

CA on appeal from QBD, Official Referee's Business (HHJ Hicks) before Nourse LJ; Roch LJ; Phillips LJ. 9th July, 1997

LORD JUSTICE PHILLIPS:

1. This appeal is brought pursuant to Section 2(3) of the Arbitration Act 1979. It requires the Court to construe two standard form building contracts in order to determine the effect of an award in an arbitration between employer and contractor on the liability of the contractor to a nominated sub-contractor.
2. The Appellant ("the Main Contractor") was the main contractor for the construction between 1987 and 1988 of a shopping centre at Kingsland High Street, Dalston, London under the 1963 edition of the JCT Standard Form of Building Contract at a contract price of over £7.6 million. The Employer under that contract was College Estates Limited ("the Employer"). The Respondent ("the Sub-Contractor") was the nominated mechanical and electrical services Sub-Contractor under the so-called "Green Form" which is designed for use where a sub-contractor is nominated by the architect under the JCT Form.
3. After completion of the contract work disputes arose under both the main contract and the sub-contract. An arbitration took place under the main contract, to which the nominal parties were the Employer and the Main Contractor. The Employer took no part in the Arbitration, but both the Main Contractor and the Sub-Contractor were separately represented at it. This dual representation was because some of the claims advanced by the Main Contractor against the Employer mirrored claims made by the Sub-Contractor against the Main Contractor in a separate arbitration pending under the sub-contract, so that the Sub-Contractor, rather than the Main Contractor, was primarily concerned that they should be made good.
4. The Arbitrator delivered his award on the 10th March 1993. Having heard evidence, he found that events that were not the responsibility of the Main Contractor or the Sub-Contractor had "caused delay, disruption, frustration and uneconomic working so as to create a totally chaotic contract". He found that itemised claims amounting to nearly £5 million were proved. These included monies claimed by the Sub-Contractor amounting to £325,842 in respect of measured works and £779,625 in respect of loss and expense. These sums formed part of the award made by the Arbitrator in favour of the Main Contractor. Had the Employer honoured the award, the Main Contractor would have passed on these two sums to the Sub-Contractor, less 2.5% which the sub-contract permitted the Contractor to retain. Unhappily the Employer went into liquidation without honouring the award. In these circumstances, the Sub-Contractor claimed to be entitled, without further proof, to recover the amounts in question from the Main Contractor in the arbitration under the sub-contract.
5. The Main Contractor challenged that claim. It became apparent that there was an issue of law as to whether the award of the Arbitrator had binding effect in the arbitration under the sub-contract. That issue was referred to the High Court pursuant to Section 2(1) of the Arbitration Act 1979. On the 16th June 1995 His Honour Judge Hicks, Q.C., decided it in favour of the Sub-Contractor. Against his decision the Main Contractor now appeals.
6. Judge Hicks' decision was made on the basis of a Statement of Agreed Facts which I shall annexe to this judgment.

The Contractual Scheme

7. Under the JCT Form the main contractor agrees to carry out contract works, which include works which are to be sub-contracted to sub-contractors nominated by the architect. While the main contractor is contractually liable to perform these works, and entitled to be paid for them, the contractual scheme sets out to insulate him from responsibility for them in practice. This is achieved by provisions in the main contract and the sub-contract which make the rights and duties of the main contractor and the sub-contractor back to back in relation to the sub-contract works and which place the sub-contractor under the instructions of the Architect rather than the main contractor.
8. In *Northern Region Health Authority v Derek Crouch Construction Limited* [1984] 1 Q.B.644 Dunn L.J. gave the following helpful summary of the contractual scheme:
9. The decision is made by the architect: the obligation of the contractor is confined to transmitting information from the sub-contractor to the architect, and carrying out the architect's decisions vis-à-vis the sub-contractor by delivering instructions or variations (clause 7); granting extensions of time (clause 8), and making payments under certificates (clause 11). So far as those clauses are concerned, the contractor acts as no more than a conduit pipe between the architect and the sub-contractor, and exercises no independent judgment of his own.
10. The reasons for these provisions arise out of the unique contractual relationships developed over many years by the J.C.T. and their predecessors in the standard forms of building contracts and sub-contracts. The scheme enables the building owner to deal with one main contractor instead of making separate contracts with specialists. But he has the right to decide which specialist the main contractor is to engage, and retains control through the architect over the amount paid to the specialist for his work. The main contractor, having on instructions entered into a sub-contract with a nominated specialist, is required to pay the sums identified as having been included in the certificates issued to him by the architect in respect of the specialist's work. The main contractor is protected against claims for liquidated damages by the owner if the contract work as a whole is delayed by the specialist sub-contractor's failures. The architect is given power to control variations, the granting of extensions of time, and certificates of payment of the sub-contract work. The main contractor has no power to do any of these things.
11. So far as payment is concerned, the architect's certificate that payment is due in respect of sub-contract works is a trigger both for the main contractor's right to payment from the employer in accordance with the certificate and

