J.C.T. 1963 (July 1977 Revision) Clause 20(c) The Domestic Sub-contractor

by John A. Goodwin, Northern Area Manager, The Builders' Accident Insurance Ltd.

Two cases were heard recently on the vexed question whether under the pre- 1987 J.C.T. Forms the domestic sub-contractor was responsible for fire damage to the employers' existing structures. In England, the matter was considered by Garland J. in *Norwich City Council* v *Paul Clarke Harvey and Briggs Amasco* (1987) 30 BLR 75.

Norwich wished to extend their swimming complex and appointed Bush Builders (Norwich) Ltd. (Bush) as main Contractors. Bush subcontracted the roofing work to Briggs, who set fire to and damaged the works and the existing structure. The main contract between Norwich and Bush was J.C.T. 1963 with 1977 Revision, Local Authority version with Quantities and Clause 20(c) applied. Clause 20(c) indicated that the existing structures, their contents and the works were at the sole risk of the employers, Norwich, as regards damage by Fire. But Briggs were sub-contractors and not a party to the main contract. In such circumstances, many commentators and not a few lawyers have previously argued that the Clause 20(c) protection given to the main contractor could not extend to the sub-contractor.

The contract between main contractor and sub-contractor was based on the main contractor's purchase order which was said to be "subject to the observance of the main Contract and Conditions overleaf." The Conditions noted that "the acceptance of this order binds the sub-contractors and suppliers to the same terms and conditions as those of the main contract."
Scottish Special Housing Association v *Wimpey Construction* (1986) 34 BLR.1. had earlier held that the responsibility for fire damage remained with the employer under Clause 20(c) even if the fire damage was caused negligently by the main contractor. The question here was, did this protection from Clause 20(c) extend for the benefit of the sub-contractor?

After reviewing a large number of authorities, Garland J. was forced to the view that "the matter must be approached as one of principle (namely) is the duty owed by the sub-contractor to the employer qualified by the employer's contract with the main contractor (i.e.) by the employer propounding a scheme whereby they accepted the risk of fire to their property...."

The Judge was left "in no doubt that the duty in tort owed by the sub-contractor to the employer was so qualified."

Almost the self same facts were present in a case heard by Lord Clyde in the Outer House of the Scottish Court of Session in March, 1988. In *Aberdeen Harbour Board* v *Heating Enterprises (Aberdeen) Ltd.* 1988 SLT 762 the Pursuers owned a multi tenure property in Aberdeen. Their tenants employed, under the J.C.T. 1963 (1977 Revision) contract, a Contractor who subcontracted part of the work. The Defender sub-contractors were said to have negligently set fire to the building causing damage, not only to that part of the building occupied by the employers, but also to the remainder of the building. As in the Norwich case it was accepted by Lord Clyde almost without argument, that:

> "when the employer owns and occupies the whole premises the whole interest in the property will be his and the Clause 20(c) should operate without difficulty.... The loss would be that of the employer and, he having undertaken the whole risk, there is no liability on the contractor *or the sub-contractor* for their own negligence."

But the Defenders (the sub-contractors) wished to take the matter a stage further. They argued that the words "existing structures" for which the employer was responsible for fire damage, meant the whole building, including that part which the employer did not occupy and in which they had no interest. Clause 20(c) reads:

> "The existing structures together with the contents thereof owned by him or for which he is responsible .... shall be at the sole risk of the employer as regards damage by fire...."

Lord Clyde could not accept the Defender's submission. He referred to Clause 18(2) (the Clause providing the employer with an indemnity from the contractor in respect of damage to T.P. property) and indicated that as Clause 18(2) expressly referred to indemnification:

> "It (was) accordingly unlikely that if an indemnity was intended in relation to Clause 20(c) it was not expressly included."

Lord Clyde's view was that "Clause 20(c) (was) not requiring an insurance against the liabilities of the contractor or subcontractor to third parties arising out of their negligence but an indemnity for the employer against *his* loss in the event of any of the specified risks occurring whether or not caused negligently."

If we examine Clause 20(c) the requirement that the property be at the sole risk of the employer is qualified, in that the property must be "owned by him or for which he is responsible."

Few would argue with Lord Clyde's decision.

