Fenwick Elliott
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# Dispatch

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

**The problem with oral contracts**

**■ Brian Royle Maggs t/a BM Builders v GAS Marsh & Marsh Jewellry Co Ltd**

Mr Marsh contacted Mr Maggs with a view to engaging Mr Maggs to carry out the refurbishment of a town house in Bath. The parties met and at that meeting Maggs' surveyor, Mr Cook, listed the work which Marsh wanted carried out. A budget estimate of £36,510 plus VAT was orally accepted by Marsh and works began. During the works, some additional work was undertaken and some work was omitted. No estimates were asked for or provided for the additional works. Maggs then produced a priced list of "variations to the works to date" and he then submitted his final bill for £69,293.71 plus VAT together with a list of omissions and extras. Taking into account amounts paid, Maggs claimed he was owed £26,043.71 plus VAT.

Marsh disputed this and Maggs issued a claim in the Bristol County Court. Maggs amended his claim to seek a total contract price of £126,363.00 based upon the valuation by his expert surveyor. As part of his defence, Marsh referred to the two lists of extras that had been produced by Maggs as evidence that certain items of work claimed by Maggs as extras were in fact included in the original contract price. At the hearing, a major factual issue in dispute related to what works had been included in the original contract. Both Marsh and Maggs gave evidence at the hearing as to what was discussed at the meeting in July 2002 and in the pre-contract period. The fundamental issue that then emerged was what type of evidence the Judge could receive and rely on in determining the scope of the original contract.

Counsel for Marsh argued that as this was an oral contract the Judge should take account of all the evidence including what was said and done after the contract was formed as this would throw light on what the parties believed was the scope of the original contract. Such evidence would include the two lists of extras as these could provide a guide to Maggs' understanding of what the parties had agreed. Counsel for Marsh argued that if Maggs was now saying that a lot of items of work claimed but not included in the two lists were true extras then there was good reason to doubt the accuracy of Maggs' evidence. Counsel for Maggs disagreed and argued that it was not permissible for the Judge to receive or take account of evidence of conduct subsequent to the formation of the contract.

The Judge found that subsequent conduct could not be taken into account in determining the terms of the contract. He therefore did not take account of the lists produced by Maggs. The Judge preferred the evidence of Maggs and Cook to that of Marsh and then proceeded to rule on which of the items claimed by Maggs were extras. At a later quantum hearing the payment recovered by Maggs for the extras was nearly £87,000. Marsh appealed the legal ruling which excluded consideration of the list of extras as relevant to the issue of what was agreed between the parties in March 2003. The issue before the CA was whether the Court could take account of evidence of conduct subsequent to the formation of contract when the contract is an oral contract. The CA said that it could. With an oral contact, nothing prevents the Court from looking at the way the parties acted for the purpose of ascertaining what terms were agreed but not written down.

The CA said that the Court's task was to decide what the parties agreed at the time of the original contract in March 2003. That was ascertainable at the time, but unfortunately here no one ascertained it. The parties did not write down what they had agreed. No complete record was made. Accordingly, the only way to decide what had been agreed then was to hear evidence about it at the trial, two or three years later. The accuracy of the parties' recollections was disputed. In those circumstances as a matter of general principle, for the purpose of testing the accuracy of those recollections, it was highly relevant to hear evidence about what the parties had said and done about the disputed matters in the meantime.

Thus the Judge should have considered whether any inference should be drawn from the two lists of extras. The view he took of the explanations for the disparity between the extras claimed in February 2004 and those claimed after March 2005 would have been bound to have effected his conclusions as to credibility. As the whole result depended upon the Judge's preference for Maggs' evidence, this issue went to the heart of the case. Cases relating to the construction of oral contracts rarely reach the courts. Here, the Recorder erred, following the rules of construction for written contracts not those for oral contracts. This meant that the matter was referred back to the County Court for reconsideration. Unsurprisingly, this was a case where the costs comfortably exceeded the money at issue, and the CA ended their judgment by recommending ADR and also noting, perhaps with an eye on a future costs award, the fact that the Claimant had not utilised the Pre Action Protocol procedure.

