

# ADJUDICATION CASE SUMMARIES N



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## **Naga On Building Services Ltd v Euston Hotel Ltd [2000] Teclar**

In a two line note, Teclar reports that it would appear that in **Naga On** the court declined to follow the ruling in *Bloor Construction v Bowmer & Kirkland* to apply the slip rule and permit an adjudicator to amend a decision. There is no transcript or further details available on this case. 1<sup>st</sup> May 2000

## **Nageh v Giddings [2006] EWHC 3240 (TCC)**

Application to set aside a default enforcement judgement of a default adjudication decision. Assertion that notice of adjudication and subsequent enforcement action sent to wrong address. In both situations adjudicator and solicitors sent notices to two addresses in compliance with CPR rules. Enforcement judgement upheld. *Regency Rolls Ltd v Carnall [2000] EWCA Civ 379* : *Mersey Docks v Michael Kilgour [2004] EWHC 1638 (TCC)* : *Rhode Construction v Markhan-David [2006] EWHC 814 (TCC)*: *Carillion v Devonport [2005] EWCA Civ 1358*. considered. His Honour Judge Peter Coulson. TCC. 8th December 2006

## **Naylor (William) (t/a Powerfloated Concrete Floors) v Greenacres Curling Ltd [2001] ScotCS 163**

Powerfloated Concrete Floors (PCF) contracted to lay a concrete skim over pipe-work at an ice rink. When Greenacres failed to pay for the work PCF referred the matter to adjudication. Greenacres defence was that the concrete used did not meet specifications. The adjudicator did not agree and ordered payment.

Greenacres then commenced a second adjudication seeking an order for rectification of the works. PCF sought, invoking the "Double Jeopardy" rule to stop this second adjudication. The court concurred with the petitioner's assertion that it was not possible to distinguish between the subject matter of the first and second adjudication. However, in the circumstances of the case the application failed. As a matter of Scottish legal procedure, the applicant had sought an interdict which is a procedure aimed at specific performance of for instance the obligations of the second adjudicator, whereas he should have applied for Judicial Review.

The court considered *Workplace Technologies plc v E Squared [2000]* and contrasted English and Scottish procedure. Whilst in England the courts might not have jurisdiction to stop the adjudication Judicial Review in Scotland could be used to prevent a procedure that would ultimately end up being considered in Judicial Review enforcement procedures and the evident issue of double jeopardy would have to be addressed in any case. Lord Bony. Outer House, Court of Session. 26<sup>th</sup> June 2001

**COMMENT** : Whether or not the court has the power to stop an adjudication is not really that important. Once the court had expressed the view that the second adjudicator did not have jurisdiction there would be little point in the referring party or the adjudicator continuing with the adjudication. The defendant could simply boycott the process to avoid incurring any expense, ignore the eventual decision of the adjudicator and resist any application for enforcement, reinforced by the opinion of the court. The referring party would hence incur a large amount of expense for no useful purpose. The opinion of the court is valuable to the referring party in that it makes it clear that since they challenge the merits of the first adjudicator's decision, what they need to do is to move to arbitration or litigation to seek a final determination of the matter.

## **Nolan Davis Ltd v Steven P Catton (No1) [2000] EWHC 590**

The defendant resisted an application for enforcement of an adjudicator's decision on the grounds that no contract had been concluded between the parties and accordingly the adjudicator had no jurisdiction. The question as to whether or not there was a concluded contract was not put to the adjudicator. Rather the issue put to the adjudicator was one in respect of legal personality and the relationship between Mr Catton and the companies with which he was associated and whether or not Mr Catton should be held personally liable.

The problem centred around problems with the trading name of the company (Hazel Green Village Management Ltd) as set out in correspondence – which was incorrectly stated on two occasions but where Mr Catton was clearly identified. It is clear that on all occasions Nolan Davis had intended to contract with the company. Under the Companies Act s349 an individual can be held personally liable where the company

## NADR ADJUDICATION CASES SUMMARIES

is not properly identified. The parties agreed to submit this issue as a preliminary issue to the adjudicator. He decided that Mr Catton was personally liable and subsequently awarded against Mr. Catton with costs.

