

1999 SCL HUDSON PRIZE WINNERS

The meeting of the Society of Construction Law at the National Liberal Club on Tuesday evening, 4 April 2000, introduced the winners of the 1999 SCL Hudson Prize. The first prize winner, Ms Deborah Brown, and the runner up, Mr Michael Barlow, received their handsome prize cheques and presented their winning papers to the sizeable audience. The evening was chaired by John Burgess and later discussions by Professor Anthony Lavers.

Deborah Brown presented her paper entitled “After the Divorce – Problems with Partnering Agreements”. Deborah Brown is a trainee Solicitor at Barlow Lyde Gilbert.

Ms Brown identified, on the basis of the dicta of Humphrey Lloyd J. in *Birse Construction Ltd v St David Ltd*, three potential problems with Partnering Agreements. The comments of Humphrey Lloyd J. in regard to Partnering Agreements were strictly obiter and, whilst the case was overturned on appeal, the Court of Appeal did not address any of the matters concerning Partnering Agreements.

Implied Standards of Conduct

In *Birse* Humphrey Lloyd J. felt that, if a party had agreed to cooperate in a Partnering Agreement, it could not then go back on its word by then failing to co-operate. So, while Partnering Agreements are non-binding, it seems that the court may think otherwise and imply standards of conduct into the Contract. Moreover the Court has a wide ranging power to open up and review certificates, and it may well be that it could take cooperation into account in so doing.

Exclusion Clauses

Where a consumer is involved, an exclusion clause will be subject to the test of reasonableness in accordance with section 3 of the Sale of Goods Act 1977. By section 11, reasonableness can be determined by reference to circumstances at the time of contract. One such circumstance may be the existence of a Partnering Agreement.

Reasonableness is also determined according to whether or not there were “inducements” to entering into the contract. An inducement, such as a Partnering Agreement, can push that clause from the reasonable bracket into the unreasonable bracket.

Moreover it is now established that one can look at the “factual matrix” or background in interpreting a contract. A Partnering Agreement may be considered part of the “background”.

Mitigating Loss

Co-operation as agreed to in a Partnering Agreement may require an Employer to mitigate the other party's loss where, for example, the project has overrun. Thus the Employer may have thrust upon him a pro-active role in mitigation.

In conclusion, Ms Brown thought that Partnering Agreements should be used as a sword rather than a shield. A new agreement could be produced that is binding and sufficiently clear to be enforceable, thereby incentivising their use. Such a course would follow the spirit of Latham's principles and recommendations.

Michael Barlow then presented his paper entitled "Pure economic loss for defective buildings after Henderson v Merrett Syndicates: When is a building contract not an ordinary building contract?" Michael Barlow is a Solicitor at MacRoberts, Edinburgh.

In D&F Estates v Church Commissioners for England [1989] AC 177 and Murphy v Brentwood District Council [1991] 1 AC 398 the building owner faced the obstacle of claiming the cost of repairing defects caused by a Sub-Contractor. Such loss is usually treated as economic loss and not recoverable unless Hedley Byrne & Co v Heller & Partners [1964] AC 465 applies and a "special relationship" can be established. This is a difficult hurdle to get over because the contractual structure tends to rule it out.

In the Henderson Case Lord Justice Goff seemed to sound the death knell to such claims to directly sue the Sub-Contractor. He stated that where a building owner seeks to sue a Sub-Contractor liability did not "ordinarily" arise and there is "generally" no assumption of responsibility. Thus, whether liability can be established hinges on the structure of the Contract.

Henderson therefore reinforces Junior Books v Veitchi & Co [1983] 1 AC 520 despite the latter case's continuing unpopularity and Goff L.J.'s dismissing remarks. In Junior Books the contractual structure was the same as that in Henderson. The fact of being a nominated Sub-Contractor encouraged the finding of a "special relationship".

The impact of proximity in contractual chains is relevant therefore in deciding whether there is liability and its precise effect depends on the circumstances.

In *White v Jones* [1995] 2 AC 207, the court concerned itself with the boundaries of assumption of responsibility, finding, on the facts, that there was no “reliance” nor was it necessary to have it. Lord Browne Wilkinson asked whether it was “fair, just and reasonable” to impose liability. This, suggested Mr Barlow, could be used for the test of “special relationship”.

Concurrent Liability

Concurrent liability arises in the situation where the Defendant is liable in the same matter even if not to the same Claimant. The Courts prefer contractual liability.

In *Henderson* concurrent liability was permitted provided that allowing tortious liability would not be inconsistent with contractual liability. Determining inconsistency requires viewing the structure and the content of the contract. In the well known cases of *Pilkington v Wood* [1953] Ch. 770 and *Scott Lithgow v Secretary of State for Defence* (1989) 45 BLR 1, HL the courts rejected concurrent liability on the basis of inconsistency.

Turning to the “terms” of a contract, to which Goff LJ in *Henderson* hinted consideration must be given, little guidance as to what may be excluded short of express exclusion of liability has been proffered. Implied exclusion was dealt with in the *Greater Nottingham Co-operative Society v Cementation Piling & Foundations* [1989] QB 71, where a collateral warranty excluded several items but neglected to exclude liability for the manner of execution of the contract. The court held that the Parties had intended to exclude the execution of the contract and the claim thereby failed. It is difficult after *Henderson* to define the parameters of implied exclusion of liability.

In conclusion, Mr Barlow said that despite *D&F Estates* and *Henderson* regarding ordinary building contracts, the decision of the latter case is likely to encourage a new search to show a “special relationship” and *Henderson* reinforces *Junior Books*, both being based upon the principle in *Hedley Byrne*.

It has also given a new impetus to the search for an “assumption of responsibility”. So, when is a building contract not a building contract? The answer is that we must wait and see: after *Henderson* that should be soon.

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