for the sub-contractor's right to be paid the same sum, less 2.5%, by the main contractor. This appeal raises the question of whether, and in what circumstances, an award in an arbitration between the employer and the main contractor under the main contract can also render the main contractor liable to make a payment to a sub-contractor.

12. Where the sub-contractor wishes to challenge a decision taken by the architect, the main contractor may be indifferent as to the resolution of the dispute. The sub-contract makes provisions, however, designed to ensure that the challenge can be mounted by a claim brought in the name of the main contractor against the employer pursuant to the arbitration clause in the main contract.
13. The issue raised on this appeal requires consideration of the effect of the clauses in the main contract and the sub-contract that deal with the right to payment and with the resolution of disputes by arbitration. I propose to compare the clauses in the two contracts to see how they inter-relate.

Variations

The Main Contract

14. Clause 11 of the main contract provides for variations. By sub-clause (1) the Architect may issue instructions for variations, by sub-clause (4) all such variations are to be valued and by sub-clause (5) effect is to be given to such valuations in Interim Certificates and by adjustment of the Contract Sum. By sub-clause (6): *"If upon written application being made to him by the Contractor, the Architect is of the opinion that a variation.... has involved the Contractor in direct loss and/or expense for which he would not be reimbursed by payment in respect of a valuation made in accordance with the rules contained in sub-clause (4) of this Condition, and if the said application is made within a reasonable time of the loss or expense being incurred, then the Architect shall either himself ascertain or shall instruct the Quantity Surveyor to ascertain the amount of such loss and/or expense. Any amount from time to time so ascertained shall be added to the Contract Sum, and if an Interim Certificate is issued after the date of ascertainment any such amount shall be added to the amount which would otherwise be stated as due in such Certificate."*

The Sub-Contract

15. In the sub-contract it is clauses 7 and 10 which deal with variations.
Sub-clause (1) requires the Sub-Contractor to comply with Architect's instructions relating to the sub-contract works of which the Main Contractor issues copies to the Sub-Contractor. By sub-clause (2) the Sub-Contractor may require the Main Contractor to request the Architect to specify which provision of the main contract empowers any such instruction. After specifying the effect of subsequent compliance by the Sub-Contractor with such an instruction the sub-clause continues:
PROVIDED always that if before such compliance the Sub-Contractor shall have made a written request to the Contractor to request the Employer to concur in the appointment of an arbitrator under the Main Contract in order that it may be decided whether the provision specified by the Architect empowers the issue of the said instruction, then, subject to the Sub-Contractor giving the Contractor such indemnity and security as the Contractor may reasonably require, the Contractor shall allow the Sub-Contractor to use the Contractor's name and if necessary will join with the Sub-Contractor in arbitration proceedings by the Sub-Contractor to decide the matter as aforesaid.
The proviso is one of a number of clauses which make provision for what has been referred to as a "name-borrowing arbitration".
16. Clause 10 deals in sub-clauses (a) to (c) with the valuation of variations. Sub-clause (d) reads:
(d) If upon written application being made to him by the Contractor on behalf of the Sub-Contractor the Architect for the time being under the Main Contract is of the opinion that a variation.... has involved the Sub-Contractor in direct loss and/or expense for which he would not be reimbursed by payment in respect of a valuation made in accordance with sub-clause (b) of this Clause and if the application is made within a reasonable time of the loss or expense having been incurred then the Contractor shall request the Architect either himself to ascertain or to instruct the Quantity Surveyor to ascertain the amount of such loss or expense. Any amount so ascertained shall be added to the Sub-Contract Sum and if a certificate under Clause 11(a) hereof is issued after the date of ascertainment the Contractor shall apply to the Architect for any such amount to be added to the amount which would otherwise be included in respect of the Sub-Contract Works in such certificate.
17. There is no name-borrowing clause, nor any other express provision for challenge by the Sub-Contractor of an adverse decision by the Architect.

