Oakley (William) v Airclear Environmental Ltd [2001] Adj.L.R. 10/4

JUDGMENT : Mr Justice Etherton : Chancery Division. : 4th October 2001.

Introduction:

1. These are combined appeals from the refusal of His Honour Judge Chambers QC, on 11 April 2001 in the Cardiff County Court, to set aside statutory demands dated 19 December 2000 served on William Oakley and David Oakley.

The Background:

2. In 1999 Scottish and Newcastle Retail Limited ("S&N") wished to carry out works to premises known as Bar 38, Mermaid Quay, Cardiff ("the Site"). G Oakley & Sons ("Oakley"), which I understand to be a firm of which William and David Oakley were the partners, was invited to tender for the main contract for those works. The contract was to be the intermediate form of building contract 1991 edition ("the Main Contract"). Such a contract was in due course executed, with amendments, by S&N and Oakley.

3. Under the Main Contract, S&N, as employer, was in a position to nominate subcontractors. Section 6 of the Main Contract contained provisions concerning named subcontractors. Airclear Environmental Limited, the First Respondent, was listed in section 6 of the Main Contract as one of a group of named possible subcontractors in relation to mechanical and air-conditioning works. Under the Main Contract the selection and appointment of the nominated subcontractor was achieved by use of documentation known as NAM/T. This is in three sections. The first section, Section I, which is completed by the employer, is an invitation to the potential subcontractor to tender. It sets out various matters including, for example, matters relating to the description of the proposed subcontract works and a description of the main contract terms, on the basis of which the subcontract tender was to be made. The second section. Section II, is the tender to be completed by the potential subcontractor and contains provision for the subcontractor's proposals on a range of matters, including, for example, the timing of any subcontract works to be carried out, the provision of insurance, and any special contractual provisions which the subcontractor wished to include in any contract. The third section, Section III, contains the terms of the subcontract agreement between the main contractor and the successful subcontract tenderer. Article 1.1 of Section 3 is as follows:
"For the consideration mentioned in article 2 the Sub-Contractor shall, upon and subject to the Sub-Contract Documents, namely this Tender and Agreement NAM/T, the Sub-Contract Conditions and the Numbered Documents, carry out and complete the Sub-Contract Works in accordance with the requirements, if any, of the Contractor for regulating the due carrying out of the Works which are agreed by the Sub-Contractor, initialled by the Contractor and Sub-Contractor, attached hereto and incorporated herein, provided that such requirements shall not alter any item set out in Section I or II of NAM/T. "

   Article 1.2 of Section III is, so far as material, in the following terms:
"The Sub-Contract Conditions are those set out in the 'Sub-Contract Conditions NAM/SC' 1998 Edition issued by The Joint Contracts Tribunal Limited, which shall be deemed to be incorporated herein."

   Article 3 of Section III is in the following terms:
"If any dispute or difference arises under this Sub-Contract either Party may refer it to adjudication in accordance with clause 35A."

4. Clause 35 of NAM/SC contains provisions relating to resolution of disputes by an adjudication process. Clause 35A of NAM/SC is as follows:
"The decision of the Adjudicator shall be binding on the Parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given."

   Clause 35A.7.3 is as follows:
"If either Party does not comply with the decision of the Adjudicator the other Party-shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause 35A.7.1.

5 . S&N completed Section I of NAM/T in relation to the mechanical and air-conditioning subcontract works. S&N sent the completed Section I direct to the First Respondent. Oakley was not sent a copy of it until much later.

6. The First Respondent did not complete Section II of NAM/T, but returned to S&N a single page *"Tender Cost Breakdown"* for a tender cost of £76,066, and a total tender sum, after adding 1/39th for the main contractor's profit, of £78,016.41. This document was not received by Oakley until after disputes had arisen between the parties.

7. On 13 December 1999, Mr Morris, on behalf of Oakley, sent to S&N's quantity surveyor a fax in the following terms: "We have not received any formal instruction or subcontract documentation to engage .... Airclear .... and whilst we are currently paying as their agreed invoice values, we cannot continue to do so without proper instruction. Would you please issue the necessary papers by return."

8. That faxed memorandum was acknowledged and responded to on 13 December 1999 as follows, so far as material: *"Section 3 of the NAM/T document has been issued to each of the named sub-contractors. Please contact those concerned for necessary documentation. Any problems, please call."*

9. Possibly as a result of that indication by S&N's quantify surveyor, on 20 December 1999 the First Respondent faxed through to Oakley a completed Section III of NAM/T. The faxed copy of Section III was undated, but there had been inserted in it a subcontract sum of £76,066. The faxed copy had been signed on behalf of the First Respondent. Oakley never signed that copy or any other copy of Section III of NAM/T.

