IN THE SUPREME COURT OF QUEENSLAND No. 186 of 1984

BEFORE:

The Chief Justice (Sir Walter Campbell)

Mr. Justice Sheahan

Mr. Justice McPherson

BRISBANE, 10 OCTOBER 1984

BETWEEN:

GROUTCO (AUSTRALIA) PTY. LTD. (Plaintiff) First Respondent

- and -

THIESS CONTRACTORS PTY. LIMITED (First Defendant) Appellant

- and -

GLADSTONE AREA WATER BOARD (Second Defendant) Second Respondent

JUDGMENT

THE CHIEF JUSTICE: In this matter I would allow the appeal, set aside the order appealed from, and substitute therefor an order that the first respondent's claim of charge be cancelled. I would further order that the respondent should pay the appellant's costs of the hearing below and of this appeal to be taxed. I publish my reasons.

MR. JUSTICE SHEAHAN: I agree with the reasons proposed and published by the Chief Justice and with the order proposed.

MR. JUSTICE McPHERSON: I also agree with the order proposed. I publish by reasons.

THE CHIEF JUSTICE: The order of the court is as I have just proposed.

IN THE SUPREME COURT OF QUEENSLAND WRIT NO. 186 of 1984

GROUTCO (AUSTRALIA) PTY. LTD. (Plaintiff) First Respondent

and

THIESS CONTRACTORS PTY. LIMITED (First Defendant) Appellant

and

GLADSTONE AREA WATER BOARD (Second Defendant) Second Respondent

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THE CHIEF JUSTICE

SHEAHAN J.

McPHERSON J.

Judgments delivered by The Chief Justice and McPherson J. on 10th October, 1984. Sheahan J. concurring.

"Appeal allowed, set aside the order appealed from, and substitute therefor an order that the first respondent's claim of charge be cancelled. Further order that the

respondent should pay the appellant's costs of the hearing below and of this appeal to be taxed."

IN THE SUPREME COURT OF QUEENSLAND No. 186 of 1984

FULL COURT

BETWEEN:

GROUTCO (AUSTRALIA) PTY. LTD (Plaintiff) First Respondent

AND:

THIESS CONTRACTORS PTY. LIMITED (First Defendant) Appellant

AND:

GLADSTONE AREA WATER BOARD (Second Defendant) Second Respondent

JUDGMENT - THE CHIEF JUSTICE

Delivered the day of 1984.

This appeal raises a question of the construction of the *Subcontractors' Charges Act 1974 - 1976* ("the Act"). The appellant company ("the contractor") entered into a contract dated 13th January, 1982 ("the head contract") with the second respondent Gladstone Water Board ("the Employer"), for the carrying out of certain works with respect to the construction of the Awoonga High Dam. The contractor entered into a written subcontract agreement dated 27th July, 1982 with the first respondent ("the subcontractor") whereby the latter agreed to perform certain drilling and grouting work which formed part of the work covered by the head contract. It appears that the work which was the subject of the subcontract actually commenced about 28th February, 1982 - some five months prior to the execution by the parties of the written contract - and was

preceded by certain correspondence, between the contractor and the subcontractor. By a letter dated 24th September, 1981 the subcontractor forwarded its quotation for the drilling and grouting work which quotation was, in effect, a schedule of rates for equipment and labour and was subject to a "rise and fall" provision. By a letter dated 22nd October, 1981 the contractor informed the subcontractor that it intended to award the subcontract to the letter. That letter stated: "Details of the sub-contract agreement are being prepared and will be forwarded to you in the near future for your concurrence. Conditions of Contract will be as per Head Contract." The letter also said that award of the subcontract was subject to prior approval by the employer. This was followed by a letter dated 3rd November, 1981 from the subcontractor submitting certain revised rates to be read in conjunction with the previous quotation. The duly executed subcontract document described the specific work to be performed and contained a schedule of rates for work and materials (including standby rates). The subcontract agreement makes reference only to rates and not to quantities, although it provides that the work will be done in accordance with Identified drawings. It provides (cl. 7.12) that the pay quantities for the drilling and grouting work will be based on the same quantities paid to the contractors by the employer. It also provides that the subcontractor should perform the work in accordance with all the terms, provisions, conditions, plans and specifications of the head contract so far as they may be applicable thereto and also in accordance with the general conditions of acceptance of the subcontract as shown in the document and any other special conditions as may be annexed to the document. It also provides (cl. 3):

> "As full consideration for the performance of such work the company will pay to the sub-contractor the amounts shown in schedule C below with such additions or reductions as may be subsequently agreed in writing. Where applicable variations in the value of such work due to 'rise and fall' ceases (as set out in any "special conditions annexed hereto) subsequent to the date of this sub-contract shall be made in accordance with the formula set out in schedule D below."

