## CLAIMS AND DISPUTES - FURTHER DEVELOPMENTS

**The National Public Works Conference and the National Building And Construction Council Joint Working Party's has prepared a report entitled "NO DISPUTE: Strategies For Improvement In The Australian Construction Industry", which will be released at seminars to be held in the major capital cities in July 1990.**

1989 Australian Construction Law Newsletter Issue #3 contained a summary of the industry report entitled "Strategies For The Reduction Of Claims And Disputes In The Construction Industry".

In response to this report, the National Public Works Conference and the National Building And Construction Council established a Joint Working Party to examine the recommendations in the Strategies Report and related issues. The terms of reference for the Joint Working Party were set out in 1989 Australian Construction Law Newsletter Issue #7 at page 8.

The Joint Working Party has now prepared a report entitled "NO DISPUTE: Strategies For Improvement In The Australian Construction Industry", which was presented to a joint meeting of the National Public Works Conference and the National Building and Construction Council in May 1990. NPWC and NBCC have agreed to publish this report and will release it at seminars to be conducted in the capital cities in July 1990.

## ANOTHER COMFORTING LETTER

**- Dr Chris Gilbert, Consultant, Henderson Trout, Solicitors, Brisbane.**

**A recent decision by the Supreme Court of NSW shows that Australian courts may be more prepared to attach legal consequences to so called "letters of comfort" than are their English counterparts.**

In *Bank of Brussels Lambert SAS v Australian National Industries Limited*, Rogers J. Chief Justice, Commercial Division, New South Wales Supreme Court, 12 December 1989, ANI provided a letter of comfort to the plaintiff, a Belgian Bank. In reliance on this, the bank made available a credit facility of US$5 million to Spedley Securities Limited which was wholly owned by Spedley Holdings Limited. Ani had a 45% shareholding in the latter company.

In its letter to the bank, ANI said:

> "it would not be our intention to reduce our shareholding in Spedley Holdings Limited from the current level of 45% during the currency of this facility. We would ... provide your bank with 90 days notice of any ... decisions taken by us to dispose of this shareholding, and ... we acknowledge that, should any such notice be served on (you), you reserve the right to call for the repayment of (the loan) within 30 days".
>
> "We ... confirm that it is our practice to ensure that ... Spedley Securities Limited will at all times be in a position to meet its financial obligations as they fall due ... (including) repayment of all loans made by (you) ... (as) mentioned in this letter".

This letter was issued in 1982. After the stock market crash of October 1987, ANI decided to sell all its shareholdings in Spedley Holdings Limited. No notice of this decision was given to the bank. Shortly after this, Spedley Securities Limited went into liquidation, and the bank (which had loaned substantial sums to Spedley Securities Limited pursuant to the loan facility) incurred large losses as a result. ANI declined to make good the bank's losses. The bank sued ANI for breaching its letter of comfort relying on breach of condtract, breach of the Trade Practices Act, unconscionable conduct and unjust enrichment.

Mr Justice Rogers held the defendants liable for breach of contract and unconscionable conduct. He dismissed the claims based on the Trade Practices Act and unjust enrichment. The court held that ANI's promises in the letter of comfort to give 90 days notice of any impending share sales and to ensure that Spedley Securities Limited would at all times be in a position to meet its financial obligations, were contractual in nature in the particular circumstance of this case.

The Court criticised much of the reasoning in the well-known English Court of Appeal decision on letters of comfort, *Kleinwort Benson Limited v Malaysia Mining Corporation* (see 1989 Australian Construction Law

Newsletter Issue #4 page 6 and Issue #7 page 28) According to the NSW Court, Australian law on this topic may differ considerably from English law as applied in the *Kleinwort Benson* case. If this is so, plaintiffs in the situation of the Bank of Brussels are more likely to obtain a remedy against defendants in the shoes of ANI.

Assuming that the NSW decision is not reversed by an appeals Court, it shows that letters of comfort, depending on the circumstances in which trhey are created, can no longer merely be regarded as evidence of moral good faith on the part of those who sign them. In future, business people and corporations who wish to use these letters, but who do not want to assume legal obligations because of them, will have to be extremely careful indrafting these letters. Loose drafting may lead to unwanted legal obligations where none were intended.

**- Reprinted with permission from Henderson Trout's HT Update.**

## CONTRACT- BONUS TO COMPLETE

**- Philip Davenport**

**In [1989] 9 Australian Construction Law Newsletter there is a report of the decision in *Atlas Express Ltd. v. Kafco Importers and Distributors Ltd* where a manufacturer under economic duress "agreed" to an increase in the contract rate for carriage of basketware. The court held that the new "contract" was not binding because there was economic duress and absence of consideration. Now in *Williams &Roffey Bros. v. Nicholls [Contractors] Ltd* 1989 NLJ 1712 the Court of Appeal in England has made a statement of the law on the subject.**

The plaintiff subcontracted to carry out carpentry work on 27 flats for £20,000. The subcontract price was low and the subcontractor got into financial difficulties. The main contractor was facing the risk of liquidated damages under the main contract. In an endeavour to expedite the work, the main contractor agreed to pay the subcontractor an extra £10,300 if the subcontract work was completed on time. The main contractor reneged on the bonus agreement, arguing that in law there was no agreement because the subcontractor was doing no more than the subcontractor had already agreed to do for £20,000. The Court said:

> Clearly if a sub-contractor has agreed to undertake work at a fixed price, and before he has completed the work declines to continue with it unless the contractor agrees to pay an increased price, the subcontractor may be guilty of taking unfair advantage of the difficulties which he will cause if he does not complete the work to secure the contractor's promise. In such a case an agreement to pay an increased price may well be voidable because entered into under duress.

The main contractor conceded that in return for the promise to pay extra the main contractor received benefits, namely: [1] ensuring that the subcontractor continued work; [2] avoiding liquidated damages; and [3] avoiding the trouble and expense of engaging other people to complete the subcontract work. The Court of Appeal held that this was consideration sufficient to make the promise to pay an extra £10,300 binding.

It was not suggested that the the promise of the main contractor to pay extra was given under duress and the Court held that because there was consideration for the promise to pay extra,the subcontractor could enforce the promise. The Court said:

> ... the present state of the law on this subject can be expressed in the following proposition:
>
> [1] if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B, and
>
> [2] at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will,