10. Notwithstanding that there was no formal agreement signed by Oakley and the First Respondent, the First Respondent carried out work on the Site from about the end of September 1999. Oakley made stage payments to the First Respondent pursuant to various "remittance advices". Oakley made deductions from the certified value of work completed and material on the Site specified in the remittance advices. Deductions were made in respect of a "retention" and a "discount", and in respect of various "contra-charges". Those contra-charges amounted in aggregate to in excess of £17,000 in respect of loss and expense which Oakley maintained it had sustained in consequence of delays in construction by the First Respondent.

11. The First Respondent did not agree with the deductions made by Oakley. By letter dated 1 February 2000 from the First Respondent to Oakley, the First Respondent said, so far as material:

"Since we have never been in contract with you, we are accepting payments from you on the footing that you are acting on behalf of the employer, Scottish & Newcastle Retail (SNR) in the capacity of its agent.

In these circumstances there is no basis for the amount having been reduced, either as to value or way of contra-charges in respect of what you perceive, incorrectly, to be by way of compensation for alleged defaults on your part which, of course, is misconceived.

Further, in view of the contents of your letter to SNR's agents, Hills, dated 13 December 1999, you are plainly in agreement with the above analysis, and there is confirmation of this in the absence from your construction programmes of any reference to the mechanical installations, and from your exchange of faxes with Newman Gauge on 15 November 1999.

It is clearly a very serious matter if you have received from SNR a greater sum than that paid to us and any shortfall should be remitted immediately. In this connection, we shall in any event be grateful if you would kindly forward to us for inspection copies of the substantive contract documents in place as between yourself and SNR. Alternatively, an appointment for our representative to visit your offices for this purpose would be appreciated."

12. In an attempt to negotiate a settlement of the dispute, the First Respondent's adviser, Mr Cliff Cowen FRICS, prepared a summary of the First Respondent's case dated 9 June 2000. He set out the First Respondent's case on two bases. He said the following by way of written introduction to the detailed submissions:

"Disputes have arisen concerning the failure of Oakley to make adequate payments to Airclear, purportedly arising from cross-claims, described by Oakley as 'set-offs', which have never been substantiated, and in respect of which Airclear denies liability.

In rebutting the said set-offs, Airclear has two alternatives, one of which it believes to be untenable. The first is that no contract has ever been entered into at all between Airclear and Oakley. The second assumes the existence of a contract between them on the terms of the JCT Standard Sub-Contract Conditions NAM/SC, 1998 Edition (NAM/SC98), which is denied by Airclear.

Nevertheless, for present purposes, the First Submission herein assumes (so far as possible) that NAM/SC98 terms apply and that Oakley's Main Contract incorporated the terms of the JCT Intermediate Standard Form of Building Contract 1998 Edition (IFC98)."

13 . It is clear from that introductory statement and from Mr Cowen's written submissions that his and the First Respondent's primary position at that stage was that there was no contract between Oakley and the First Respondent on the terms of NAM/SC, so that (as was put in paragraph 2.1 of his submissions) the First Respondent was entitled to a "fair commercial price as a quantum meruit in restitution .... with no deduction for retention, which is to say £24,185.72."

14. The attempts to negotiate a settlement were not successful. On 6 July 2000, Oakley applied to the President of the RICS for the appointment of an arbitrator on a standard form application. In the form, Oakley described the "Nature of Dispute" as follows: "Value £17K approx. Contract: Bar 38, Mermaid Quay, Cardiff. Contra Charge claim for damages, disruptions and contract overrun."

15. In the standard form of application, Oakley specified clause 35B of NAM/T as the "clause in the contract .... [which] gives the President power to make this appointment ...."

16. In paragraph 18 of his witness statement dated 28 February 2001, Mr Cowen describes a meeting which took place on 18 July 2000: "Also on 18 July 2000, I attended a meeting with Mr William Oakley, Mr David Oakley and Mr Ian Garland, who was the quantity surveyor for G Oakley & Sons. I pointed out to them that under the NAM/SC98 clause the proper nominating body for arbitration was the Royal Institute of British Architects ('RIBA"), not RICS. Mr William Oakley immediately said to me, 'So you are not saying now that there is no contract then?' and I said to him, 'No, I am not saying that following advice', indicating that Airclear now agreed, following advice, that there was a contract. Where we disagreed was the appropriate nominator for arbitration under the contract. G Oakley & Sons' stance was that the President of RICS could make the appointment. I also recall mentioning that we could go to adjudication to resolve the dispute over payment. All three of G Oakley & Sons' representatives indicated their preference, as they put it, for arbitration, and they dismissed the notion of adjudication out of hand. Therefore, I believed it to have been confirmed that it was common ground at the meeting of 18 July 2000 that a contract existed between Airclear and G Oakley & Sons on NAM/SC98 terms."

