

# ADJUDICATION CASE SUMMARIES



LAST UPDATED 20<sup>th</sup> JUNE 2008

## **Oakley (William) v Airclear Environmental Ltd [2001] EWHC Ch.Div.**

This concerned a dispute between NAM/T nominated subcontracts (Airclear appeared in succession to the original sub-contractor – though Oakley opposed any assignment of the contract) and the main contractor on work to a bar in Cardiff Bay. The nomination paperwork envisage the adoption of NAM/SC contract terms. In the event no contract was formerly concluded though a letter / tender was submitted. Work went ahead. The subcontractor submitted bills in due course and was paid subject to deductions for discounts, retentions and contra-charges for loss and delay. A dispute arose. During negotiations Airclear's primary stance was that there was no contract, that they were entitled to a quantum meruit – a fair price – and that the JCT NAM/T or NAM/SC contract provisions regarding set off etc did not apply.

Relying on NAM/T Oakley submitted the dispute to adjudication claiming £17K contra-charges to RIBA. Airclear responded by submitting the dispute regarding deductions and quantum meruit to RICS pursuant to NAM/SC. The adjudicator delivered a decision which included a finding that there was a concluded NAM/SC contract, that the deductions were incorrect and that sums were due to Airclear. This decision was not complied with. Accordingly, this was followed up with a statutory demand pursuant to Rule 6.5(4) of the Insolvency Rules 1986.

The statutory demand was challenged and at first instance the court found that there was no contract but that the parties had agreed to an ad hoc adoption of the NAM/SC adjudication provisions by exchange of correspondence. *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd (The "Amazonia")* [1990] 1 Lloyd's Rep 236, *Hiscox v Outhwaite (No 1)* [1992] 1 AC 562, 575, *The Vistafjord* [1988] 2 Lloyd's Rep 343 referred to. The court here held that this conclusion was plainly wrong. It was not based on s107 HGCRA. The adjudicator was not validly appointed. His decision was a nullity and could not therefore be relied on in support of a statutory demand. Appeal allowed.

*Macob v Morrison* [1999] BLR 93 on objective of adjudication referred to.

His Honour Judge Etherton. Chancery Division, High Court. 3<sup>rd</sup> October 2001.

## **Orange EBS Ltd. v ABB Ltd. [2003] EWHC 1187 (TCC)**

This concerned a final account dispute arising out of a DOM/1 1980 edition standard form contract. Whilst negotiations and claims commenced in June the final account and demands were not submitted until 2<sup>nd</sup> December. When payment was not forthcoming the dispute was referred to adjudication on the 6<sup>th</sup> January. The contractor resists enforcement on the grounds that a dispute had not yet crystallised and further time till the 20<sup>th</sup> January was needed to consider the application, particularly because the holiday period had intervened.

Regarding what is a dispute and the crystallisation of a dispute, *Halki v Sopex* [1998] 1 WLR 726, *Monmouthshire CCC v Costelloe & Kemple* [1965] 5BLR, *Fastrack v Morrison* [2000] BLR 168, *Sindall v Solland* 2001, *Edmund Nuttall v R G Carter* [2002] BLR 312, *Cowling v CFW Architects* [2002] EWHC 2914, *Watkin Jones v Lidl*, *Durnell v Kaduna* 2003, *Tomlinson v Midas Homes*. 2003 and *Beck Peppiatt v Norwest Holst* [2003] EWHC 822 considered. On the facts the court determined that a dispute had crystallised. The *Halki* applied. The intervening holiday period was not sufficient excuse in the circumstances to deprive the claimant of a right to settle the matter promptly.

Her Honour Judge Frances Kirkham : TCC. 22 May 2003

## **Outwing Construction Ltd v. H. Randell & Son Ltd [1999] EWHC TCC 248**

A dispute arose over payment of elements of a final account in respect of a DOM/1 Contract for ground works. The adjudicator found for the claimant and ordered peremptory payment of the sum, his fees and the nomination fee. He further authorised application for enforcement, subject to his approval upon notification. As an aside, His Honour Humphrey Lloyd J observed that since he was *functus officio*, this was unnecessary but noted that nothing turned upon it.

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The claimant gave notice that unless paid, in accordance with *Macob Civil Engineering Ltd v Morrison Construction Ltd* 1999, they would seek enforcement. The respondents replied stating they were aware of the implications of *Macob* but contended that the adjudicator had exceeded his powers and further stated that payment on final account was not due under the Scheme for another 6 weeks. The claimants commenced this action for summary judgement and costs subject to an abridged timetable. The respondents then paid by cheque leaving only the question of costs of this application to be dealt with. The respondent essentially complained about the haste with which this action had been pushed through the court – which is why they were caught out by events.

The court noted that the enforcement of peremptory orders is a novel procedure provided for by the amended s42 Arbitration Act 1996. Application for abridgement of time is in line with the unique speedy process envisaged by Parliament. The claimant was further entitled to recover costs of that application.

His Honour Judge Humphrey Lloyd. TCC. 15<sup>th</sup> March 1999.

### **Owen Pell Ltd v Bindi (London) Ltd (2008) LAWTEL AC0117443**

The parties agreed, after the event, to the determination of a construction dispute by expert determination in lieu of adjudication, arbitration or litigation. The defendant did not like the outcome and refused to pay alleging bias and irrationality. In this application for summary enforcement the court ruled that in the absence of bias, expert determination is not subject to review by the courts where it had been pre-agreed that the decision be final and binding.

*Campbell v Edwards* [1976] 1 WLR 403, *Baber v Kenwood* [1978] 1 Lloyd's Rep. 175, *Dean v Prince* [1954] 2 WLR 538, *Arenson v Arenson* [1973] 2 WLR 553. *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 2 EGLR 103; *Jones v Sherwood Computer Services* [1992] 1 WLR 277, *Re Medicaments and Related Classes of Goods* [2001] 1 WLR 700; *Porter v Magill* [2002] 2 AC 357, *Macro v Thompson (No. 3)* [2002] BCLC 36, *Bernhard Schulte v Nile Holdings* [2004] Lloyd's Rep. 352, *Homepace Ltd v Sita South East Ltd* [2008] EWCA Civ 1 considered.

HHJ Frances Kirkham TCC. Birmingham Registry. 19<sup>th</sup> May 2008/05