His Honour Judge David Wilcox held that even if the adjudicator wrongly decided the jurisdiction issue the court would not interfere. Similarly the court would not disturb a decision on costs. In both cases the parties had conferred jurisdiction on the adjudicator to determine the issue and in consequence to determine his own jurisdiction. *Northern Developments v Nichol* applied. Application for summary enforcement granted.

His Honour Judge David Wilcox. TCC. 22<sup>nd</sup> February 2000.

### **Nordot Engineering Services Ltd v Siemens plc [2000] EWHC SF 00901 (TCC) 16/00**

A dispute arose between sub and main contractor on a project which involved power generation. Potentially therefore the construction may well have been exempted from the HGCRA adjudication procedure by s105. This point was not finally determined by the court.

Nordot submitted the dispute to adjudication. Siemens objected on the basis of a s105 exception but left it to the adjudicator to decide whether or not it was a relevant contract subject to the scheme, agreeing to be bound by that decision. The adjudicator decided that the scheme applied, and went on to determine the dispute. Siemens, in this action, resisted enforcement on jurisdictional grounds, namely that there could be no jurisdiction for an adjudicator to determine disputes relating to exempted contracts.

The court considered *The Project Consultancy Group v Trustees of the Grey Trust* [1999] BLR 377; *Westminster Chemicals & Produce Ltd v Eicholz Aloeser* [1954] 1 LLR 99; *Palmers Ltd v ABB Power Construction Ltd* [1999] BLR 426, 436; *Homer Burgess Ltd v Chirex Annan Ltd* 1999 and determined that there is nothing to prevent the parties voluntarily submitting disputes relating to exempted contracts to adjudication subject to the statutory procedure. Whilst it is not possible for one party to unilaterally evade the statutory procedure, there is no reason why parties cannot opt in. See para 20

*"It seems to me that the submission that it is not open to the parties to confer jurisdiction on an adjudicator is not sound in principle, I can see no reason as a matter of law, why parties cannot agree to abide by the decision of a third party if they so wish. Clearly that is appropriate in the case of arbitration. Why should it not be appropriate in the case of adjudication I ask? If parties with their eyes open enter into an agreement to the effect that "The adjudicator will decide this question and we will be bound by his decision", why should the court not give effect to that agreement? There can be no public policy against that and the mere fact that the system adjudication is established by statute does not, it seems to me, make any difference. One could say exactly the same thing, as a matter of principle, in relation to the question of arbitration, There is no obligation to agree to arbitration before the parties agree to it. Similarly if parties wish to resolve a dispute and submit it to an adjudicator who derives his jurisdiction from the statute nevertheless, it seems to me, it is open to the parties to confer that jurisdiction on him by agreement should they wish."*

His Honour Judge Gilliland. TCC. 14<sup>th</sup> April 2000.

### **Northern Developments Ltd v. J & J Nichol [2000] EWHC TCC 176**

This dispute concerned a Dom/2 subcontract. ND was the contractor, J&J the subcontractor. Issues regarding delay and the standard of work arose. ND issued a withholding notice. J&J withdrew from site. ND treated this withdrawal as a repudiation of the contract. J&J commenced adjudication. ND raised 1) set off for defective works, 2) loss arising out of delay and 3) the repudiation question in their defence. The adjudicator asked the parties whether these issues should be considered as an integral part of the dispute referred to him. The adjudicator determined that the issues were an integral part of the dispute and proceeded to rule upon them.

The referral was for a decision without reasons and this is what he delivered, but then went on to provide an explanatory note, which was stated not to be part of the decision. Here he explained that the defects were integral to the dispute because they were relevant to the value claimed. J&J challenged this because it was not covered by the withholding notice and thus beyond his jurisdiction. He further determined that there was delay but decided that delay costs were outside the dispute since they were not covered by a withholding notice. Repudiation did not arise out of the contract and was not within his jurisdiction. DN challenged the repudiation issue as a denial of justice.

*Macob v Morrison* (1999) BLR 93; *Project Consultancy v Gray Trust* (1999) BLR 377; *Bouygues v Dahl-Jensen* 1999; *Sherwood & Casson v Mackenzie* 1999 ; *VHE Construction v RBSTB* 2000 ; *Outwing v Randell* [1999]

## NADR ADJUDICATION CASES SUMMARIES

*BLR 156 ; Homer Burgess v Chirex* 1999. considered regarding review of the adjudicator's decision. In the circumstances the delay question was mentioned in the withholding notice, even though not quantified. The adjudicator had jurisdiction. Whether or not the decision was correct was another matter, but it could not be challenged here. Application for payment enforced.