17. In paragraph 6 of his witness statement dated 1 March 2001, William Oakley takes issue, to some extent, with what Mr Cowen said He said: "At paragraph 18 of his witness statement, Mr Cowen refers to a meeting held on 18 July 2000. Mr Cowen's recollection of the meeting is wrong if he believed it to have been confirmed that it was common ground at the meeting of 18 July 2000 that a Contract existed between Airclear and G Oakley & Sons on NAM/SC98."

18. The First Respondent determined to press ahead with its proposal to refer the matter for adjudication. Mr Cowen sent a letter to Oakley dated 1 August 2000 in which he said, among other things, as follows: *"Having taken legal advice concerning the shortfalls in payment, which amount to some £22,000 in total at present, Airclear adopts the first alternative contained in my two-part submission dated 9 June 2000, which is to say that it will rely upon the terms of NAM/SC98 sub-contract agreement for which you have consistently contended, including paragraph 1.85 of my said submission which assumes an implied agreement to complete the sub-contract works within a reasonable time. Airclear's final account will be submitted as soon as possible after the return of Mr John Davies, who is presently on holiday.*

Notwithstanding your views as to dispute resolution as expressed by Mr W Oakley and Mr Garland on the occasion of my visit to your offices on 18 July 2000, you are hereby invited, pursuant to clause 35A.2 of NAM/SC, to agree to the appointment of Mr R A P Hawkins FRICS, FCIArb, of 14 Upper High Street, Winchester S023 8UT, to act as Adjudicator in this matter, subject to his availability and willingness to act.

The Adjudicator will be asked to decide the dispute between the parties as to whether certain set-offs, discount and retention deducted by yourselves from payments which you have made to date to Airclear are in breach of sub-contract, as to which see the Schedule on page 2 of this letter.

Airclear will claim to be entitled to immediate payment of the sums indicated on the said Schedule, together with contractual interest in accordance with clause 19.6 and such other sums as the Adjudicator shall see fit, including the Adjudicator's costs.

Failing your agreement to the above proposals within seven days of this letter, Airclear will make an application forthwith and without further notice to the President of the Royal Institute of British Architects pursuant to section 19 of Tender and Agreement NAM/T."

19. *By letter dated 2 August 2000, the RICS notified the First Respondent that the President had appointed Mr R M Entwistle FRICS arbitrator: ".... in accordance with the terms and conditions of an application made by G Oakley & Sons and supported by reference to a contract between the parties."*

20. By letter dated 4 August 2000, Oakley wrote to Mr Cowen saying that they were surprised that "it would seem that you are still proceeding with appointing an 'Adjudicator' when we have clearly informed you that we had approached the RICS for an appointment of an Arbitrator, which has now happened."

21. By letter dated 8 August 2000, Mr Cowen wrote to Mr Entwistle saying that, under the terms of the contract with Oakley, the proper appointor of the arbitrator was the President or Vice-president of the RIBA; that the President of the RICS had no authority to appoint; and that Mr Entwistle consequently had no jurisdiction in the matter.

22. By letter dated 22 August 2000 to both Oakley and the First Respondent, Mr Entwistle said:
"Further to my letter yesterday, I have now received a letter from Mr Cliff Cowen, on behalf of the Respondent, in which questions are raised over my jurisdiction, arising from the choice of appointing body used. I note that Mr Cowen's letter was copied to both parties.
In view of the points made, I would invite G Oakley to let me have their comments before I make a decision as to whether or not I should proceed in this matter. If I hear nothing by close of business on Friday 24 August, I shall assume that the point about my jurisdiction is accepted and I shall withdraw from the reference."

23. Oakley responded by letter dated 23 August 2000 saying, among other things: " . . . . we are currently looking into the forms of contract with particular attention to your jurisdiction as arbitrator."

24. In the meantime, the First Respondent had applied on about 29 August 2000 to the President of the RIBA for the appointment of an adjudicator. The President nominated Paul Newman FCIArb, barrister, for that purpose. Oakley wrote to the RIBA on 5 September 2000 as follows:
"We wish to confirm receipt of your letter of appointment of an 'Adjudicator' for the above case . It has become apparent that the following matters need to be addressed prior to any appointment:
(a) whether a contract exists and if so between whom;
(b) what contract exists and the amendments to it;
(c) the clause to which appointment is to be referred to, adjudication, arbitration, etc, and who is to appoint, RICS or RIBA.
Once these matter have been addressed, we will proceed accordingly."

25. The First Respondent submitted a formal written Notice of Referral to the adjudicator dated 10 September 2000. No response to that Notice of Referral was ever served by Oakley. Oakley played no part in the adjudication process following its letter of 5 September 2000.

26. The adjudicator gave a written adjudication decision dated 9 October 2000. In summary, he determined that he had jurisdiction, and that the monies deducted as set-off and discount by Oakley should be released to the First Respondent.