Extensions of Time

The Main Contract

18. Clause 23 of the main contract lists causes of delay which entitle the Main Contractor to apply to the Architect for an extension of the completion date.

The Sub Contract

19. Clause 8(b) of the sub-contract deals with the same topic:
"Upon it becoming reasonably apparent that the progress of the Sub-Contract Works is delayed, the Sub-Contractor shall forthwith give written notice of the cause of the delay in the progress or completion of the Sub-Contract Works or any section thereof to the Contractor, who shall inform the Architect thereof and of any representations made to him by the Sub-Contractor as to such cause as aforesaid."

If on receipt of such information and representations as aforesaid the Architect is of the opinion that the completion of the Sub-Contract Works is likely to be or has been delayed beyond the [relevant period]

- (i) by reason of any of the matter specified in Clause 7(1) of this Sub-Contract or by any act or omission of the Contractor, his sub-contractors his or their servants or agents; or*
- (ii) for any reason (except delay on the part of the Sub-Contractor) for which the Contractor could obtain an extension of time for completion under the Main Contract; then the Contractor shall, but not without the written consent of the Architect, grant a fair and reasonable extension of the said period or periods for completion of the Sub-Contract Works or each section thereof (as the case may require) and such extended period or periods shall be the period or periods for completion of the same respectively and this clause shall be read and construed accordingly.*

PROVIDED always that if the Sub-Contractor shall feel aggrieved by a failure of the Architect to give his written consent to the Contractor granting an extension of the said period or periods for completion of the Sub-Contract Works, then, subject to the Sub-Contractor giving to the Contractor such indemnity and security as the Contractor may reasonably require, the Contractor shall allow the Sub-Contractor to use the Contractor's name and if necessary will join with the Sub-Contractor as plaintiff in any arbitration proceedings by the Sub-Contractor in respect of the said complaint of the Sub-Contractor.

Once again provision is made for a name-borrowing arbitration.

Loss and expense caused by disturbance of the works

The Main Contract

- 20. Clause 24 of the main contract provides for applications by the contractor in respect of direct loss or expense, for which he would not be reimbursed under any other provision, caused by disturbance of the regular progress of the works from specified causes. The Architect is required, in similar terms to those of Clause 11(6), to ascertain the amount of the loss or expense, which is then to be added to the Contract Sum and to the next Interim Certificate.

The Sub-Contract

- 21. Clause 8(c) of the sub-contract makes provision for claims for loss and expense caused by disturbance to regular progress. Paragraph (i) reads as follows:
 - (i) The Contractor shall subject to Clause 12 of this Sub-Contract enforce and make available to the Sub-Contractor the benefit of any right under the Main Contract to claim for loss and expense caused by disturbance to regular progress of the Main Contract Works and the Sub-Contractor shall comply with all requirements reasonably necessary to enable the Contractor to obtain the aforesaid benefit.*
- 22. There is no provision for a name-borrowing arbitration in relation to this topic. The wording of the sub-clause echoes that of Clause 12, to which I shall come.
- 23. It is pertinent to note the next two sub-clauses which provide for liabilities of the Main Contractor and the Sub-Contractor in relation to losses for which one or other is responsible:
 - (ii) If the regular progress of the Sub-Contract Works is materially affected by any act, omission or default of the Contractor, his servants or agents, or any sub-contractor employed on the Works the Sub-Contractor shall as soon as such material effect becomes apparent give written notice thereof to the Contractor and the agreed amount of any direct loss or expense thereby caused to the Sub-Contractor shall be added to the Sub-Contract Sum and regarded as a debt due to the Sub-Contractor.*
 - (iii) If the regular progress of the Main Contract Works (including any part thereof which is sub-contracted) is materially affected by any act, omission or default of the Sub-Contractor, his servants or agents, or any sub-contractor employed by him on the Sub-Contract Works, the Contractor shall as soon as such material effect becomes apparent give written notice thereof to the Sub-Contractor and the agreed amount of any direct loss or expense thereby caused to the Contractor (whether suffered or incurred by the Contractor or by sub-contractors employed by the Contractor on the Main Contract Works from whom claims under similar provisions in the relevant sub-contracts have been agreed by the Contractor, sub-contractor and the Sub-Contractor named in these conditions) shall be regarded as a debt due to the Contractor and deducted from the Sub-Contract Sum.*

