Fenwick Elliott
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# Dispatch

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Dispatch highlights a selection of the important legal developments during the last month.

## Adjudication

### Latham Review

On 17 September 2004, Sir Michael Latham's review of the Construction Act was presented to construction minister Nigel Griffiths. The review looked at both the payment and adjudication provisions of the HGCRA. Detals of the review can be found at www.dti.gov.uk/construction/hgcra/hgcralead.htm
It is interesting that there was a strong degree of consensus within the group reviewing adjudication, but far less so in the group reviewing the payment provisions of the HGCRA. The review identified the following issues which might need to be addressed in any reform of the HGCRA:

On adjudication:

(i) preventing the practice of one party requiring that the referring party pay both parties legal costs irrespective of the outcome of the adjudication;
(ii) a reinforcement of the requirement for impartiality;
(iii) the prohibition of trustee stakeholder accounts; and
(iv) clarification of the requirement for a contract to be "in writing".

On payment:

(i) improving the effectiveness of the right to suspend performance in cases of non-payment;
(ii) providing a right for a third party to pay all (or some of) the unpaid funds to the payee where the original payer is insolvent;
(iii) resolving the confusion over what entitlement to be paid arises at the the "due date" for payment, possibly to include removing or replacing s110(2) of the HGCRA; and
(iv) limiting the right of cross-contract set-off.

Sir Michael Latham has proposed that the next stage is for the government to produce a consultation paper to identify proposals for changes to the HGCRA and this paper is expected later this autumn.

## Cases from the TCC - Was there a contract?

### Gurney Consulting Engineers v Pearson Pension Property Fund Ltd & Anr

The matter in dispute here was whether a contract had been concluded between the parties such that it incorporated the standard ACE conditions of engagement. More specifically, Gurney sought a declaration that there was no valid arbitration agreement between the parties. There was no dispute that Gurney did provide consulting engineering services in relation to the refurbishment project. Gurney's position was that the work had not been done pursuant to a contract because no contract was ever concluded, even though it undertook the work which it was requested to do in the anticipation of making a contract.

If no contract was concluded, there was no arbitration agreement. The practical significance of this was that Gurney would be able to make claims under Part 20 of the CPR against others alleging them to be liable in respect of the collapse of the front wall of the property, whereas that option would not be available to them in arbitration proceedings. The case turned on the circumstances of the negotiations between the parties. It was agreed between the parties that the correct course was to consider the correspondence as a whole. In particular, there were a number of disputed telephone conversations.

Gurney in fact ultimately sent a signed copy of the Memorandum of Agreement to the Defendants. On top of there being some confusion about the correct name and identity of the client, no company or body claimed to be the client ever executed the document. Indeed, almost one month later, the appointment of Gurney was terminated.

HHJ Seymour QC found that the sending of the signed memorandum was an offer to enter into an agreement in the terms of that memorandum. It was thus capable of acceptance by execution of the document by or on behalf of the client. That never happened. Therefore the offer was never accepted. In fact, it was probably rejected when the client terminated Gurney's engagement. Accordingly, there was no contract between the parties. Both parties' intention was that the formal appointment was to be concluded by a standard form of appointment signed by both parties. Agreement was never formally executed.

**Cases from the TCC - Quantum Meruit**

**Mowlem Plc v Phi Group Ltd**

Mowlem subcontracted the earthworks and associated design and construction of some retaining walls to Phi under a formal subcontract. Disputes arose and were referred to arbitration. The primary issue between Mowlem and Phi concerned Mowlem's supply to Phi of free issue fill which was to be incorporated into the earthworks.

This free issue fill turned out to be unsuitable for the purpose and to contain material that did not comply with the terms of the contract. Mowlem then supplied additional fill material to Phi who declined to pay for it. Mowlem claimed payment for the additional material on a quantum meruit basis. The quantum meruit claim failed as the arbitrator found that Phi had not agreed to pay Mowlem and that no term could be implied into the subcontract to that effect.

Mowlem appealed to the court pursuant to s69 of the 1996 Arbitration Act stating that the arbitrator had erred in law. However, HHJ Gilliland QC agreed with the arbitrator. Mowlem argued that it was implicit that in Phi's requests for Mowlem to supply material there was a promise by Phi to pay Mowlem a reasonable price for it.

However, the arbitrator had held that there was no evidence of any mutual understanding between Mowlem and Phi that payment should be made and that there was no necessity (or business efficacy) for implying such a term. Therefore, Mowlem were not entitled to payment on a restitutionary basis in principle. Mowlem had had the choice of what materials to supply and the original fill was not fit for its purpose by the inclusion of the additional material.

The parties had acted together for their mutual benefit to complete their respective contracts and construct the retaining walls. There was no evidence of any mutual understanding that payment should be made and there was no necessity to imply such a term. It is necessary to look at all the circumstances of the case to see whether an obligation should be imposed. It is not enough to merely say that any presumption as to payment arose as a result of carrying out the work.

Where one party provides a service or supplies a product to another, there is no presumption that that service or product must be paid for. There was no express term in the subcontract governing payment for the replacement material and no evidence was produced of there being any mutual understanding between the parties that the replacement fill should be paid for.

The fact that the supply benefited Mowlem because it would not be at risk of breaching its own contract was a material factor for the arbitrator to take account of.

The Judge also agreed with the arbitrator that there was no implied term to the effect that Phi had to accept whatever specified material was supplied and in insufficient quantity to complete the subcontract works. Such a term was not required to give business efficacy to the subcontract.This finding did not equate to any error of law. As it happened, the arbitrator had erred in relation to the quantity of fill to be supplied, but that did not affect the outcome of the appeal.

**Costs - Consequences of Refusing to Mediate**

**Yorkshire Bank plc & Anr v RDM Asset Finance Ltd & Anr**

Yorkshire were broadly successful at trial. They applied for a costs order to reflect the fact that RDM had refused to attempt to settle the dispute through mediation.

Judge Langan agreed that this refusal was unreasonable. The reasons for this included that the dispute (about four coaches which Yorkshire had engaged RDM to recover and sell on its behalf) was a factual one and did not involve questions of law of the construction of a document. The Judge further concluded that the character of the individuals involved, who had given evidence, was such that they were practical commercial people who if they sat round a table might well have come to a sensible resolution of the dispute.

Finally, each party's case had certain weaknesses which only became apparent when the matter came to court. These were weaknesses a skilled mediator would have brought home to the parties.

The Judge said that in the ordinary course of events, given that Yorkshire had been broadly successful in respect of the claim, he would have awarded Yorkshire 50% of their costs. However, this was increased to 65% as a result of the refusal by RDM to mediate.

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