27. No sums were or have been paid by Oakley to the First Respondent pursuant to the adjudicator's decision.

28. It was in those circumstances that the statutory demands were served, by the First Respondent on the Appellants pursuant to the Insolvency Act 1986, section 268(1) (a), and the Insolvency Rules 1986, rule

6. In each case the demand was for £25,870.69. The Particulars of Debt specified in each of the statutory demands as follows:

"1. Airclear Environmental Limited (Air-clear) were sub-contracted by G Oakley & Sons for the installation of mechanical ventilation and comfort cooling systems under a standard NAM/SC, 1998 Edition sub-contract.

2 . G Oakley &- Sons provided remittance advice slips throughout the contract which retained monies for discount, set-off and retention. The slips are annexed and marked Document 1.

3. Airclear applied for Adjudication under the contract and an Adjudicator's decision was made by Paul Newman ('the Adjudicator') on 9 October 2000 which found in favour of Airclear on the grounds of both discount and set-off. The Adjudicator's decision is annexed and marked Document 2.

4. The decision reached by the Adjudicator is found at paragraph 16 of the Adjudicator's report. The monies due were taken from the remittance slips presented by G Oakley & Sons and laid out in Annexure 5 annexed and marked Document 3.

5. Interest is calculated to the day of the Statutory Demand as under the Contract terms at 5% over the Base Rate of the Bank of England and in accordance with the Adjudicator's decision. The relevant interest rate can be found in the NAM/SC, 1998 at 19.2.6, the appropriate page is annexed and marked Document 4 . A table of the interest calculation is annexed and marked Document 5.

The amount due is £19,904.59 plus interest of £1,710.30 plus VAT of £3,483.30 plus the Adjudicator's fee £772.50. Accordingly, the amount demanded and due at the date of this Demand is £25,870.69."

29. By notices of application dated 15 January 2001, the Appellants applied to set aside the statutory demands.

The Insolvency Principles:

30. Rule 6.5(4) of the Insolvency Rules 1986 seta out the grounds on which the court may grant an application to set aside a statutory demand. So far as material, it provides as follows:

"The court may grant the application if --

(a) the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand; or

(b) the debt is disputed on grounds which appear to the court to be substantial; or

(d) the court is satisfied , on ether grounds, that the demand ought to be set aside."

31. Paragraph 12.4 of the Practice Direction relating to Insolvency Proceedings provides as follows:

"Where the debtor --

(a) claims to have a counterclaim set-off or cross-demand (whether or not he could have raised it in the action in which the judgment order was obtained) which equals or exceeds the amount of the debt or debts specified in the statutory demand; or

(b) disputes the debt (not being a debt subject to a judgment or order) , the court will normally set aside the statutory demand if, in its opinion, on the evidence there is a genuine triable issue."

The Housing Grants. Construction and Regeneration Act 1996 ("the 1996 Act")

32 . The adjudication provisions of NAM/SC were intended to give effect to the statutory scheme in the 1996 Act. Section 108 of the 1996 Act provides, so far as material, as follows:

"(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.
For this purpose 'dispute' includes any difference.

(2) The contract shall --

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;

(e) impose a duty on the adjudicator to act impartially; and

(f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.
The parties may agree to accept the decision of the adjudicator as finally determining the dispute.
(4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.
(5) If the contract does not comply with the requirements of subsection (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply."

33. "Construction contract" is defined in section 104 of the 1996 Act, so far as material, as follows:
"(1) In this Part a 'construction contract' means an agreement with a person for any of the following --
(a) the carrying out of construction operations ;
(b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise ;
(c) providing his own labour, or the labour of others, for the carrying out of construction operations."

34. S105 defines the expression "construction operations". Such operations include the work carried out by the First Respondent on the Site.

35. The adjudication provisions in s108 of the 1996 Act only apply if the provisions of s107 of the 1996 Act are also satisfied. S107 is in the following terms:
"(1) The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.
The expression 'agreement', 'agree' and 'agreed' shall be construed accordingly.
(2) There is an agreement in writing --
(a) if the agreement is made in writing (whether or not it is signed by the parties),
(b) if the agreement is made by exchange of communications in writing, or
(c) if the agreement is evidenced in writing.
(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.
(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.
(5) An exchange of written submissions in adjudication proceedings or in arbitral or legal proceedings in which the existence of the agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.
(6) Reference in this Part to anything being written include its being recorded by any means."