I will not go into further detail in relation to the terms of the subcontract but will assume, for present purposes, that it contains those particular terms or conditions which the subcontractor subsequently alleged were breached by the contractor and to which I will briefly refer letter in these reasons. It appears that on 12th December, 1983 the subcontractors gave to the employer a notice (pursuant to s. 10(1)(a) of the Act) that it claimed a charge under the Act in an amount of $530,189.00, and by a notice dated 12th December, 1983, the subcontractor gave notice to the appellant (pursuant to s. 10(1)(b) of the Act) that it had served a notice on the employer claiming a charge upon moneys that "is now or will be payable by" the employer to the contractor in respect of work done in respect of its contract with the contractors namely, foundation grouting to the. Dam by the subcontractor under its subcontract. The amount claimed as payable is $530,189.00 and the notice stated that such sum is calculated as follows:

(a) Lost production time for labour and equipment	$338,862.00
(b) Additional supervision	25,530.00
(c) Financing of cash flow deficit	76,522.00
(d) Loss of profit	61,220.00
(e) Preparation of Claim	28,055.00
Total:—	$530,189.00

By a notice dated 22nd December, 1983 (pursuant to s. 11(iii)(b)) the contractor notified the sub-constractor that it disputed the claim on the ground that "There is no money that is payable or "which is to become payable to Groutco (Australia) Pty. Ltd. for work done under the sub-contract between Thiess Contractors Pty. Ltd. and Groutco (Australia) Pty. Ltd."

On or about 9th December, 1983 the contractor received from the subcontractor a document of approximately a thousand pages which set out with more particularity the claims of the subcontractor as contained in its notice of claim of charge. On 25th January, 1984 the subcontractor

issued a writ (pursuant to s. 12 of the Act) against the contractor and the employer claiming the sum of $530,189.00 as against the contractor for damages for breach of the written contract dated 27th July, 1982 and as against the employer for moneys payable by virute of the provisions of the Act in respect of moneys payable to or to become payable to the contractor by the employer pursuant to the head contract. A draft statement of claim setting out the issues involved was prepared on behalf of the subcontractor and was placed before the learned Judge of first instance.

The draft statement of claim alleges that the subcontract is contained or evidenced by the documents to which I have earlier referred, namely, the three letters and the duly executed subcontract agreement. The draft statement of claim, in summary, alleges (i) that express terms of the subcontract are that the works be carried out in two stages and that continuity of work be allowed at all times to the subcontractor, and asserts that the contractor committed a breach of those terms in failing to manage his progress of the works under the head contract so as to allow the subcontract work to be carried out in two stages and in failing to allow the subcontractor continuity of work at all times; (ii) that it was an implied term of the subcontract that the contractor would provide the subcontractor with contiguous areas so as to allow grouting to be clone in a certain method and that the contractor failed to provide such contiguous areas; (iii) that the contractor would provide the subcontractor with reasonable access to working areas and the contractor breached this condition; (iv) that the contractor would provide the sub-contractor free of charge with water within a certain distance of working areas at a reasonable flow and that the contractor committed a breach of this term; (v) that a term of the subcontract was that the contractor would supply the subcontractor with cement for pressure grouting and that it committed a breach of this term, alternatively (vi) that it was a term of the subcontract that the subcontractor be reimbursed by the contractor where the delay experienced in carrying out the works was no fault of Its own, that the

subcontractor by virtue of the breaches to which I have previously referred experienced delay through no fault of its own and as a result incurred financial loss and damage amounting of $530,189.00, and that the contractor, committed a breach of this term in failing to pay any part of this sum to the subcontractor. The total claimed by way of damages for breach of the subcontract "or for moneys owing under the subcontract" is that sum of $530,189.00. However, in the draft statement of claim the subcontractor alleges that it is not possible to allocate the loss resulting from the breaches of contract among the individual breaches.