Certification and payment

The Main Contract

- 24. Clause 30 of the main contract concerns certificates and payments. By sub-clause (1) the Architect is to issue Interim Certificates at specified periods and the Contractor is entitled to payment within 14 days of presentation. Sub-clause (6) provides for the issue by the Architect of a Final Certificate stating (inter alia) the adjusted Contract Sum and sub-clause (7) deals with its evidential effect, as follows:
 - 7.(a) *Except as provided in paragraphs (b) and (c) of this sub-clause (and save in respect of fraud), the Final Certificate shall have effect in any proceedings arising out of or in connection with this Contract (whether by arbitration under clause 35 of these Conditions or otherwise) as*
 - (i) conclusive evidence that where the quality of materials or the standards of workmanship are to be to the reasonable satisfaction of the Architect the same are to such satisfaction, and*

- (ii) *conclusive evidence that any necessary effect has been given to all the terms of this contract which require an adjustment to be made of the Contract Sum save where there has been any accidental inclusion or exclusion of any work, materials, goods or figure in any computation or any arithmetical error in any computation, in which event the Final Certificate shall have effect as conclusive evidence as to all other computations.*
- (b) *If any arbitration or other proceedings have been commenced by either party before the Final Certificate has been issued the Final Certificate shall have effect as conclusive evidence [as to the Architect's satisfaction with materials and workmanship and that all proper adjustments of the Contract Sum have been made] after either*
 - (iii) *such proceedings have been concluded, whereupon the Final Certificate shall be subject to the terms of any award or judgment in or settlement of such proceedings, or*
 - (iv) *a period of 12 months during which neither party has taken any further step in such proceedings, whereupon the Final Certificate shall be subject to any terms agreed in partial settlement,**whichever shall be the earlier.*
- (c) *If any arbitration or other proceedings have been commenced by either party within 14 days after the Final Certificate has been issued, the Final Certificate shall have effect as conclusive evidence as provided in paragraph (a) of this sub-clause save only in respect of all matters to which those proceedings relate.*

The Sub-Contract

- 25. Clause 11 of the sub-contract concerns payments. Sub-clause (a) provides for the Main Contractor to make applications under the main contract for interim certificates and for the inclusion in such certificates of amounts representing the value from time to time of the sub-contract works. Sub-clause (b) requires the Main Contractor within 14 days of receipt of a certificate to pay to the Sub-Contractor the certified value of the sub-contract works less retention money, 2.5% cash discount and sums already paid.
- 26. Clause 11(d) is a name-borrowing clause in relation to certification:
 - (d) *If the Sub-Contractor shall feel aggrieved by the amount certified by the Architect or by his failure to certify, then, subject to the Sub-Contractor giving to the Contractor such indemnity and security as the Contractor shall reasonably require, the Contractor shall allow the Sub-Contractor to use the Contractor's name and if necessary will join with the Sub-Contractor as claimant in any arbitration proceedings by the Sub-Contractor in respect of the said matters complained of by the Sub-Contractor.*