36. In **Macob Civil Engineering Ltd v Morrison Construction Ltd** [1999] BLR 93, 97, Dyson J said of the provisions of section 108 of the 1996 Act: "*The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement."*

The Appellants' case:

37. The Appellants' case may be briefly summarised in the following way. They say, first, that there was no contract between Oakley and the First Respondent, or, in any event, there was no contract incorporating NAM/SC and NAM/T. Accordingly, the adjudicator had no jurisdiction and his decision is a nullity. Second, even if there was such a contract, it was not a contract in writing within section 107 of the 1996 Act. Accordingly, on either or both of these grounds the debt underlying the statutory demands is disputed on substantial grounds within rule 6.5(4)(b) of the Insolvency Rules 1986. Third, the Appellants have a counterclaim, set-off or cross-demand which exceeds the debt specified in the statutory demands, within rule 6.5(4) (a) of the Insolvency Rules. In this connection, they say that the adjudicator was wrong to disallow the 2.5% discount specified in the remittance advices; and also Oakley has a claim for damages due to delays in carrying out the subcontract work by the First Respondent. They assert that these cross-claims amount in the aggregate to in excess of £19,000. In the fourth place, the Appellants submit that the Court ought to set aside the statutory demands under Rule 6.5(4) (d) of the Insolvency Rules on the ground that the bankruptcy procedure is an inappropriate route for enforcement of an award by an adjudicator. It is said that the route is

inappropriate because the award of an adjudicator is merely provisional, and, on bankruptcy, the statutory regime relating to mutual credits and debts and other mutual dealings would automatically come into effect and require the substantive rights and claims of all parties to be investigated.

The judgment of His Honour Judge Chambers QC

38. The heart of the decision of His Honour Judge Chambers QC is contained in paragraphs 48 - 62 of his judgment, which are as follows:

"48. In his decision which is dated 9 October 2000, the Adjudicator held that a combination of Airclear's signature upon the NAM/T Articles of Agreement and Oakley's letter of 4 August 2000 provided for the necessary agreement.

49. I cannot say that I am convinced by this approach.

50. For present purposes it is enough to say that there is much in what Oakley contend to be the reason why there is no formal contract. Airclear's signature on a document (NAM/T) that contains little of relevance beyond the contract price and the standard printed provisions is a rather unstable starting point for the submission that there was such a contract. The request for arbitration certainly indicates belief in an agreement but neither sets it out nor makes it.

51. The requirements of the Act are quite demanding. First there must be a contract. Second that contract must be set out in writing.

It is important to note that an oral agreement is only effective where, at the time that it is made, the agreement is by reference to terms which are in writing (s 107(3)) or where it is recorded with the authority of the parties to the agreement (s 107(4)). What one might otherwise regard as written evidence of an oral agreement does not appear to be covered by the section. Once one has a binding contract, common sense suggests that there might be other terms, agreed orally, that need not be found in writing.

52 . The various printed terms and conditions that are set out in NAM/SC do not constitute a contract. If parties agree to act upon the basis of those terms and conditions, it still remains for them to agree those matters necessary to provide contractual effect.

53. Although I am confident that in the present case there was a contract between Oakley and Airclear, the evidence does not show me where I find all its essential terms in the documents. Where do I find a description of the works to be performed? Where do I find the period for the performance of the works or is it suggested that a reasonable period was all that was agreed?

54 . It may be that some or all of this can be done by reference into the main contract but that was not the way the case was put. I do not find helpful Airclear's reliance upon Oakley's response to Mr Cowen's 'report' of 9 June 2000.

First, because references to 'the contract' could just as easily be references to the main contract as to a sub-contract. Second, because I do not think that the document comes within s107 or constitutes any sort of agreement to the effect that Oakley accept that they are subject to the adjudication provisions of the Act.

55. It seems to me that the essential questions are whether Oakley's conduct constituted an ad hoc adoption of NAM/SC and the dispute provisions of NAM/T Section III and whether Oakley can take advantage of this.

56. Clause 35A.1 of NAM/SC reads as follows: 'Clause 35A applies where, pursuant to Article 4 of NAM/T Section III, either party refers any dispute or difference arising under this Sub-Contract to adjudication.'

57. Clause 35B.1 is in similar terms in respect of arbitrations. Oakley must have purported to make their referral either under NAM/T Section III with NAM/SC or NAM/SC alone because these were the only mechanisms that provided for arbitration.

58. It is clear that the letter of 5 September did not constitute an agreement to Mr Newman or any other adjudicator deciding upon his own jurisdiction to determine a reference to adjudication. Indeed the letter resiled from the earlier position that there was an agreement that provided for resolution of the dispute by arbitration. Was it too late?

59. I think it was.

60. I do not think that it was ever open to Oakley to contend that the effect of the correspondence was that it operated to indicate that there was an agreed arbitration mechanism but no agreed adjudication mechanism. These mechanisms are part of the same package. So long as Oakley maintained that there was agreement for arbitration, Airclear was entitled to require adjudication. The necessary consensus was not as to whether there was an agreed arbitration mechanism or an agreed adjudication mechanism; but whether there were applicable provisions in the NAM documentation which covered both eventualities. The exchanges of correspondence in August 2000 were clearly upon the basis that there were such agreed mechanisms. The reference to adjudication was made upon that basis. I am of the view that Oakley have no case to the contrary effect.

61. Quite regardless of the Act, clause 35A.7.2 provides that: 'The Parties shall, without prejudice to their rights under this Sub-contract, comply with the decisions of the Adjudicator; and the Contractor and the Sub-contractor shall ensure that the decisions of the Adjudicator are given effect.'

