## BARRISTERS

**- Philip Davenport**

The Solicitors Journal (134 S J 177) reports that in England the Bar Council has approved a new code of conduct which removes a number of restrictions on the way barristers practice. Henceforth they can appear in court without a solicitor being present. They can practice from home or wherever they wish, and without a clerk, and they can advertise. They can also attend conferences in solicitor's offices.

This last innovation would be welcomed in NSW by many solicitors and clients. Barristers chambers rarely provide the standard of office accommodation provided by the larger city firms of solicitors or enjoyed by many commercial clients. It is difficult to explain to busy and influential clients that no matter how valuable their time may be, or what they are prepared to pay, they must attend on the barrister and never vice versa.

Frequently the client is kept waiting in a narrow noisy corridor shoulder to shoulder with all manner of people in trouble with the law, and without so much as a comfortable chair and good coffee. There is also a risk of breach of security because the overcrowding in barristers' chambers makes it difficult to ensure absolute security.

## LIQUIDATED DAMAGES REVISITED

**- John L Pilley, BISCOA State Director Victoria.**

Two recent cases have discussed in some detail what happens to the rights of the builder to recover from a specialist contractor liquidated and ascertained damages when the contract indicates that liquidated and ascertained damages shall be "nil". (The same considerations apply of course in respect to liquidated and ascertained damages payable to a proprietor by a builder).

The first case which considered this question was the case of Temloc (*Temloc Ltd v Errill Properties* 1987 39 BLR 30) where it was held that writing in the word "nil" against liquidated and ascertained damages under consideration in that case (in the words of one judge);

> "constitutes an exhaustive agreement as to the damages which are or are not to be payable by the contractor in the event of his failure to complete the works on time".

It was consequently held that writing in the word "nil" meant that not only was the proprietor not able to recover any liquidated and ascertained damages under the contract but also could not recover common law damages for delay caused by the builder.

It was commonly felt that this principle would apply in relation to all contracts and, indeed, that the same argument could apply where, for instance, the sub-contractor was seeking to recover time extension costs which might be called liquidated and ascertained damages payable to the sub-contractor for delay by the builder (as they are, for instance, in the MBA of Victoria Form of Contract SC.6).

The identical problem has arisen again, this time in the Supreme Court of NSW in the decision of *Baese Pty Ltd v R A Bracken Building Pty Ltd*, a decision of Mr Justice Giles given on the 13 December 1989.

In that case the Form of Contract was JCC.B and Clauses 10.14 and 10.15 came under consideration. In particular, Clause 10.14.01 states that if the builder fails to bring the works to practical completion by the Date for Practical Completion then the Architect may give notice in writing to the builder and to the proprietor no later than twenty (20) days after the date on which the works actually reached or are deemed to reach practical completion giving his opinion as to what ought to have been the date for practical completion. The clause then provides that if the notice was given, the builder shall pay or allow to the proprietor a sum calculated and certified by the Architect at the rate stated in Item M of the Appendix as liquidated and ascertained
damages for the period of delay. In the contract under considerable the word "nil" has been written against Item M of the Appendix.

Mr Justice Giles had no hesitation in finding that the Temloc decision wasn't applicable in this instance and the proprietor was not precluded from seeking Common Law damages for delay even though he was precluded by the use of the word "nil" from recovering liquidated and ascertained damages under the contract for delay. He decided that clause 10.14 did not (unlike the clause considered in the Temloc case) constitute an exhaustive agreement as to what damages are payable for delay. Mr Justice Giles considered that the clause of the contract in Temloc which was headed "Damages for Non-Completion" meant that the clause dealt generally with damages for non-completion and not just liquidated and ascertained damages under the contract and the provisions in the clause were "imperative". He held that clauses 10.14 and 10.15 of JCC.B fell into neither of these categories and as a result the proprietor was entitled to proceed at common law for damages for delay.

It therefore appears that each contract must be treated on its merits to see whether the particular liquidated and ascertained damages clause falls within the Temloc principle of being an exhaustive agreement as to all damages for delay or whether it is like clause 10.14 of JCC.B which relates specifically and only to liquidated and ascertained damages and does not deal with damages generally for delay. Similar considerations will also have to be taken into account when interpreting a contract where extension of time costs are called liquidated and ascertained damages or some such similar phrase and are likewise stated to be "nil".