The subcontractor admits that the work the subject of the subcontract has been completed although no final certificate has been issued. It also admits that it has been paid $285,350.49 and that the employer is presently retaining $15,033.08 by way of retention money. However, it claims that it is owed that further sum of $530,189.00 for work done by it under the subcontract.

The work to be carried out pursuant to the subcontract has been completed and measured by the contractor and the subcontractor. The subcontractor has been paid $285,350.49 for the work carried out by it and so measured and the contractor, presently holds the sum of $15,033.88 by way of retention moneys pursuant to the subcontract agreement. Schedule F of that agreement provides that 5% of the value of the subcontract work is the limit of retention moneys. The contractor maintains that the sum of those two amounts constitutes the whole of the moneys payable to the subcontractor for the works carried out pursuant to the subcontract.

By notice of motion dated 29th February, 1984 (issued pursuant to the provisions of s. 21 of the Act) the contractor sought an order that the subcontractor's claim pursuant to the Act be cancelled, or alternatively that the effect of the claim be modified. The learned Judge of first instance said that it was obvious that the subcontractor's

claims "are for damages for breach of contract, in contrast to claims for moneys due under the subcontract". His Honour, after stating that the application to cancel the claim was founded on the submission that such claims are not for "money that is payable .... to him for work done by him under the subcontract" within the meaning of s. 5(2) of the Act, concluded that, an examination of the facts in the case satisfied him that the claim was for money payable for work done under the subcontract. He held that the claim for "preparation of claim - $28,055.00" was not maintainable and so he ordered that the claim be modified to the sum of $502,134.00. The main ground of appeal is that His Honour erred in holding that the claim for unliquidated damages could be the subject of a valid charge under the Act.

At the outset of the hearing before us Mr. Jackson Q.C., the respondent subcontractor, informed us that the argument that the requirement of s. 5(2) of the Act that the charge must secure "payment in accordance with the subcontract", meaning that the payment must be in conformity with some provision, of the subcontract, was not put to His Honour; he said that "the only argument put to the Court below was that the charge must secure all money that is payable or that is to become payable .... for work done ... under the subcontract." He said that he would like to wait until the conclusion of the argument put to us by counsel for the appellant to see if he wished to take any further point about it. On the other hand, Mr. Drummond Q.C., for the appellant, said that he was informed by his learned junior that in the court below the latter did put a submission to His Honour that subs. (2) of s. 5 involved both requirements and counsel did not limit, his argument merely to one of them. He admitted that His Honour confined his attention to the second of those two criteria but that His Honour fell into error in ignoring the first requirement of s. 5(2). In the event no further point was taken by Mr. Jackson.

The purpose of the Act is described in the preamble which states that it is "An Act to make better provision

for securing the payment of money payable to subcontractors and for other purposes." It is s. 5 which creates charges in favour of subcontractors and it reads as follows:

> "(1) Where an employer contracts with a contractor for the performance of work upon or in respect of land or a building, or other structure or permanent improvement upon land or a chattel, every subcontractor of the contractor shall be entitled to a charge on the money payable to the contractor or a superior contractor under his contract or subcontract.
>
> (2) The charge of a subcontractor shall secure payment in accordance with his subcontract of all money that is payable or is to become payable to him for work done by him under the subcontract.
>
> " (3) The total amount recoverable under the charges of subcontractors shall not exceed the amount payable to the contractor or subcontractor under his contract or subcontract, as the case may be."

It can be seen that subs. (2) of s. 5 sets up two separate criteria, each of which must be satisfied before a charge can be supported. These are that the charge shall secure (a) payment in accordance with the subcontract, and (b) payment of all money that is payable or is to become payable to the subcontractor for work done by him under the subcontract. Section 5 gives to a subcontractor an entitlement to a charge, to secure such payment, on the money payable by a superior contractor to the contractor under the latter's contract. Subsection (3) is significant, in that It limits the total amount recoverable under the charges of subcontractors to the amount payable to the contractor under his contract.