62. I should make it clear that, even if the effect of this provision is to enable a party to continue to run a counterclaim or set off as a defence to enforcement of the decision, which I doubt, there is no good evidence before me in this case of any such counterclaim or set off."

The Second Respondent

39. Following the judgment of His Honour Judge Chambers QC, the Appellants discovered that the business, assets and liabilities of the First Respondent had been sold to Airclear TS Limited. Abbreviated accounts of the First Respondent for the period from 1 October 1999 to 5 February 2001 contained a statement that the sale had taken place on 5 February 2001 and that the First Respondent was not expected to trade for the foreseeable future. The balance sheet apparently showed net assets of £100.

40. In fact, it now appears that the business, assets and liabilities of the First Respondent were transferred to Airclear TS Limited on 6 March 2001, but the First Respondent had ceased to trade on 5 February 2001. The Appellants' solicitors wrote to the First Respondent's solicitors recounting these matters and stating that, in the light of them, without prejudice to the other grounds advanced before His Honour Judge Chambers QC, there was no debt due to the First Respondent. The First Respondent's solicitors replied on 20 September 2001 stating, among other things, that they intended to make an application, on the hearing of the appeal, for Airclear TS Limited to be substituted for the First Respondent.

41. At the outset of the hearing of the appeals, on the application of Mr Hickey, who represented both the First Respondent and Airclear TS Limited before me, I gave permission to add Airclear TS Limited as a party to the proceedings and as Second Respondent to the appeals. Mr Lee, who appeared for the Appellants before me, consented to that order, but with the express reservation, that the Appellants' consent was without prejudice to his submission that NAM/SC prohibited any assignment by the First Respondent of the benefit of the NAM/T contract, including any cause of action and the proceeds of any cause of action arising under the contract.

The Appellants' submissions on appeal

42. Mr Lee's starting point was that the learned County Court Judge correctly decided that there was no formal concluded agreement between Oakley and the First Respondent in the NAM/T form, incorporating NAM/SC.

43. Mr Hickey agreed with this interpretation of the judgment. He sought, however, to persuade me that the Judge was wrong in so concluding. He submitted that, taking the facts as a whole, there was an agreement between Oakley and the First Respondent incorporating NAM/SC, even though Section I of NAM/T was not sent to the First Respondent, Section II was never completed, and Section III was never signed on behalf of Oakley. In relation to the absence of a signature, he relied upon section 107(2)(a) of the 1996 Act. This submission, like others to which I will refer in due course, was not stated in the Respondent's Notice to be an additional ground for upholding the learned Judge's order. When this was pointed out to Mr Hickey, he applied orally for permission to amend. This was opposed by Mr Lee. For reasons which I give later in this judgment I decline to give permission to amend the Respondent's Notice.

44. In any event, it seems to me quite impossible on the facts to find that there was a concluded agreement between Oakley and the First Respondent in the form NAM/T, incorporating NAM/SC. Section I of NAM/T, which Oakley did not see, and Section II of NAM/T, which was never completed, contained provisions that were central to the contract, including a description of the subcontract works and provisions fixing the time for commencing and carrying out the subcontract works. Knowledge and agreement by Oakley to the description of the subcontract works in Section I would have been of particular importance to Oakley since, under the terms of clause 2.2 of NAM/SC, in the event of any discrepancy between the Main Contract and the subcontract documents, the terms of the subcontract documents were to prevail. The absence of knowledge of, and express agreement by, Oakley to those matters, and also, for example, to the question of insurance and of the treatment of VAT, which ought to have been addressed in Sections II and III of NAM/T, are inconsistent with any intent by Oakley to enter into a formal contract in the terms of NAM/T. The correspondence, including, in particular, the faxed memo of 13 December 1999, to which I have referred earlier in this judgment, is also consistent with this conclusion.

45. Mr Lee submitted that the learned Judge, having correctly found that there was no contract within section 107 of the 1996 Act, was wrong to hold that the exchange of correspondence referred to in paragraphs 39 - 46 of his judgment "amounted to an ad hoc agreement to apply both the dispute resolution procedures of both Clauses 35 (a) (adjudication) and 35(b) (arbitration) of the standard terms and conditions known as NAM/SC": see page 2 of the grounds of appeal.

46. As developed in oral argument, Mr Lee's submission was that the discussions and correspondence between the parties and their advisers in July and August 2000, as to the possibility of referring the dispute to arbitration or adjudication, amounted to no more than an ad hoc proposal by the First Respondent to adopt the provisions of NAM/T and NAM/SC as to arbitration, and an ad hoc proposal by the Appellants to adopt the provisions of NAM/T and NAM/SC as to adjudication, with neither assenting to the proposal of the other. In short, he submitted that there was no agreement or common assumption by the Appellants and the First Respondent that NAM/T or NAM/SC applied generally or solely in relation to their dispute resolution provisions or any of the dispute resolution provisions. Accordingly, Mr Lee submitted, there could be no question of either an ad hoc agreement or an estoppel so as to satisfy the requirements of a written construction contract within s107 and s108 of the 1996 Act, or otherwise bind the parties to the adjudication provisions of NAM/T and NAM/SC.

