and concluding with *Michael Salliss & Co Ltd v Calilona* (unreported) 3 July 1987 Judge Fox-Andrews. His Lordship then made the following comments, at page 1175, as to whether the engineer was liable to the contractor in tort:

> "One must start with the proposition that if the contractor had required an indemnity for extra-contractual protection in respect of default by the engineer or insolvency on the part of the employer then it was open to the contractor to have stipulated for such protection. On the contrary, by accepting the invitation to tender on the terms disclosed in the document "Instructions to Tenderers" and the contractual document submitted therewith the contractor must be taken to accept the role to be played by the engineer as defined in the contract."

Included in the contract was an "exclusion clause" which purported to exempt the employer and the engineer from being liable for any acts or obligations performed under the contract or from any default or omission in the performance of such acts.

Having regard to the contractual framework, and after taking into account the "exclusion clause" (although His Lordship stated that his decision would have been the same even if the "exclusion clause" did not exist), His Lordship concluded, at page 1176, that it was ".... impossible either to support the contention that the engineer was holding himself out to accept the duty of care with the consequential liability for pecuniary loss outside the provisions afforded to the contractor under the contract, or to support the contention that the contractor relied in any way on such an assumption of responsibility on the part of the engineer in any way to bolster or extend its rights."

His Lordship did not consider that there was any difficulty in allowing a clause in a contract between two parties to operate to limit liability by one of those parties to a third party. His Lordship stated, at page 1177, as follows:

> "The presence of such an exclusion clause whilst not being directly binding between the parties, cannot be excluded from a general consideration of the contractual structure against the contractor demonstrates reliance on, and the engineer accepts responsibility for a duty in tort, if any, arising out of the proximity established between them by the existence of that very contract."

Ralph Gibson and Russell LJ reached the same conclusion regarding the existence of a duty owed by the engineer to the contractor. However their Lordships' reasoning was somewhat different.

Estoppel

The second submission made on behalf of the engineer was that the proceedings should be dismissed as a result of the exercise of the court of its inherent jurisdiction to prevent vexatious or oppressive litigation. This submission was based upon the earlier arbitration proceedings between the contractor and the employer and the settlement of those proceedings.

His Lordship considered this submission in the light of principles of estoppel. His Lordship accepted that historically privity between parties was necessary to establish estoppel. However His Lordship also accepted that in one sense the court proceedings between the contractor and the engineer amounted to a bear re-agitation of the same issues which were dealt with in the arbitration between the contractor and the employer. His Lordship did not express any firm view on this issue as it was unnecessary to do so given that he had already held that there was no duty owed by the engineer to the contractor. However His Lordship did state, at page 1179, as follows:

> "Had I been obliged in order to determine this appeal to reach a firm conclusion in the circumstances I would have been minded to sustain what would be a small extension of the principle already established ....".

Having regard to the above comment His Lordship would appear to be amenable to an argument that the resolution of the arbitration between the contractor and the employer did operate as an estoppel between the contractor and the engineer.

Causation

The final submission put to the court was that any damages which might have been suffered by the contractor did not flow from any breach of duty which may have been owed by the engineer. In effect there had been an intervening act, that is the arbitration and its settlement, which had broken the causal nexus between any beach of duty and the suffering of any loss.

His Lordship accepted these submissions.

Ralph Gibson LJ also accepted this argument.

- Phillip Greenham

UNSIGNED BUILDING CONTRACT HELD ENFORCEABLE

Empirnall Holdings v Machon Paull Partners Pty Limited, New South Wales Court of Appeal, 11 November 1988.

A dispute which raised fundamental questions of contract law relevant to the construction industry has recently been decided by the New South Wales Court of Appeal.

The decision, concerning the acceptance "by silence" of a building contract is one of practical importance in a general contractual sense and is of particular interest as it arose in the context of a dispute between a firm of architects, Machon Paull Partners Pty Limited ("the architects") and a property developer, Empirnall Holdings Pty Limited ("the developer").