Arbitration

The Main Contract

- 27. Clause 35 of the main contract is the arbitration clause. Sub-clause (1) provides for the reference to arbitration of any: *"dispute or difference.... between the Employer or the Architect on his behalf and the Contractor.... as to the construction of this Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this Contract to the discretion of the Architect or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled or the [final] measurement and valuation [of the Works] or....)"*
- 28. By sub-clauses (3) and (4):
 - (3) *Subject to the provisions of Clauses 2(2), 30(7) and 31D of these Conditions, the Arbitrator shall, without prejudice to the generality of his powers, have power to direct such measurements and/or valuations as may in his opinion be desirable in order to determine the rights of the parties and to ascertain and award any sum which ought to have been the subject of or included in any certificate and to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given.*
 - (4) *The award of such Arbitrator shall be final and binding on the parties.*
- 29. It is common ground that, in addition to his duty to lend his name to the Sub-Contractor for name-borrowing arbitrations in accordance with the specific provisions of the sub-contract, the Main Contractor can also be obliged to pursue an arbitration for the benefit of the Sub-Contractor pursuant to clause 8(c) and clause 12 of the sub-contract. The latter clause provides:
 - 12. *The Contractor will so far as he lawfully can at the request and cost of the Sub-Contractor obtain for him any right or benefits of the Main Contract so far as the same are applicable to the Sub-Contract Works but not further or otherwise.*

The Sub-Contract

- 30. Clause 24 of the sub-contract is the arbitration clause. It provides:
 - In the event of any dispute or difference between the Contractor and the Sub-Contractor whether arising during the execution or after the completion or abandonment of the Sub-Contract Works or after the determination of the employment of the Sub-Contractor under this Sub-Contract (whether by breach or in any other manner), in regard to any matter or thing of whatsoever nature arising out of this Sub-Contract or in connection therewith, then either party shall give to the other notice in writing of such dispute or difference and such dispute or difference shall be and is hereby referred to the arbitration of such person as the parties hereto may agree to appoint as Arbitrator or failing*

such agreement as may be appointed on the request of either party by the President for the time being of the Royal Institution of Chartered Surveyors provided that if the dispute or difference between the Contractor and Sub-Contractor is substantially the same as a matter which is a dispute or difference between the Contractor and Employer under the Main Contract the Contractor and Sub-Contractor hereby agree that such dispute or difference shall be referred to an Arbitrator appointed or to be appointed pursuant to the terms of the Main Contract who shall have power to make such directions and all necessary awards in the same way as if the procedure in the High Court as to joining one or more defendants or joining co-defendants or third parties was available to the parties and to him and in any case the Award of such Arbitrator shall be final and binding upon the parties.

Provided that such Arbitrator shall not without the written consent of the Architect or the Contractor and in any such case of the Sub-Contractor enter on the arbitration until after the completion or abandonment of the Main Contract Works, except to arbitrate upon the question whether or not a certificate has been improperly withheld or is not in accordance with the terms of the Main Contract, or in respect of matters for which a notice of arbitration under Clause 13B(1)(a)(i) of this Sub-Contract has been given, or on any dispute or difference under Clause 8 of the Sub-Contract Conditions.

And Provided further that in any such arbitration as is provided for in this clause any decision of the Architect which is final and binding on the Contractor under the Main Contract shall also be and be deemed to be final and binding between and upon the Contractor and the Sub-Contractor.

The Main Contractor's Case

31. It is the Main Contractor's case that it is only liable in debt to make payments to the Sub-Contractor where the sub-contract expressly so provides, namely:
- (1) pursuant to the issue of a certificate by the architect - Clause 11;
 - (2) where the Main Contractor's fault has impeded the regular progress of the sub-contract works - Clause 8(c)(ii)
 - (3) pursuant to Clause 8(c)(1) and Clause 12.
32. These last two clauses only require the Main Contractor to account to the Sub-Contractor for benefits obtained from the Employer that are applicable to the sub-contract works. Benefits include payments due, but there is no obligation to account for these unless and until they have been obtained from the Employer. Had the Main Contractor been able to enforce the award obtained against the Employer, it would have been bound to account to the Sub-Contractor for that proportion that related to the claims advanced on behalf of the Sub-Contractor. As it has proved impossible to enforce the award, nothing is due to the Sub-Contractor.