When dealing with analogous legislation in New Zealand (the *Contractors' and workmen's Liens Act 1892*) Edwards J., who delivered the principal judgment of the Court of Appeal

in *In Re Williams, Ex parte Official Assignee* (1899) 17 N.Z.L.R. 712, said, at pp. 719-720:

> " The purpose of the Act is shortly and correctly described in its title, 'An Act to make Better Provision for securing the Payment of Money due to Contractors and Workmen, and for other Purposes.' In pursuance of the purpose so defined, the 3rd section of the statute provides that a contractor, subcontractor, or workman who does, or procures to be done, any work, upon or in connection with any land, or any building or other structure or permanent improvement upon land, or does, or procures to be done, any work upon or in connection with any chattel, is entitled to a lien upon the whole interest of the employer in that land or chattel for the contract price of the work, subject to certain specified limitations, the main object of which is to provide that the aggregate amount of liability so imposed upon the employer shall not exceed his liability under his contract. This section is, I think, the key to the interpretation of the statute."

I agree with that observation. In construing the Act I also agree with the approach adopted by Alpers J. in *Farmers' Union Trading Co. Ltd. v. A.W. Bryant* [1925] N.Z.L.R. 390 who, when considering analogous provisions of the *Wages Protection and Contractor Lions Act, 1908* (N.Z.) said, at pp. 392 - 3:

> "The object of the Act is to protect workers and subcontractors, and for their benefit to intercept contract moneys in the hands of the employers. To that extent it is an interference with the complete freedom of action of the employer under his contract. But the scope of the protection thus afforded and the interference thus authorised must be strictly limited by the language employed ..... The Act does not enlarge the obligations of the employer; it merely intercepts the money actually payable by him to his contractor. ..... the statute must be subject, to strict construction."

I think it is helpful to refer at this stage to the New Zealand legislation and to some judicial views expressed in relation to it in that jurisdiction. In *Ball v. Scott Timber Co. Ltd.* [1929] N.Z.L.R. 570 five judges of

the Full Court of the Supreme Court of New Zealand considered certain sections of the *Wages Protection and Contractors' Liens Act, 1908* (N.Z.) s. 51 of which read: "A subcontractor is entitled to a charge for the money due to him under the subcontract on any money payable to his contractor or to any superior contractor, by the employer or by any superior contractor, in respect of the work done or to be done under the subcontract". Smith J., who delivered the judgment of the Full Court, described the charge created by that Act, at p. 577, as follows:

> "The charge to which a subcontractor is entitled by virtue of the Act is limited by s. 51 to a charge for the money due to him under his subcontract on any money payable to his contractor or to any superior contractor by the employer or by any superior contractor, in respect of the work done or to be done under the subcontract."

Section 21 of *The Wages Protection and Contractors' Liens Act 1939* (N.Z.) has taken the place of the 1908 Act and s. 21 of the 1939 Act reads as follows:

"(1) Where any employer contracts with or employs any person for the performance of any work upon or in respect of any land or chattel, the contractor and every subcontractor or worker employed to do any part of the work shall be entitled to a lien upon the estate or interest of the employer in the land or chattel, and every subcontractor or worker employed by the contractor or by any subcontractor to do any part of the work shall be entitled to a charge on the moneys payable to the contractor or subcontractor by whom he is employed, or to any superior contractor, under his contract or subcontract.

(2) The lien or charge of the contractor or of a subcontractor shall be deemed to secure the payment in accordance with his contract or subcontract of all moneys that are or are to become payable to him under the contract or subcontract. The lien or

charge of a worker shall be deemed to secure the payment in accordance with the terms of his employment of all moneys that are payable or are to become payable to him for his work.

(3) The total amount recoverable under the liens and charges of the contractor and of the subcontractors and workers employed by the contractor or by any subcontractor shall not, except in the case of fraud, exceed the amount payable to the contractor under his contract.

(4) The total amount recoverable under the liens and charges of all claimants who are employed as subcontractors or workers by any contractor or subcontractor shall not, except in the case, of fraud, exceed the amount payable under his contract or subcontract to that contractor, or subcontractor, as the case may be."

