THE MILLENNIUM SCL HUDSON PRIZE
Prize Giving Evening, 1 May 2001

Professor Anthony Lavers chaired an evening of prize giving at the National Liberal Club on 1 May 2001. The main business of the evening was a premiere of the winning papers of the Millennium SCL Hudson Prize. However, the evening began with the presentation of two awards for performances on the MSc in Construction Law and Arbitration at the Centre for Construction Law at Kings College, London.

Philip Ranagh Prize 2000

The Philip Ranagh Prize 2000 for the best dissertation on the MSc was awarded jointly to John Williams, Treasury Solicitor and Adrian Elliot of Masons.The award was presented by Dominic Helps of Shadbolts on behalf of the Law Courts Branch of the Arbitration Club.

Bickerdite Allen Prize 2000

The Bickerdite Allen Prize for the best performance by a first year student on the MSc was awarded to Emma Colquoun of Lovells. The prize was presented by Alan Smith of Bickerdite Allen.

The Millennium SCL Hudson Prize

Professor Anthony Lavers said that the award for the year 2000 had received a larger number of entries than in previous years, but that the standard had nevertheless been very high. Professor Lavers invited those present to encourage others in their places of work to enter in future years, emphasising that the word limit for entries was 5,000 words.

The first prize was awarded to Philip Eyre of Glovers, for his paper *Panatown v McAlpine: Has the Fog Cleared Yet?*

The second prize was awarded to Philip Britton of Kings College, London for his paper *Construction, Public Bodies and Liability: Fair, Just and Reasonable?*

The prize winners presented their papers to the audience.

Philip Britton: *Construction, Public Bodies and Liability: Fair, Just and Reasonable?*

Mr Britton opened with a commentary on the *Dutton* to *Murphy* line of cases, concerned with the liability of a local authority for its function as building control enforcer. The key point to emerge from these cases is that the liability of a public body for a particular type of loss should not be considered in isolation from the liability of private parties, such as building contractors, for the same losses. Mr Britton also discussed the mutual gap filling that has taken place as between the laws of contract and tort. However, Professor Britton expressed the view that the effect of insurance cover on the imposition of liability remains a difficult issue.

Mr Britton went on to discuss the implications of a body of authority from the late 1990s, and which is concerned with the liability of public bodies for negligence in other contexts, for disputes in construction matters. One crucial factor is: What is provided for by the statutory framework? A further issue is whether the public body's power is discretionary, although Mr Britton noted that a discretionary power may in certain cases give rise to liability for negligence.

A further question is: liability for what type of loss? Mr Britton said that no single answer to this question is possible, but in some cases, it will turn on the intended purpose of the statute; in others, on the cause of action. On this basis, a *Hedley Byrne* type claim may enable a party to recover damages for pure economic loss from a public authority. Mr Britton also highlighted the effect of *Osman* in softening the blanket immunities previously enjoyed by public

authorities, and raised the question as to whether this may lead to the wider recovery of damages for pure economic loss.

Mr Britton then opened up the yet bigger question: when *should* public authorities be liable for negligence. In particular, Mr Britton highlighted the contrast with the French and German legal systems, where the liability of public bodies in tort is not simply an imitation of private law as it applies to the same facts. For example, in certain situations, the liability of public bodies is on a 'no fault' basis, such that the body is effectively an insurer.

In summary, Mr Britton drew a number of tentative conclusions with regard to the state of the present law, on both building control and health and safety issues. However, the uncertainty generated by the decisions of the courts, and the judicial resources absorbed by the issue in recent times, both raise the question as to whether the liability of public authorities is in fact a matter for Parliament rather than the courts.

Philip Eyre: *Panatown v McAlpine: Has the Fog Cleared Yet?*

Mr Eyre gave a brief outline of the facts of *Panatown.* In 1989, Panatown and McAlpine entered into a contract on the 1981 JCT form for the construction of an office block and car park. The land was in fact owned by the UPIL, a sister company of Panatown, and the contractual arrangements were set up to minimise VAT. However, UPIL took a duty of care deed from McAlpine. The contract was something of a disaster, and Panatown commenced a multi-million pound arbitration against McAlpine. McAlpine raised the 'no loss' defence: Panatown were not owners of the land and had suffered no loss. The defence was rejected by the arbitrator; accepted by Judge Thornton QC; rejected by the Court of Appeal; and accepted by the House of Lords.

The 'fog' with which Mr Eyre's paper was concerned was the *St Martins v McAlpine* and *Darlington v Wilshier* line of cases and the decision of the Court of Appeal in *Panatown* itself. Mr Eyre said that the 'no loss' point crops up frequently in construction cases, notwithstanding that the JCT form assumes that the employer is the owner of the land being developed. However, in recent times, the fog caused by the *St Martins* line of cases has rendered it near impossible to advise clients on the point.

In *Panatown,* the House of Lords found by a majority of 3 to 2 that the existence of the DCD was fatal to Panatown's claim. The majority - Lords Clyde, Browne-Wilkinson and Jauncy - found that the purpose of the DCD was provide UPIL with a remedy and to displace Panatown's claim. The minority - Lords Goff and Millett - found that the DCD was intended to provide a right assignable to successors in title, but that should there be any dispute under the contract, UPIL would not enforce the DCD. Rather, it would allow its sister company Panatown to enforce its more valuable rights under the contract.

Mr Eyre expressed the view that, whilst it is often far from clear what parties' intentions are, the view of the minority accords more closely with commercial practice: a DCD is regarded as a 'belt and braces' measure, rather than the parties' sole remedy. However, given that a DCD only provides a remedy for a failure to use reasonable care and skill, the effect of *Panatown* is that an employer is better off without the collateral warranty. Parties will therefore change their behaviour in response to the decision, but *Panatown* nevertheless creates something of a trap for the unwary.

The second issue with which *Panatown* was concerned was whether the "broad ground", as identified by Lord Griffiths in *St Martins*, provides a solution to the no loss problem. On the "broad ground" analysis, an employer suffers a loss by reason of a contractor's breach whether or not he is the owner of the land, because he loses his "performance interest". This principle, which received the approval of the Lords in *Panatown*, only entitles a party for compensation for a genuine loss, and not an uncovenanted profit, an approach that echoes the *Ruxley* requirement of reasonableness.

The minority of Lords Goff and Millett expressed the view that Panatown had indeed suffered a genuine loss. However, there remains uncertainty as to whether an employer will be required to use any damages recovered to carry out remedial works.

Mr Eyre also expressed the view that, after *Panatown,* the "narrow ground" upon which the *St Martins* decision was decided does survive, but that it is hard to conceive of a situation in which the broad ground would not represent the preferable solution.

Finally, Mr Eyre turned to consider the effect of measures taken by parties to deal with the Contracts (Rights of Third Parties) Act 1999 on their common law rights. If the parties expressly provide for enforceability by a third party, the contracting party's remedy will be displaced. If the parties do nothing, the narrow and broad grounds will both apply, provided that the third party has no other remedy. However, if the parties seek to exclude the effect of the act, the form of words used - "this contract does not confer a benefit on any third party" may also exclude both the narrow and the broad grounds.

Following the presentations, an interesting, if brief, discussion of both topics took place. After the meeting, the winners enjoyed celebratory drinks, and the other members of the society also found something to drink to.

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