The Judge's Reasoning

33. The Judge first had to resolve an issue as to the nature of the Arbitrator's award. Counsel for the Main Contractor argued that the Arbitrator had made an award of damages. The Judge rejected this contention. He held:

....although it is textually accurate to say that the arbitrator does not express himself in his award as making it in exercise of his power to open up and revise, it is in my view plain that that is what he was doing. The claims before him were pleaded, opened and proved in a form and context which were directed to that end and the calculations put before him and his acceptance, rejection or adjustment of them were framed by reference to those which had been, or should have been, carried out by the Architect in the exercise of his functions as such under the Main Contract, and to the correction of the Architect's acts or omissions in that regard. The Main Contractor, indeed, presumably still relies on the award as having that effect in relation to the claims advanced for its own benefit, and I can see no ground for distinguishing in that regard between those claims and the ones advanced for the benefit of the Sub-Contractor (as of other sub-contractors).

I therefore conclude that the effect of the award, in relation to the claims advanced in the main contract arbitration for the benefit of the Sub-Contractor, was to revise, pro tanto, the certificates and other decisions issued and made by the Architect in the administration of the Main Contract.

34. This part of the Judge's reasoning has not been challenged by the Main Contractor. The Judge then went on to consider whether the Arbitrator's decision was binding in the arbitration under the sub-contract. He held:

There remains only the question what effect that has in the sub-contract arbitration. The proviso to clause 24 of the Sub-Contract quoted in paragraph 27 above makes decisions of the Architect which are final and binding on the Main Contractor under the Main Contract final and binding in sub-contract arbitrations, but that does not by any means resolve the issue. On the one hand it does not expressly extend to decisions of a main contract arbitrator and although clause 30(7)(b)(i) of the Main Contract conditions, quoted in paragraph 16 above, provides that a final certificate shall be "subject to the terms of any award", which could perhaps imply that it is the final certificate as amended by the award which is binding under clause 24, there is no such provision as to other decisions of the Architect, which is what we are concerned with here. On the other hand the conclusions that Architect's decisions which have been revised in a main contract arbitration by the joint efforts of the Main Contractor and Sub-Contractor remain binding as between them in their unrevised form in a sub-contract arbitration in which there is no jurisdiction to revise them defies reason. In my view this proviso to clause 24 should be construed as being confined to the effect of architect's decisions which are and remain final and binding under the Main Contract because they have not been opened up or revised. The position in regard to those which have been revised would then be a matter to be deduced from the contractual scheme as a whole. There is no difficulty in concluding, especially having regard to clause 12 of the Sub-Contract, the name-borrowing provisions and the fact that it is possible in a main contract arbitration but not

in a sub-contract arbitration to revise architect's decisions, that such revisions are binding under the Sub-Contract as well as the Main Contract and in sub-contract arbitrations as well as in main contract arbitrations.

35. He went on to hold that, as Counsel for the Main Contractor had rightly conceded that, had the award been honoured, the Main Contractor would have been bound to pay the Sub-Contractor the latter's share, it must follow that the Contractor was under the same liability even though the award had not been honoured.
36. He held that the obligation to make the payment could not be conditional upon the Contractor first being paid by the Employee: *"....there is no such condition and the Main Contractor takes the risk of the Employer's insolvency. I can see no reason for distinguishing for these purposes between liabilities arising from arbitration and those arising from certificates; in the former case as well as the latter those liabilities are therefore contractual and unconditional."*