47. It is important to note that the learned Judge does not refer anywhere in paragraphs 55 - 62 of his judgment to an ad hoc "agreement". He refers, in paragraph 55, to an ad hoc "adoption" of NAM/SC and the dispute provisions of NAM/T Section III, Mr Hickey accepted that the finding of the learned Judge in paragraphs 58 - 60 of his judgment was a finding of an estoppel, and not of an ad hoc "contract". That concession was, in my judgment, rightly made. It is consistent with para 25 of the learned County Court Judge's judgment which was as follows: "I also see no reason in principle why an estoppel by convention should not arise where two parties proceed under a mutual assumption (which has been communicated between them) that a code or codes of dispute resolution shall be available to resolve a dispute that has arisen between them."

48. In my judgment, the learned Judge was entitled to find, on the facts, that, at the time of the application for the appointment of the adjudicator by the First Respondent, there was a common assumption by the First Respondent and the Appellants that their contractual relations were governed by NAM/T and NAM/SC, including, in particular, their dispute resolution provisions.

49. Mr Lee submitted, particularly in the light of the comments of William Oakley in paragraph 6 of his witness statement of 1 March 2001 in relation to the meeting on 18 July 2000 (which I have mentioned above), that there was never any agreement or assumption by the Appellants that NAM/T or NAM/SC, or their dispute resolution provisions, governed the contractual relationship between the parties. I cannot accept that submission. Paragraph 6 of Mr William Oakley's witness statement, to which I have referred, is expressed in the most vague and ambiguous language. If the position was that the Appellants, or either of them, actually told the First Respondent or its advisers in July or August 2000 that the Appellants did not believe that NAM/T or NAM/SC applied, or if they did not so

believe, I would have expected the Appellants, or one of them, to have stated this clearly and explicitly in a witness statement. By contrast, the application by Oakley for the appointment of an arbitrator, and the continuation of that process of appointment by them, even after the meeting of 18 July 2000, is only consistent with their belief that they were entitled to have an arbitrator appointed under the provisions of NAM/T or NAM/SC. In my judgment, the learned Judge plainly had material on which he could properly come to the conclusion of a common assumption, sufficient to found an estoppel by convention, that, at the time of the application for the appointment of the adjudicator, the provisions of NAM/T and NAM/SC were binding on the parties.

50. The learned Judge held, in paragraphs 58 to 60 of his judgment, that in the letter of 5 September 2000 from Oakley to the adjudicator, which was copied to the First Respondent, Oakley resiled from that common assumption, but that it was too late for them to do so.

51. The Court will only hold a party bound by an estoppel by convention if and to the extent that it would be unconscionable for that party to deny the common assumption. In **Furness Withy (Australia) Pty Limited v Metal Distributors (UK) Ltd (The "Amazonia")** [1990] 1 Lloyd's Rep 236, 251, Dillon LJ said: *"The modern formulation of the question to be asked where there is a question of estoppel by convention is that the Court should ask whether in the particular circumstances it would be unconscionable for a party to be permitted to deny that which knowingly or unknowingly he has allowed or encouraged another to assume to his detriment."*

52. In **Hiscox v Outhwaite (No 1)** [1992] 1 AC 562, 575, Lord Donaldson MR, having referred to the judgment of Bingham LJ in **The Vistafjord** [1988] 2 Lloyd's Rep 343 said: *"For present purposes all that need be said is that his judgment is authority for the proposition that estoppel by convention is not confined to an agreed assumption as to fact but may be as to law, but the court will give effect to the agreed assumption only if it would be unconscionable not to do so and that once a common assumption is revealed to be erroneous estoppel will not apply to future dealings."*

53 . Mr Lee submitted that there was nothing unjust or inequitable in Oakley resiling from the common assumption, as found by the learned Judge, by its letter of 5 September 2000. The learned County Court Judge does not appear to have addressed this issue directly. In paragraph 59 of his judgment he simply found that it was too late, on 5 September 2000, for Oakley to resile from the position that there was an agreement that provided for the resolution of the dispute by arbitration. He does not state why he considered, as a matter of law, it was too late.

