

Wright Hassall Construction Law Update 2008-2009

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Preamble

- A fruitful year for adjudication cases
- A lean year for Contract Law
- As most people here are not adjudicators, I have concentrated on Contract Law and Negligence

Formation of contracts – acceptance by conduct

- ***A E Yates Trenchless Solutions –v- Black and Veatch***
- Issues:-
 - Is there a contract?
 - If so, how is it made?
 - The job was drilling works at Water Treatment Works

Formation of contracts – acceptance by conduct (cont..)

- ***A E Yates Trenchless Solutions –v- Black and Veatch***
- Gleeson engaged Yates but later novated the job to Black and Veatch
- Yates tendered on the ICE Blue Book
- At tender interview the parties signed a record saying I Chem E Brown Book would apply

Formation of contracts – acceptance by conduct (cont..)

- ***A E Yates Trenchless Solutions –v- Black and Veatch***
- Gleeson sent out the order and asked Yates to proceed – the sub-contract would follow
- The sub-contract was sent out on I Chem E Brown Book
- Yates confirmed it had passed Sub-Contract to Head Office

Formation of contracts – acceptance by conduct (cont..)

- ***A E Yates Trenchless Solutions –v- Black and Veatch***
- The Contract may have been lost – not signed or returned
- Work proceeded
- Yates made claims for payment referring to I Chem E Brown Book
- Yates then took advice and were told Brown Book was not incorporated

Formation of contracts – acceptance by conduct (cont..)

- ***A E Yates Trenchless Solutions –v- Black and Veatch***
- Was there a contract? Yes
- Gleeson sending the Sub-Contract was an offer
- This was accepted by conduct by Yates:-
 - Receiving variation instructions without challenging them and acting on them
 - Signing and returning and operating a self-billing system referred to by Gleeson
 - Commencement of Sub-Contract works without qualification
 - Making of claims pursuant to Brown Book
 - Further letter sent indicating that claims had been notified under the Brown Book

Formation of contracts – acceptance by conduct (cont..)

- ***A E Yates Trenchless Solutions –v- Black and Veatch***
- The Court referred to *G Percy Trentham –v- Archital Luxfer* –
- Where works had been performed (completed):-
 - Even if no precise correspondence of offer and acceptance
 - It was then unrealistic to say no intention to create legal relations
 - And difficult to say that contract is void for uncertainty

Formation of contracts – acceptance by conduct (cont..)

- ***A E Yates Trenchless Solutions –v- Black and Veatch***
- In interpreting contract formation, the yardstick is the reasonable expectations of sensible businessmen
- The Court is prepared to find the existence of a contract (under the Construction Act) even though it has to look to the conduct of the parties

Contract interpretation – pre-contractual negotiations

- ***Chartbrook Limited –v- Persimmon Homes Limited***
2009 UKHL
- House of Lords decision –
- Court declined to abandon the basic principle that evidence of pre-contractual negotiations is not allowed to interpret a contract
- **BUT**
- You can look at pre-contract negotiations to establish that a fact which is relevant background was known to the parties.

Contract interpretation – pre-contractual negotiations (cont...)

- ***Chartbrook Limited –v- Persimmon Homes Limited 2009 UKHL***
- You can rely on pre-contract negotiations:-
 - a) to claim estoppel by convention –
that there was a common assumption about the meaning of words
 - b) for rectification –
that the parties had a common, continuing intention at the time of the contract and by mistake it was not reflected in the agreement

Contract interpretation – pre-contractual negotiations (cont...)

- ***Chartbrook Limited –v- Persimmon Homes Limited***
2009 UKHL
- The Courts do not easily accept that parties make linguistic mistakes
- The proper question is “*What a reasonable man, having all the background information which would have been available to the parties, would have understood them to mean*”
- In this case the ordinary meaning of words made no commercial sense. The Court applied a meaning which gave effect to commercial purpose

The wrong house

- ***Platform Funding –v- Bank of Scotland***
- A Surveyor who surveyed the wrong house was liable to the funder – even though there was no evidence of negligence

The wrong house – (cont..)