The Scheme Revisited

37. Mr Ramsey Q.C., for the Main Contractor, contended that the contractual scheme is designed to protect the Main Contractor from exposure to the Sub-Contractor in the event of the Employer's insolvency. There is a limited exposure in as much as, where an individual certificate is issued, the Employer and the Contractor become independently obliged to pay the sum certified in respect of the sub-contract works covered by the certificate within 14 days. If at that point the Employer becomes insolvent, the Contractor remains liable. Where, however, there is a dispute that has to be submitted to arbitration, the Sub-Contractor's claim to enjoy the benefit of the arbitration lies exclusively under Clause 12. It is only if the Main Contractor succeeds in enforcing the award that he will become contractually obliged to account to the Sub-Contractor for the benefit thus obtained.
38. While I agree that, if Mr Ramsey's contentions as to the true construction of the relevant provisions are correct, they provide a degree of protection to the Contractor against the Employer's insolvency, I am unable to detect any policy that the Contractor should have such protection when the scheme is considered as a whole. Where one has a chain of contractual rights and liabilities, the party in the middle is normally exposed to the risk of insolvency on the part of one of the other parties. If the scheme set out to avoid that consequence, I would expect it to do so by clear and express provision. Mr Ramsey accepts the degree of exposure that results from the Main Contractor's obligation to honour certificates. That, of itself could be a considerable exposure, particularly, as Mr Fernyhough, Q.C., for the Sub-Contractor pointed out, because more than a single certificate might be involved. But the Main Contractor's exposure under the express terms of the Sub-Contract is greater than that. Mr Ramsey accepted, and I think rightly, that the Main Contractor can become independently liable to the Sub-Contractor under Clause 8(c)(ii) in respect of matters in respect of which a claim will lie by the Main Contractor against the Employer under Clause 8(c)(i). Indeed, Mr Ramsey submits that this case is an example of a such a situation. Thus, if Mr Ramsey is correct in contending that the Award has not itself exposed the Main Contractor to liability to the Sub-Contractor, it remains open to the Sub-Contractor to make a claim in the sub-contract arbitration in relation to the subject matter of the award, notwithstanding the Employer's insolvency.

The Sub-Contractor's Claim

39. The Points of Claim in the sub-contract arbitration were initially pleaded before the arbitration between the Main Contractor and the Employer was held. The claims pleaded by the Sub-Contractor were for direct loss and expense consequent upon disturbance of the works. These claims were advanced under Clause 8 of the sub-contract, or alternatively as claims for damages for breach of an implied term of the contract. The arbitration under the Main Contract then took place. In that arbitration the claims advanced by, or in the name of, the Main Contractor included the sums claimed against the Main Contractor by the Sub-Contractor. As the Judge found, the basis upon which these sums were claimed in the arbitration was that the sums in question should properly have been ascertained as due by the architect and included in certificates issued by the architect. Once the award was published, the Sub-Contractor amended its claim in the arbitration under the sub-contract to add an alternative claim to be entitled to be paid the sums awarded in the arbitration in respect of the sub-contract works. It is that entitlement which is in issue in this appeal.

The Basis of the Award

40. Under the main contract, if one ignores the provisions for arbitration, the sole basis upon which the Main Contractor is entitled to be paid by the Employer is certification by the architect. The issue of a certificate, whether interim or final, is a condition precedent to the right to payment. Where the Main Contractor alleges that loss and expense is caused by variations, or by disturbance to the progress of the work, the architect has first to ascertain the amount, if any, of loss of expense attributable to such cause and then to issue a certificate to incorporate such amount. Where, in an arbitration, the Main Contractor alleges that the architect has not performed these obligations, the complaint is, if properly analysed, both of a failure to ascertain and of a failure to certify.
41. The arbitration clause in the Main Contract might simply have empowered the arbitrator to determine the sum that should properly have been ascertained as due, leaving it to the architect to make a consequent amendment to the certificate, so that the payment mechanism remained undisturbed. That is not, however, the approach that has been adopted. The arbitrator is empowered to: *"award any sum which ought to have been the subject of or included in any certificate and to open up, review and revise any certificate, opinion, decision, requirement or notice..."*
42. Thus the Main Contract provides for the arbitrator's award to replace the architect's certificate as the basis of the Contractor's right to be paid.

43. In the present case that was the nature and effect of the arbitrator's award. In awarding the sums in respect of the sub-contract works, he was reviewing the certificates issued and the decisions made by the architect and awarding the sums which should have been the subject of certificates.

