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Legal Consequences of Non-Contractual Promises in Construction Industry

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Abstract— Contract law is in the process of evolution if not revolution. As the construction industry is notorious for contractual disputes, one cannot underestimate the significance of remaining well informed of these developments. The developments in contract law have been caused by a shift in legal thinking. Legal thinking has shifted from interpreting contracts based solely on their express and implied terms to nowadays looking at the circumstances of a case as a whole. Looking beyond the terms of a contract has consequences for how negotiations are to be considered by a court of law. Traditionally, negotiations have been seen as informal discussions. Unless something mentioned in negotiations was subsequently framed as a term of the contract it had no legal consequence. Recent case authority has rejected this proposition and so it is deemed as being appropriate to state contract law as being in the process of revolution.

Index Terms— Contract, Legal, Negotiation

1 Introduction

Individuals and companies doing business in a variety of industries have found themselves bound by informal statements made in the course of negotiations [1]. What this development represents is a shift in the legal convention of offer and acceptance to nowadays looking at the circumstances of the case as a whole. The reasoning behind the shift is direct consequence of the "neighbour" principle. In brief, the law expects parties to a contract to treat one another as if they were "neighbours" [2 thru 5]. What this means exactly, is that parties are no longer bound simply by legal obligations but also moral obligations to one another. An English case, Williams v Roffey Bros, is just one illustration of the moral duty contractors are now finding themselves bound to perform. It is this case that this paper will now address.

2 Williams v Roffey Bros and Nicholls (Contractors) Ltd.

Williams v Roffey Bros and Nicholls (Contractors) Ltd. [6] will be hereafter referred to as the "The Roffey decision". A contractor put out a tender for carpentry work. The Carpenter who was awarded the subcontract grossly under-bid for the job. About half way from completion of the project the subcontractor unsurprisingly was faced with financial difficulty. The Contractor, subject to liquidated damages if the contract was not completed on time, offered the Carpenter more money. This extra payment was for work that the Carpenter was already bound to do. Two weeks later, but before the job was completed, the Carpenter suspended work and demanded the contract amount plus the bonus payment. The Contractor refused to pay both the contract amount and the bonus payment on two grounds:

1. The Carpenter, failing to complete the project, had not fulfilled their contractual obligations
2. The bonus payment was not a contractual term since there was no consideration given for the extra pay. In other words, the Contractor gave the Carpenter extra payment, but the Carpenter, was not giving anything extra in return for their bonus payment.

The Carpenter sued to recover the sum of money. The Court upheld the Carpenters claim for contract amount minus an allowance for the amount of work yet to be completed, plus the bonus payment. The main focus of the Court in upholding the Carpenters claim was that the Contractor knew the bid was remarkably low. Therefore, the court held that the contractor was under a moral duty to have informed the Carpenter of its concern. The other finding, whose significance shall be discussed in conclusion, is that the benefit which the contractor received for the promise of extra payment was the benefit of having the project completed on time and thus not being penalized. Putting the discussion of benefit derived from the promise made aside for the moment, focus shall immediately fall upon the influence English authority may have on American jurisdiction.

3 Conclusions

Although an English authority, readers should not wilfully blind themselves to the potential influence this case could have on American jurisprudence. For example, the English cases of the 1930's have played a tremendous role in shaping the laws of negligence in this country. By analogy, within the American jurisdiction, there are numerous authorities to the effect that promises made, that are not necessarily part of a contract, can be enforced [7]. Therefore, shrewd American business parties in the United States will recognize that it could be a costly error to assume that they are immune from the Roffey decision.

What the Roffey decision adds to the jurisdiction of promise enforcement is a novel concept of consideration. The

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promise of extra money became a term of the contract. The extra money was given so the contractor could avoid liquidated damages. This benefit sufficed to be consideration.

Beyond this consideration argument, what must have come as a nasty surprise to the contractor was that they were legally bound to have informed the subcontractor of its concern for the low bid. The obvious outcome for contractor and subcontractor alike is to closely scrutinize bids. One can only estimate as to how much in the way of time and money could have been saved had Williams informed Roffey of their concern for the unusually low bid. Under traditional legal convention of offer and acceptance, Williams was under no legal obligation to inform Roffey, the price which Roffey had offered had been accepted by Williams. The neighbour principle however instructs someone in Williams position to perform their moral obligation of informing Roffey of their concern.

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