The case is of interest, however, because it supports the view of Garland J. in the *Norwich* case that the 20(c) protection does extend to the sub-contractor despite the lack of privity between the employer and sub-contractor. As in the *Norwich* case the terms of the sub-contract were such that the sub-contractor:

> "shall be deemed to have knowledge of all the provisions of the main contract, other than detailed prices"

and that the tender document contained the following condition:

> "The main contractor or the building owner shall bear the risk of loss or damage by fire as defined under Clause 20 of the Standard Form."

Paragraph 8.3 of the tender provided that the applicable clause of the Standard Form was 20(c).

No comment is made in Lord Clyde's opinion upon the point save the plain acceptance in the passage earlier cited that 20(c) relieved both the main and sub-contractors of liability for fire damage to the existing structures.

These decisions have come just a little late for some, for, since January 1987 the J.C.T. Forms of Contract were amended and the "sole risk" element in Clause 20(c) was removed. Now, Clause 22C of the 1980 Form with the 1986 Amendments, requires the employer to insure the existing structures, their contents and the works for (inter alia) loss or damage by fire. The Policy has to be in the joint names of the employer and the main contractor and there must be a waiver of subrogation as far as damage to the works is concerned for the benefit of nominated and domestic sub-contractors. Nominated sub-contractors are of course those chosen by the employer or their advisers. Domestic sub-contractors are chosen by the main contractor. Unfortunately, the benefit of the Joint Names Policy covering the existing structures and contents, Clause 22C 1, is extended to protect only a nominated sub-contractor and not a domestic sub-contractor. This leaves the domestic sub-contractor very exposed. The reports of either case do not indicate whether the sub-contractors were nominated or domestic. The likelihood is that they were both domestic sub-contractors and if so, under the revised arrangements the result would have been the reverse in both cases with the sub-contractors being responsible for the damage caused by the negligence of their employee.

The Joint Contractors Tribunal broadly represents public sector employees: architects, contractors and sub-contractors. There is a standing drafting committee responsible for the wording of the contractors. This Committee's draft amendments are circulated to members and are not adopted unless all members are unanimous.

Whilst appreciating these procedural problems of the Joint Contractors Tribunal in

redrafting the Insurance Clauses, it is unfortunate that sub-contractors have lost the protection they previously enjoyed. Now they must so arrange their Public Liability insurances, such that, when they are acting as domestic sub-contractors, their limits of indemnity are sufficient to provide for the total loss of the existing structure upon which they are working. Specialist roofing, plumbing and heating sub-contractors beware!

ADDENDUM

Norwich City Council's appeal was heard in December, 1988. The full report is not available at the time of writing, but a summary of the Judgement indicates that the appellant employer's appeal was dismissed. May L.J. referring to *Welsh Health Technical Services* v *Haden Young* (1987, unreported) said that the trial judge there concluded that in similar circumstances:

> "the situation comprising the general contractual arrangements between the parties was a consideration which ought to negative, or to reduce or limit the scope of the duty.... or the damages to which the breach of it may give rise".

McPherson J. in *Welsh Health Technical Services* had said:

> "in the light of all that (the main contractor) put forward and insisted upon by way of Conditions of Tender and in view of the whole "contractual setting" it would indeed be right to negative their prima facie right to damages. Such matters being ideally "considerations" within the second part of Lord Wilberforce's words."

May L.J. concluded in *Norwich*:

> "that the overall burden of the authorities supported the view taken by the judge and accordingly it was not necessary to consider the question of the insurance position and subrogation rights as between the parties and their respective insurers."

The Appeal Court's decision was unanimous.

While there had been cases heard by Official Referees and other first instance courts indicating that the 20(c) protection did extend to sub-contractors the *Norwich* case is the first, to this writer's knowledge, that has gone as far as the Court of Appeal. It is a great pity that the very clear position that did prevail has now seen the rather dramatic turnround as a result of the J.C.T. 1986 changes. There will almost certainly be a degree of confusion among sub-contractors who will be nominated for one contract and domestic for another. Maybe those involved in the drafting can persuade the J.C.T. members to agree to the benefit of the Joint Names Policy being extended to domestic sub-contractors. Perhaps the recent Court of Appeal decision in *Norwich* will provide them with the strong argument they were previously seeking.