- ***Platform Funding –v- Bank of Scotland***
- The Court of Appeal reached its decision on two grounds:-
 - The instructions from Platform Funding to the Valuer were to value a particular house – he had failed to carry them out at all
 - The valuation report certified that the property offered as security had been inspected – it had not. The unqualified statement created liability as a warranty, without negligence

Contractual termination or acceptance of repudiation – the two alternatives

- ***Stocznia Gydnia SA –v- Gearbulk Holdings Limited***
- Court of Appeal
- Question 1. Did the termination provisions of the contract preclude the wronged party from accepting a repudiatory breach? – **NO**
- Question 2. Does using the termination provisions prevent you from claiming common law damages for repudiatory breach? – **Not in this case**

contractual termination or acceptance of repudiation – the two alternatives (cont...)

- ***Stocznia Gdynia SA –v- Gearbulk Holdings Limited***
- Court of Appeal
- If the grounds for termination go to the root of the Contract and are repudiatory in nature and the consequences of contractual termination and repudiation are the same, then:-
 1. Generally a party will be able to claim its rights to damages in repudiation as well as any contractual remedy
 2. There does not have to be a clear election as to which method of termination is being followed.

Contractual termination or acceptance of repudiation – the two alternatives (cont..)

- ***Stocznia Gdynia SA –v- Gearbulk Holdings Limited***
- Court of Appeal
- On the other hand, if the Contract and the general law provide the injured party with alternative rights with different consequences, then the wronged party will have to elect between contractual termination and acceptance of repudiatory breach

Defective premises act and fitness for habitation

- ***Bole –v- Huntsbuild***
- Decided that – a property can be unfit for habitation under Section 1 of the Defective Premises Act even though continuously occupied.
- Suitability for purpose and fitness for habitation are to be equated
- **NOTE:**
- The Housing Act 1985 tests for fitness for habitation provide “*A useful checklist*” under the DPA

Defective premises act and fitness for habitation (cont...)

- ***Bole –v- Huntsbuild***
- The Housing Act states “*In determining whether premises are unfit for habitation regard shall be had to their condition in respect of the following:*”
 - *Repair*
 - *Stability*
 - *Freedom from damp*
 - *Internal arrangement*
 - *Natural lighting*
 - *Ventilation*
 - *Water supply*
 - *Drainage and sanitary conveniences*
 - *Facilities for the preparation of cooking and disposal of waste water”*

Adjudicator's fees and jurisdiction

- ***Mr Christopher Linnett –v- Halliwells LLP***
 1. You have to pay adjudicators fees if there is no challenge to his jurisdiction – even if you don't sign his terms
 2. If you challenge jurisdiction and don't take part – you don't have to pay fees (unless your challenge fails in Court)
 3. If you challenge jurisdiction and do take part – you still have to pay the Adjudicator's fees

Adjudication – scope of defences – right to raise set offs

- ***Quartzelec Limited –v- Honeywell Control Systems***
- Quartzelec served Notice of Adjudication
- Honeywell sought to reduce the value of the claim by raising an omission from the Works
- The Adjudicator did not take the omission into account on the grounds that the proposed reduction had not been in play prior to the Notice of Adjudication
- The Judge said it was difficult to see why a Respondent should not be entitled to raise any defence open to him against the claim, regardless of whether it was raised as a discreet ground of defence in the run up to the adjudication.
- So you can raise a defence in adjudication even though not previously raised.

Adjudication – scope of defences – right to raise set offs (cont..)

- ***Letchworth Roofing Company –v- Stirling Building Company***
- This case decides that even though you can raise any defence to an adjudication (new or pre-existing) you still cannot set off against money otherwise due without giving a valid Notice of Withholding.

Trade association did not owe a duty of care in respect of information on its website

- ***Patchett –v- SPATA – Court of Appeal***
- Did SPATA (the Swimming Pool Association) owe a duty to people who relied upon their website to appoint a Contractor?
- **NO** – because SPATA encouraged people to make further enquiries and consult their information pack – Patchett did not do so.

Trade association did not owe a duty of care in respect of information on its website

- ***Patchett –v- SPATA – Court of Appeal (Cont...)***
- SPATA’s website stated that SPATA pool installer members were fully vetted and required to comply with a code of standards and ethics.
- It also said that only SPATA-registered installers belong to a unique bond and warranty scheme.
- There is some potential for trade associations to be liable to end-users of their members as a result of statements and representations on the website.

Thank You