates the consultant's employment and where the consultant was engaged for the entire project (as distinct from a contract terminable at will). The Court considered such a position doubtful although "arguable".

Because there was some doubt as to the consultant's ultimate entitlement, the Court was required to consider the balance of convenience in determining whether to grant the injunction sought.

The Court considered that the consequences to the owner of granting an injunction (loss of business and goodwill by further delays) which turns out to be unjustified far greater than the consequences to the consultant of refusing an injunction which ultimately turns out to have been justified.

The Court rejected an argument that, given the consultant's known involvement with the project, it would suffer damage if work was completed otherwise than in accordance with the plans.

As a result, the consultant was refused the relief sought. Without any form of security under the contract with the owner, the consultant's only remedy in the event of there being outstanding fees would be to recover the debt by ordinary litigious processes.

In the current economic climate, which has seen a significant number of builders faced with crippling financial difficulties, particular complications arise with respect to design and construct contracts in which the consultant is engaged by the builder.

In circumstances where a receiver has been appointed to the builder, the owner (or financier) will be seeking to use the consultants' plans to continue with or market the project. On the other hand, the receiver on the builder's behalf and the consultant may be seeking control over the documents to secure payment of outstanding progress payments or fees.

Without adequate provisions in the head contract and consultancy agreements, an owner may find itself in the invidious position of being unable to continue the project. Conversely, with the builder in receivership, the consultant may have little hope of recovering its outstanding fees.

The present economic climate and uncertainty in this area of the law make it essential that parties give consideration to protecting their rights at the contract negotiation stage by including specific provisions in all relevant contracts, sub-contracts and consultancy agreements dealing with copyright and licences to use plans both during and in the event of termination of those contracts.

Setting out the parties' rights in unambiguous terms at the drafting stage will also help to reduce disputes and the cost and inconvenience associated with litigation/arbitration proceedings.

- **Gavin Witcombe, Senior Associate, Baker and McKenzie, Sydney. First published in the National Constructor.**

Defective Glazing - Action By Head Contractor In Tort For Economic Loss, Rather Than In Contract

Simaan General Contracting Co v Pilkington Glass Ltd (No. 2) (1988) 1 All ER 791.

The plaintiff was the head contractor for a building to be erected in Abu Dhabi. The plans and specifications required double glazed units of green glass to be incorporated in the curtain walling of the building and specified that a particular type of glass manufactured by the defendants be used. The supply and erection of the curtain walling was subcontracted by the head contractor to another company which, as required by the specification and the subcontract, ordered the glass panels from the defendants.

The glass supplied was not of the uniform colour when installed and the building owner withheld payments from the head contractor until the panels were replaced. Rather than suing the supply and erect subcontractor in contract, the head contractor sued the nominated supplier in tort for economic loss caused by the withholding of payments by the building owner. At the trial of a preliminary issue (as to whether the nominated supplier owed the head contractor a duty of care to take reasonable care to avoid defects in the material) the judge held that the nominated supplier did owe such a duty relying on the House of Lords decision in *Junior Books Limited v Veitchi Co Ltd* (1982) All ER 201.

The main judgment, given by Bingham LJ, discussed the applicability of the *Junior Books* case. His Honour concluded that a claim may lie in negligence for the recovery of economic loss alone. However, he did not believe it a general rule that claims in negligence could succeed on proof of foreseeable economic loss, where there was no damage to property and no proprietary or possessory interest shown.

His Honour determined that there was no physical

damage in this case and, if there was damage, the damage occurred at the time of manufacture when the panels were the nominated supplier's property and thus the head contractor failed to show any interest in the goods at the time when damage occurred.

In any event, His Honour stated:

> "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 reason ing it might be said that (the nominated supplier) owed a duty to (the building owner) in tort as well as to (the subcontractor) in contract. I do not, however, see any basis on which (the nominated supplier) could be said to have assumed a direct responsibility for the quality of goods to (the head contractor); such a responsibility is, I think, inconsistent with the structure of the contract the parties have chosen to make."

- **Lesley Minns, Solicitor, Allen Allen & Hemsley, Solicitors, Sydney.**

Entitlement To Payment For Work Performed In Expectation Of Contract

Dickson Elliott Lonergan Limited v Plumbing World Limited [1988] 2 NZLR 608.

The absence of a concluded contract between two parties can create difficulties in the event that work is done in anticipation that a contract will be executed at some time in the future. The remedy of quasi-contract, or restitution is an effective means to resolve those difficulties. The case of *Dickson Elliott Lonergan Ltd v Plumbing World Ltd* [1988] 2 NZLR 608 is an interesting New Zealand case which hits upon the distinction between work done in the expectation of both parties to the contract that a formal contract will eventuate and work done gratuitously by one party in the hope that it might obtain a contract.

The facts are these. The defendant was a prospective tenant which entered into negotiations with the plaintiff, a developer/architect, in relation to the development and lease of a building site. The scheme was that the plaintiff should purchase a site, design and build a multi-storey building to the defendant's requirements and lease the building to the defendant on a long term basis.

Draft heads of agreement were drawn by the defendant and negotiations between the two took place. The defendant then informed the plaintiff that its board of directors had affirmed the plaintiff's site and scheme. Further detailed heads of agreement and drawings were prepared by the plaintiff, and a construction programme showing practical completion to be effected by the end of March, 1987.

The plaintiff was advised that the defendant's board of directors had approved the plan and the draft agreement on 4 April, 1986. The defendant stressed that time was of the essence owing to certain lease arrangements it already had, and the plaintiff was directed to move rapidly with the necessary documentation to allow a start date of 19 May, 1986.

The plaintiff commenced work to obtain the requisite permits immediately. The plaintiff also arranged for its solicitors to put the heads of agreement and the proposed lease into final form.

In mid-April, 1986 the plaintiff was informed that the defendant was considering an alternative site and on 25 April, 1986 was advised that the defendant's board of directors had decided to rescind its resolution to move to the plaintiff's site and to proceed instead with the alternative site.

The plaintiff brought an action to recover from the defendant the cost of the work it had performed between 4 and 25 April, 1986.

It was accepted that no concluded contract had come into being.

Eichelbaum J. delivered a straightforward judgment and looked carefully at two British decisions, *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932 and *British Steel Corp. v Cleveland Bridge & Engineering Co Ltd* [1984] 1 All ER 504. From the latter case, an extract from Robert Goff J.'s judgement was quoted in which His Honour set out the legal principle of restitution and the circumstances in which the law will impose an obligation on one party to pay a reasonable sum for work performed by the other party pursuant to the former's request:

> "Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance under that anticipated contract, one requested the other to commence the contract work and the other complied with that request. If thereafter, as anticipated, a contract was entered into, the work done as requested will be treated as having been performed under that contract; if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract, the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi-contract or, as we now say, in restitution."

Eichlebaum J. found that in the circumstances, the plaintiff was entitled to succeed. He dismissed the argument that the plaintiff's work simply related to its own development and dismissed the defendant's submission that the work had in no sense been done for the defendant