The facts

Following upon the preparation of a feasibility report, the architects were appointed architects of a development at Crows Nest.

In due course, the architect contacted the developer's agent regarding its first progress claim.

At the time, the architects also fore-shadowed they wished to institute a "contractual method" and would be forwarding contracts in the standard form BCP1 for execution by the developer.

The response from the developer's agent was to "send the claim but hold the contracts" as the principal of the developer "does not sign contracts".

The architects persisted, however, and sent, under cover of a letter dated October 3, 1983, two completed copies of the contract with a request that both copies be executed and one copy returned to them. No executed copy was forthcoming and the architects wrote again on October 19, 1983 in the following terms:

> "In reference to our letter dated October 3, 1983 concerning the return of the signed contracts we are proceeding on the understanding that the conditions of the contract are accepted by you and work is being conducted in accordance with those terms and conditions."

The understanding expressed in that letter was not refuted by the developer or its agent and that failure to respond assumed critical significance on the appeal.

At issue was whether the correspondence, together with the conduct of the developer, was sufficient, in law, to constitute acceptance of the terms of the building contract by the developer notwithstanding its later refusal to execute the contract.

Acceptance

The General Contractual Rule

Generally, in order to accept an offer, there must be a communication by the offeree to the offeror of an unqualified assent both to the terms of the offer and to the implied invitation in every offer that the offeree commits himself to a contract. This enquiry necessarily involves two sub-questions, both of which must be positively answered:

1. Has there been an unqualified assent?; and
2. Has this assent been communicated to the offeree?

Accordingly, it was generally accepted that actual communication of acceptance was essential for the creation of a binding obligation. The requirement that acceptance be communicated to an offeree is a rule supported by commercial expediency as it is of fundamental importance for an offeror to know whether his offer has been accepted or rejected.

The significance of the *Empirnall* decision lies in the fact that acceptance in terms of BCP1 was found to have taken place notwithstanding the refusal of Empirnall to execute the contract or expressly indicate its acceptance of the terms of the contract to the Architect.

The architects wished to prove that the form of contract agreed was the form BCP1; the significance of incorporation of the terms of BCP1 from the architects' point of view was that pursuant to Clause 26 of BCP1, the architects were granted an interest in the land to the extent of outstanding project management fees. Accordingly, if the architects succeeded, they would rank as a secured creditor in the event that the developer was wound up.

The decision of the Court of Appeal

The Court of Appeal noted that silent acceptance of an offer was generally insufficient to create a contract. However, the Court of Appeal held, reversing the first instance judgment, that silence, *when combined with other circumstances may be sufficient to indicate to an offeror that an offer has been accepted.*

The court acknowledged that the ultimate issue was whether a reasonable bystander would regard the conduct of the offeree, including his silence, as signalling to the offeror that his offer has been accepted. Matters which tended to suggest that a contract in terms of BCP1 existed were:

1. The protracted nature of the agreement which involved a substantial building project and large sums of money.
2. The contract was a "standard form" building contract.
3. Progress payments made were consistent with the terms of the printed contract.

These indicia of assent are of general application in the majority of building projects and may be relied upon in the event that a project is entered into on the basis of a standard form contract which has not been executed.

It is noteworthy that the Court of Appeal appeared to be of the view that the same result may well have been reached by estoppel had estoppel been pleaded before the trial judge.

Practical ramifications

The *Empirnall* decision highlights the critical importance of responding promptly and unequivocally to any correspondence in which an offer is made or a contract asserted. If no express refusal is communicated and the party to whom the offer has been made allows work to proceed, that party may be held to have accepted a contract by its conduct, if that conduct would reasonably lead an offeror to the conclusion that his offer has been accepted.

By following up their letter of October 3, 1983 with an assertion that work was being conducted on the understanding that the conditions of BCP1 were applicable, the architect won the "paper war" and was able to avail itself of the financial protection afforded to it pursuant to the contract which had not been signed by the developer.

- Mark Lamb, Solicitor, Westgarth Middletons, Solicitors, Sydney.