**The Impact of Non-Party Access to Court Documents**
**■ Statutory Instrument 2006/1689 - the Civil Procedure (Amendment) Rules 2006**

SI 2006/1689 comes into effect on 2 October 2006. Its effect is to amend CPR Rule 5.4 to widen public access (including the press) to court documents and, in particular, pleadings. Currently, Rule 5.4 of the CPR provides that unless the Court orders otherwise, a third party can only obtain a copy of the Claim Form, but not any documents attached to it, in certain defined circumstances - namely, if all defendants have acknowledged service or filed a defence, if the claim has been listed for a hearing or where judgment has been entered. Further, the Court may restrict even this access on application of a party identified in the Claim Form.

The new SI will reverse the current position. Statements of Case (which definition covers Claim Forms and pleadings) will be released to third parties unless the Court orders that they should not be. The rule change is the result of a successful lobbying campaign from the press who criticised the 2005 amendment as being contrary to the principle of open justice. The new Rule 5.4(C)(1) will state that: "*a person who is not a party to proceedings may obtain from the court records a copy of a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it*". Statements of Case will be available only where all of the defendants have filed an acknowledgment of service or a defence. Parties identified in a Statement of Case will be able to apply to the court to deny access to non-parties or restrict the persons or classes of persons who may obtain a copy of Statements of Case and the Court will be able to make orders preventing access altogether. However, the new rule does not provide any guidance as to the criteria the Court may take into account when considering whether to restrict disclosure of a document. In its wide discretion, the Court will nevertheless need to take account of the overriding objective (CPR Part 1) and the Human Rights Act 1998.

Finally, the SI does not state whether it will have a retrospective effect. In the absence of any express rule, it therefore appears that unless there has previously been an order restricting access, non-parties will be able to gain access to Statements of Case filed prior to 2 October 2006. This is an important consideration for those parties to litigation who do not wish the press to have access to pleadings that previously were protected. This is particularly in light of the fact that the publisher of defamatory material contained in a Statement of Case obtained from the Court will be protected by qualified privilege, as long as the matter is of public concern and for public benefit, and as long as there is no malice involved.

This change to the CPR has two results. Firstly, litigants as a matter of course must now consider whether they should make an application to the Court for restricted access to the parties' Statements of Case once proceedings are commenced. Secondly, if the new rules are utilised by the public and the press it will be interesting to see whether this amendment leads to an increased use of arbitration.

**Adjudication - the Insolvency Procedures**
**■ Medlock Products Ltd v SCC Construction Ltd**

SCC, a subcontractor, raised a series of invoices against the contractor, Medlock. No withholding notices had been served. These were not paid and SCC proceeded to present a petition to wind Medlock up. The sum in dispute was approximately £52k.The solicitors acting for Medlock indicated that the quantified losses of Medlock greatly outweighed those sums claimed by SCC. In other words, the debts were bone fide disputed on substantial ground or there were cross claims which Medlock had not yet been able to litigate which exceeded the amount of the petition debt. Consequently, they issued an application to restrain the advertisement of the winding up petition saying that the winding up petition was inappropriate.

The Judge noted that the contracts were written contracts within the meaning of the HGCRA because they incorporated the written terms of Medlock which are standard terms of contract. The Judge considered the possibility that the absence of a withholding notice might be a special circumstance following the leading insolvency case of *Bayoil* for refusing an order restraining advertisement. However he decided that he could rely on the absence of any withholding notice to support his conclusion that the cross claims were not substantial or serious claims which Medlock would have had in mind irrespective of the winding up proceedings.

The cross claims were described as being thought of as a last resort and would not have been advanced until the threat of winding up proceedings was already very much to the fore. This was therefore a situation where the main contractor was trying to take every possible point and "throw up a lot of dust to conceal" that he had failed to pay an agreed sum. The Judge did not think that the dispute was a genuine one on substantial grounds and the restraining application was thrown out.

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