The author of Wilson: *Contractors' Liens and Charges* (2nd ed. - 1976), when referring to the above passage from the judgment of Smith J., states that, at p. 23: "With the substitution of s. 21 for ss. 51 and 52 this admirably concise and practical summary applies, with equal felicity, to the present statute". I draw attention to the words in the 1908 legislation "money due to him under the subcontract" and those in the 1939 legislation "secure the payment in accordance with his .... subcontract." I do not consider that there is any material distinction, for present purposes, between the present Queensland and New Zealand statutes to which I have referred, and that is the reason I have set out s. 21 of the New Zealand Act in full.

I turn now to the material provisions of the Act other than s. 5 which I have already set out. It is provided by subs. (1) of s. 10 that a subcontractor who intends to claim a charge on money payable under the contract to his contractor or to a superior contractor shall give notice to the employer or superior contractor "specifying the amount and particulars of his claim ... and stating that he

requires the employer or superior contractor .... to take the necessary steps to see that it is paid or secured to the subcontractor," and he is obliged to give notice of having made the claim to the contractor to whom the money is payable. The subsection also provides that the claim shall be in respect of money payable to him at the date of the notice or money to become payable to him after the date of the notice for work done by him prior to that date. A notice of claim of charge must be given within certain times, namely, where the work is completed within three months after such completion (subs. (2)); and, where the claim is in respect, of retention money only within three months after the expiration of the period of maintenance provided for by the contract and no later (subs. (3)). A charge will only attach if notice is given pursuant to s. 10 (subs. (4)).

Where a notice of claim of charge is given pursuant to s. 10, s. 11(1) provides that the person to whom it is given (here "the employer") shall retain a sufficient part of the money that is or is to become payable by him under his contract to satisfy the claim. Subsection (3) of s. 11 provides that where notice of having made the claim is given pursuant to s. 10 the contractor shall either give notice that he accepts liability to pay the amount claimed or give notice that he disputes the claim in either case to the employer or superior contractor by whom the money is payable and to the subcontractor giving notice of claim of charge. Where notice accepting liability is given the employer or superior contractor is obliged by subs. (4) to pay to the subcontractor the amount he is required to retain.

The procedure for enforcement of a charge is laid down in s. 12. Where the person to whom notice of claim of charge has been given does not pay or may be satisfactory arrangements for paying the claimant the subcontractor may recover the amount of the charge from the person by whom the money subject to the charge is payable; claims may be heard, determined and enforced by proceedings in a court of

competent and civil jurisdiction; an action to enforce a charge may be brought by or on behalf of any number of subcontractors claiming charges (subs. (3)(a)) and every action brought by a subcontractor to enforce a charge shall be deemed to be brought on behalf of every other subcontractor who has given notice of claim of charge and who becomes a party to the action (subs. (3)(b)).

Proceedings in respect of charges in the case of a claim of charge shall be by way of action and, in respect of retention money only shall be commenced within four months after the retention money or the balance thereof is payable, and in all other cases within two months after notice of claim of charge has been given (s. 15). In endeavouring to construe the Act read as a whole these time provisions, including those relating to the giving of notices of claim of charge, are not without significance in determining whether a claim for unliquidated damages for breach of contract can be the subject of a charge.

I refer also to the provisions of ss. 9 and 23.

Section 9 provides that:

"(1) Where the *debt* secured by a charge passes to another person upon the death or bankruptcy of the person entitled to the charge, or otherwise by operation of law, the right to the charge passes with the debt.

(2) A charge may be assigned together with the *debt* secured thereby."

Section 23 reads;

> "Save as is otherwise expressly provided, nothing in this Act shall be construed to affect the right of a person to whom a *debt* is due and owning for work done to maintain a personal action to recover the debt against the person liable for it, and a judgment obtained by the plaintiff in any action brought shall not affect a charge or other right to which he is entitled under this Act."

The expression "contract price" is defined (s. 3(1)) to include "the money payable for the performance of work under a contract or subcontract, express or Implied, whether or not the price is fixed by express agreement." The phrase "contract price" is referred to in the Act only for the following purposes: in the definition of "retention money" as any part of the *contract price* retained for rectification of defects; in providing that references in the Act "to the amount of money payable under a contract or subcontract" shall be deemed to include all amounts that under the contract or subcontract are to be credited or allowed in complete or partial satisfaction of the *contract price* otherwise and upon payment in money (s. 3(2)); and in providing that the amount of money payable to the contractor or subcontractor under his contract or subcontract "shall be deemed to include all money paid in reduction of the *contract price* to a person other than the subcontractor claiming the charge unless that money is paid in good faith and not for the purpose of defeating or impairing a claim to a charge existing or arising under this Act and is paid otherwise than in contravention of section 11" (s. 6).