**Regarding repudiation** it was established in *Heyman v. Darwins* [1942] 2 Ll L 65. that acceptance of repudiation brings **performance** of the contract to an end, it does not end the contract. Since the matter was not the subject of a withholding notice it was outwith the jurisdiction of the adjudicator.

*John Cothliff v Allen Build* (1999) CILL 1530 considered regarding the power of an adjudicator to award costs. The HGCRA does not give this power, but the parties may give an adjudicator that power and in this case they did.

His Honour Judge Peter Bowsher. TCC. 24<sup>th</sup> January 2000.

### **Norwest Holst Ltd v Carfin Developments Ltd [2008] ScotCS CSOH\_138**

This case concerned an application for summary enforcement of a sum due under a certified stage payment under the ICE 5th ed standard form construction contract (in respect of ground works), in the absence of a withholding notice (in lieu of adjudication). The defendants applied for a cist to arbitration under clause 66: The court held that since there was no dispute to refer to arbitration a cist was not in order. The sum was due under the terms of the contract which incorporated the withholding notice scheme under s111 HGCRA 1996. The court dismissed an argument that insufficient information had been provided to justify certification and thus the certification was invalid. The contract required the employer to pay certified sums, thus the sum was due. An assertion that the wrong person was notified was rejected – the application followed the same procedure as previous applications which had been honoured.

*Halki v Sopex Oils* [1998] 1 WLR 726). *Sanderson & Son v Armour & Co* 1922 SC (HL) 117. *North British Rly Co v Newburgh & North Fife Rly Co* 1911 SC 710. *Roxburgh v Dinardo* 1981 SLT 291. *Thomas Woods v Co-operative Ins. Society Ltd* 1924 SC 692. *Parochial Bd of the Parish of Greenock v John Coghill* (1878) 5 R 732, *Redpath Dorman Long Ltd v Tarmac Construction Ltd* 1982 SC 14, *Albion Housing Soc. Ltd. v Taylor Woodrow Homes Ltd* 1985 SC 104, *Strathmore Building Services v Greig* 2000 SLT 815. *Orkney Islands Council v Charles Brand Ltd* 2002 SLT 100. *Hayter v Nelson* [1990] 2 Lloyd's Rep 265. *Jamieson v Jamieson* 1952 SC (HL) 44. *Minster Trust Ltd v Traps Tractors Ltd* [1954] 3 All ER 136, *Crestar Ltd v Michael John Carr* (1987) 37 BLR 113. *Emson Contractors Ltd v Protea Estates Ltd* (1987) 39 BLR 131. *Clark Contracts Ltd v The Burrell Co Ltd* 2002 SLT (Sh. Ct.)103, *Rupert Morgan v Jarvis* [2004] 1 All ER 529 considered.

Lord Glennie Outer House Court of Session. 18<sup>th</sup> September 2008

### **Norwest Holst Ltd v Danieli Davy Distington [2007] All ER (D) 120 (Jul)**

Construction Contract s105 : A contract for the design and construction of a casting pit was essentially a construction operation and thus within the HGCRA - and not covered within the exemption for plant.

TCC. Ramsey J. 9<sup>th</sup> July. 2007

### **Nottingham Community Housing Assoc v Powerminster Ltd [2000] EWHC HT 00/206 (TCC) ; BLR 309**

The court was asked to decide whether or not a contract for the maintenance of gas appliances in community owned residential properties was within the HGCRA. In a short judgement, the court concluded that the work was not excluded by s105. Further, attempts to distinguish between parts of the work and thus exclude elements related to demolition prior to rebuild were not permitted. The central issue was whether as a whole the contract was for works covered by the act rather than minor elements which could be seen to involve excluded operations.

*Walker (Inspector of Taxes) v Centaur Clothes Group Ltd* [2000] 2 AER 589 referred to regarding whether or not a provision in a contract may be deemed to be redundant.

Regarding construction of contract provisions, *Beaufort Developments Ltd v Gilbert-Ash Ltd* [1999] AC 266 referred to.

His Honour Judge Dyson. TCC. 30<sup>th</sup> June 2000.