The effect of the award on the rights under the Sub-Contract

44. Unlike the Main Contract, the Sub-Contract makes no provision for over-riding the decision or certificate of the architect. The arbitration clause provides that: *"any decision of the Architect which is final and binding on the Contractor under the Main Contract shall also be deemed to be final and binding between and upon the Contractor and the Sub-Contractor"*.
45. No express provision is made as to the effect on the rights of the parties of an award of the arbitrator under the Main Contract which reviews and revises the architect's decision. The respective Counsel agree that this must affect the rights of the parties to the sub-contract, but disagree as to how it does so. Mr Ramsey contends that it does so only to the extent that the Main Contractor manages to enforce the award, whereupon he will be obliged under Clause 12 to pass on to the Sub-Contractor the recovery made in respect of the sub-contract works. Mr Fernyhough argues that it is implicit that where, in an arbitration under the Main Contract, the arbitrator makes an award of a sum which should have been certified as due in respect of the sub-contract works, that sum falls to be treated in the sub-contract as a sum duly certified, so that, in that respect, the award is binding in the sub-contract.
46. I am in no doubt that Mr Fernyhough's submission is to be preferred. In the first place I do not consider that Clause 12 of the Sub-Contract is appropriately worded to produce the fundamental effect on the contractual scheme for which Mr Ramsey contends. **"Any right or benefit of the Main Contract... attributable to the Sub-Contract Works"** is a general phrase capable of covering a wide variety of matters. The only way that rights under the Main Contract enure to the benefit of the Sub-Contractor is by rendering the Main Contractor liable to make payments to the Sub-Contractor. This is normally achieved through the mechanism of certification. In my judgment, the clause obliges the Main Contractor, if so requested, to take appropriate steps to ensure that the contractual provisions that govern the amount to be certified for the sub-contract works are operated to the benefit of the Sub-Contractor. Where these result in the issue of a certificate, the benefit of the Main Contract is obtained for the Sub-Contractor when the certificate is issued. If it is necessary to resort to arbitration, the benefit is obtained when the award is made. In neither case can I see any warrant for suggesting that the *"right or benefit"* referred to in Clause 12 is not the right to payment, but the payment itself.
47. In the second place, I agree with Mr Fernyhough that it would be absurd for the contract by Clause 11 to make provision for the Sub-Contractor to borrow the Contractor's name in order to challenge by arbitration the amount certified by the architect or the failure by the architect to certify, if the decision of the arbitrator were not to have a direct effect on the Sub-Contractor's rights.
48. In *Northern R.H.A. v. Crouch Construction Ltd.* [1984] 1 Q.B.644 at p. 670 Sir John Donaldson M.R. said this: *"Arbitration is usually no more and no less than litigation in the private sector. The arbitrator is called upon to find the facts, apply the law and grant relief to one or other or both of the parties. Under a J.C.T. arbitration clause (clause 35), the arbitrator has these powers but he also has power to "open up, review and revise any certificate, opinion, decision, requirement or notice." This goes far further than merely entitling him to treat the arbitrator's certificates, opinions, decisions, requirements and notices as inconclusive in determining the rights of the parties. It enables, and in appropriate cases requires, him to vary them and so create new rights, obligations and liabilities in the parties"*.
49. In my judgment, the unique scheme of the JCT forms of Contract and Sub-Contract has the result that an award of an arbitrator under the Main Contract directly affects the rights and liabilities of the parties to the Sub-Contract. Mr Ramsey complains that this puts the Contractor in the invidious position of having to urge the merits of a claim in a Main Contract arbitration which will, should the Employer become insolvent, be in conflict with his own interests. It seems to me that the risk of such a conflict of interest is inherent in the scheme.
50. For the reasons that I have given, I would dismiss this appeal.

LORD JUSTICE ROCH:

51. I agree.

LORD JUSTICE NOURSE:

52. I also agree.

Order: appeal dismissed with costs; leave to appeal to the House of Lords refused.

MR V RAMSEY QC and MR J LEE (instructed by Messrs Freshfields,) appeared on behalf of the Appellant Defendant.
MR R FERNYHOUGH QC AND MR R J EVANS (instructed by Messrs Watson Burton) appeared on behalf of the Respondent Plaintiff.