Section 8 provides that "Where the money that is or is to become payable under the contract is insufficient to meet the clams of two or more subcontractors any insufficiency shall be borne by them in proportion to the amounts of the claims." Although the amount secured by the charge is all money payable or to become payable to the subcontractor "in accordance with his subcontract ..... for work clone by him under the subcontract", such amount may not be realized, at all, or in full, by reason of the operation of subs. (3) of s. 5 and by s. 8. The parts of the Act to which I have referred show that its object and purpose are to secure claims for payment of money due for work done calculated in accordance with the actual payment provisions of the subcontract. It is my opinion that the money payable (or to become payable) to a subcontractor "in accordance with his contract" for work done by him under

the subcontract are those moneys which the terms of the subcontract itself provide as being or becoming payable.

I have earlier set out the terms of cl. 3 of the subcontract, agreement dealing with the full consideration for the performance of the work, including additions or reductions. In effect, the subcontract provides that the subcontractor is to be paid an amount for particular work calculated upon certain rates stated in the subcontract. That work has been measured, the subcontract rates applied to the measured work giving a sum payable to the subcontractor which has been paid in full to the latter (subject to retention money).

Although ss. 5, 10, 11 and 12 do not refer to "contract price", the definition in the Act of "contract price" supports the construction that s. 5(2), when it refers, to moneys payable "in accordance with the subcontract", is limited to the money payable in accordance with the payment terms of that subcontract relating to the work to be performed under it. The reference to "the debt secured by a charge" in s. 9 and to "the right of a person to whom a debt is due and owing for work done" in s. 23 also support this view. I do not consider that the word "debt" in these sections can be construed so as to include unliquidated damages for breach of contract: see *In re Collbran, deceased* (1956) (1 Ch. 250); *Alexander v. Ajax Insurance Co. Ltd.* (1956) V.L.R. 436, at pp. 440 - 5. The word "debt" is a term that is not appropriate to describe claims for unliquidated damages for breach of contract but is appropriate to describe claims for sums fixed or certain. In *Ogdens Limited v. Weinberg* (1906) 95 L.T. 567 Lord Davey said, at p. 567: "I desire, however, to say that in my opinion the word 'debts', no doubt, means something recoverable by an action for debt, and nothing can be recovered in an action for debt except what, is ascertained or can be ascertained. The claim for an amount which is uncertain, and cannot be adjusted in an account, I think, be justly called, 'a debt'."

Sub section (3) of s. 3 provides that the work specified in a contract or subcontract "shall be deemed to be completed when, with such variations, omissions or deductions as have been duly authorised or agreed upon, it has been performed in accordance with the contract or subcontract ...". In other words, that subsection provides that the contract work is completed only when it has been performed in conformity with the relevant provisions of the subcontract laying down the description of the work to be done and the manner of its performance. I consider that a similar meaning should be given to the words in s. 5(2) that payment "in accordance with the subcontract" means in conformity with those provisions of the subcontract which specify the entitlements to payment, which the subcontractor is given under the subcontract. I mention here, that the rates used in the calculation of the subcontractor's claim for damages for breach of the subcontract are largely ones which are not in the subcontract agreement. Moreover, it is not possible to identify from, the claim whether any or proper credit has been given to the contractor for the payment of the sum of $235,350.49. It is also important to point out that the subcontractor's claim is not one based on the provisions of the subcontract agreement relating to extras or additions; nor is it one for "such variations, omissions or deductions as have been duly authorised or agreed upon" (s. 3(3)). The amount of the subcontractor's claim is one: which cannot be arrived at with reasonable certainty. I do not consider that the Act should be read so as to enable a subcontractor, who has been paid his full entitlement under the payment provisions of his subcontract, to obtain the status of a secured creditor in respect of a claim for unliquidated damages for breach of contract. It seems to me that it is quite contrary to the intendment of the Act for a subcontractor claiming unliquidated damages against his contractor to give a notice of a claim of charge to the employer of the contractor obliging the employer to retain (pursuant to s. 11(1)) a sufficient part of the money payable by him to the head contractor to satisfy this unliquidated claim. On the proper construction of the Act

any payment of damages for breach of contract which may be found to be payable by the contractor to the subcontractor is not a payment of money in accordance with the subcontract. Applying the principle of construction to which I have referred, if there is ambiguity in s. 5(2). it should be construed to confine its operation rather than to broaden it, and the words "in accordance with his subcontract" should be narrowly or strictly construed.

Before concluding, I think that I should refer shortly to earlier analogous legislation in Queensland. *The Contractors' and Workmen's Lien Acts, 1906 - 1921* was in force from the time of its enactment until it was repealed in 1964. Section 6 of that Act provided that a subcontractor is entitled to a charge "for the money due to him under his contract upon any money payable to a contractor or sub-contractor with and unto whom he has contracted". The other provisions of the repealed Act are not, for present purposes, materially different from the provisions of the present legislation. I refer in particular to the similarity in the definitions of "contract price", "contractor", "employer" and "subcontractor" where they appear in both statutes. See also the "contracting out" provision (s. 46 of the repealed Act. and s. 24 of the Act) and the similar wording of the Form "Notice of Intention to Claim Charge" in the Schedule to the repealed Act and the correspondening Form which appears in the Schedule to the *Subcontractors' Charges Regulations 1974* made under the Act. Both forms contain the following words: "a charge upon the money that (which) is now or will be payable to you to..... (contractor) .... in respect of the following work done by me in respect of your contract with the said .... [give a short description of the nature of the work done, and for which the charge is claimed] which work was .... done by me ....". The Regulations were made on 23rd May, 1974, three weeks after assent was given to the Act.

Mr. Jackson submitted that the present legislation should be construed according to its terms and not merely

as a re-enactment of the earlier legislation. He contended that the former Act dealt with the same general area of the law and used expressions similar to those contained in the present Act, but that the latter Act adopted a different approach. Consequently, he said that one should not start with pre-conceptions about the meaning of the Act. However, although the repealed Act gave entitlements to contractors, subcontractors and workmen to lions upon the lands of the employer, as well as for charges in favour of subcontractors and workmen on moneys payable to a contractor, and contained provisions relating to retention of moneys, procedure and enforcement which differ from those contained in the present Act, I am persuaded that the general scope and object of both sets of legislation are similar, and courts both in Queensland and Hew Zealand have given them a narrow rather than a broad operation. I have looked carefully for any authorities concerned with the earlier Queensland and the New Zealand legislation which could be said to suggest that a charge could arise under those statutes in respect of money which a subcontractor claimed as payable to him by a contractor by way of damages for breach of his subcontract. In other words, has it ever been considered, within the meaning of such legislation, that such a claim for damages amounted to money due and payable to a subcontractor for work done by him under his subcontract? I could not find any authority to this effect. There is authority that moneys are "payable" by an employer, and so available to meet a claim for a charge, only if and when they are payable under and by virtue of the contract of the employer. If no moneys are so payable there is no right of charge. For example, an employer has a right to set-off for the cost of completing a contract abandoned by the contractor and, in the case of an entire contract, no moneys are payable (with the exception of agreed progress payments) until the completion of the contract and so there are no moneys which until then can be the subject of a charge: *Ball and Scott Timber Co. Ltd.* (supra); *Stern v. J.A. Redpath & Sons Ltd.* [1950] 12 N.Z.L.R. 50; *Ashley Bergh & Co. Ltd. v. Ross Borough* [1972] N.Z.L.R. 1069. But this is a different issue as it is

concerned with the words in s. 5(1) "a charge on the money payable to the contractor or a superior contractor under his contract or subcontract".

For the above reasons I would allow the appeal, set aside the order appealed from and substitute therefor an order that the first respondent's claim of charge be cancelled. The first respondent should pay the appellant's costs of the hearing below and of this appeal to be taxed.

IN THE SUPREME COURT OF QUEENSLAND No. 186 of 1984

FULL COURT

BETWEEN:

GROUTCO (AUSTRALIA) PTY. LTD. (Plaintiff) First Respondent

AND:

THIESS CONTRACTORS PTY. LIMITED (First Defendant) Appellant

AND:

GLADSTONE AREA WATER BOARD (Second Defendant) Second Respondent

JUDGMENT - McPHERSON J.

Delivered the 10th day of October, 1984.

I have read the reasons of the Chief Justice, with which I entirely agree.

Because of the importance of the point and because we are differing from the learned judge in the court below, I think I should state more specifically what it is that leads me to the conclusion that the decision appealed from is incorrect.

The central question is whether, in conferring on a subcontractor "a charge on the money payable to the contractor ... under his contract", s. 5(1) of the Subcontractors' Charges Act means to include as "money payable" an amount that may be payable by way of damages for breach of contract. His Honour held that it did.

There is no doubt that the expression "money payable ... under his contract" is capable of being construed as including damages for breach of that contract. Perhaps money "recoverable" rather than "payable" would have been a more apt or a more precise description of such damages; but nothing is likely to turn on that. The expression "under", used in relation to a contract or agreement of this nature, may be not so wide as "out of" a contract or agreement: Government of Gibraltar v. Kenny [1956] 2 Q.B. 410, 421. It is nevertheless wide enough to include damages for breach of the contract.

Once that is accepted, however, it is difficult to know where to stop. Damages for negligent misstatement might also be said to be payable "under" a contract if they result from something in or forming part of the contract as, for example, in the circumstances disclosed in Morrison-Knudsen International Co. Inc. v. Commonwealth (1972) 46 A.L.J.R. 265. It seems unlikely that the legislation was Intended to secure tortious claims of that kind upon the money payable by the head contractor to the contractor and hence available for payment of claims of all other subcontractors besides the claimant. One therefore tends to look for indications that something more restricted was intended.

The history or genesis of the legislation, which is set out in the reasons of the Chief Justice, is one such indication. Another is the presence in s. 5(2) of the statement that the charge of the subcontractor shall secure payment "in accordance with his subcontract" of all money payable or to become payable to him for work done by him under a subcontract. Damages for breach of contract would

not ordinarily be described as payable or as a payment "in accordance with" a contract. Liquidated damages may in some circumstances bear that character; but that is because, if enforceable, a stipulation for payment of liquidated damages represents a provision for payment of a specified sum on the happening of a certain event, usually but not necessarily involving a breach of contract: cf. Campbell Discount Co. v. Bridge [1962] A.C. 600.

Two provisions that confirm this approach to the matter are s. 9 and s. 23, the text of which appears in the reasons of the Chief Justice. Both of them use the word, "debt" to describe the money payable to, or secured in favour of, the subcontractor. That prompted some discussion of the question whether the "debt" referred to means a sum recoverable by the old action of debt; whether a quantum meruit was recoverable by such an action, or only in an action of indebitatus assumpsit; and whether the latter was or was not in substance an action of debt. In a passage extracted from the 5th edition of Chitty on Pleadings (1831), vol. 1, pp. 123-124, which is set out in the judgment of Sholl J. in Alexander v. Ajax Insurance Co. Ltd. [1956] V.L.R. 436, 445, it is said that debt extended to a quantum meruit for work, although later on the same page of the report of his judgment His Honour says that such a claim is covered by the indebitatus or common count. The answer to the question no doubt depends upon the view that is taken of the nature and effect to be attributed to the fictitious promise to pay that came to be imputed to a person simply because he was indebted to another.

But it is quite unnecessary here to attempt to unravel the mysteries of Slade's Case (1602) 4 Co.Rep. 92 in order to interpret the Subcontractors' Charges Act 1974-1976. When in ss. 9 and 23 that Act uses the expression "debt" it does so in the prevailing sense of that term, as meaning a liquidated sum of money presently due, owing and payable by one person to another and one which, as s. 5(2) adds, is so payable "in accordance with" the subcontract. That excludes a claim for unliquidated damages for breach of contract,

together, it may be thought, with a claim for liquidated damages recoverable only upon proof by the claimant of a breach of contract by the contractor. What the claimant is seeking here falls outside those limits.

For these reasons, which add little to what the Chief Justice has already said, I would allow the appeal and substitute an order that the claim of charge be cancelled.