54. In my judgment, Mr Lee's submission on this point has force. By 5 September 2000 the First Respondent had applied for the appointment of an adjudicator. The First Respondent had obviously incurred some cost in so doing, and would probably have rendered itself liable for any costs and expenses of the adjudicator incurred up until that point. The adjudication had not, however, at that stage progressed beyond the actual application and appointment. The First Respondent had not made a formal written submission to the adjudicator. This was not done until 10 September 2000. There is no evidence before the court as to the cost incurred by the First Respondent in relation to the adjudication up until 5 September 2000. I have no reason to believe that it was substantial. In the absence of any express finding by the learned Judge that it was unconscionable for the First Respondent to resile from the common assumption on 5 September 2000 or, if that is implicit in his judgment, as to the basis for the finding, there seems to me to be no, or at any event insufficient evidential material to draw the conclusion that it was unconscionable for the First Respondent so to resile.

55. In the light of my conclusion as to the application of the doctrine of estoppel by convention on the facts of the present case, the appeal must succeed, subject, however, to considering a number of further arguments advanced by Mr Hickey in support of the learned Judge's order.

The Respondents' additional arguments in support of the order

56. Mr Hickey submitted that it was to be inferred, from paragraphs 53 to 60 of the learned County Court Judge's judgment, that the Judge found that the First Respondent and Oakley had entered into a written contract in the NAM/T form, incorporating NAM/SC, by virtue of sub-section 107(5) of the 1996 Act. He relied upon the Judge's reference to the application by Oakley to the President of the

RICS for the appointment of an arbitrator, referring, as it did, to clause 35B of NAM/T as the clause in the contract which conferred on the President the power to make the appointment. He also relied upon the response of the First Respondent to that application for appointment, namely that the wrong person had been asked to make the appointment of the arbitrator under the provisions of the contract. Mr Hickey submitted that the application for the appointment of the arbitrator by Oakley and the subsequent exchange of correspondence, amounted to *"an exchange of written submissions in .... arbitral .... proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response"* within sub-section 107(5).

57 . It seems to me quite impossible to infer that this was the analysis of the learned Judge in his judgment. He does not refer anywhere in paras 53 to 60 of his judgment to sub-section 107(5) of the 1996 Act. If that had been his analysis, he would not have concentrated on finding what he described, in paragraph 55 of his judgment, as "an ad hoc adoption" of NAM/SC and the dispute resolution provisions of NAM/T Section III. In paragraph 60 of his judgment he found the "necessary consensus", not by looking at Oakley's application for arbitration alone, but by having regard also to the application by the First Respondent for adjudication.

58. In case I should conclude, as I have, that the learned judge did not base his decision on s107(5) of the 1996 Act, Mr Hickey applied for permission to amend the Respondent's Notice in order to argue the point. That application was opposed by Mr Lee on behalf of Oakley. For the reasons I give below, I refuse that application.

59. The argument based on s107(5) is, in any event, plainly wrong, in my judgment. Neither the application by Oakley for the appointment of an arbitrator, nor the correspondence of the First Respondent in response to it, were "written submissions" in arbitral proceedings. The arbitration never got to the stage of written submissions in view of the First Respondent's challenge to the appointment of the arbitrator.

60. Mr Hickey advanced a further argument, in reliance on the conclusion of the learned County Court Judge, in paragraph 55 of his judgment, that there was a contract between Oakley and the First Respondent, even though it was not a contract in the NAM/T form. Mr Hickey submitted that, contrary to the view of the Judge that the terms of that contract were not all in writing for the purposes of s107 of the 1996 Act, the contract was evidenced in writing within s107(2) (c) and (4) of the 1996 Act. This additional ground is not contained in the Respondent's Notice as an additional ground for upholding the order of the learned Judge. Mr Hickey again sought leave to amend the Respondent's Notice in order to include it. The application was opposed by Mr Lee. I refuse leave, for the reasons I give later in this judgment.

61. In any event, Mr Hickey advanced the argument in a somewhat cursory fashion and broad-brush approach and without, it seemed to me, a great deal of enthusiasm. He did not take me through the various documents on which he relied in support of the argument. Even without the benefit of argument from Mr Lee on the point, I am not persuaded by Mr Hickey that all the terms of any contract between Oakley and the First Respondent were evidenced in writing within sub-sections 107(2)(c) and (4) of the 1996 Act.

62. Finally, Mr Lee submitted that, even if I concluded that there was no written agreement in the NAM/T form, incorporating NAM/SC, the statutory demands were and are valid since the First Respondent was entitled to the amounts claimed in view of the value of the work it had done on the Site. He submitted that this additional argument was included in the Respondent's Notice. He relies upon the following statement in Section 6 of the Respondent's Notice:
"As found by the Judge there was no evidence before the court of a genuine cross-claim or set-off. The Appellants' case is that no contract exists. In that event assuming (without admission) that the contention were correct, it follows that there is no basis in law for a right of cross-claim or set-off. The Appellants are unable as a matter of law to establish a duty owed by the Respondent to the Appellants not to cause them pure economic loss which could be the subject of a cross-claim or set-off against the debt due to the Respondent for work carried out. There is in any event no evidence of any such duty."

63 . It seems to me far from clear that this passage in the Respondent's Notice embraces the additional ground now advanced by Mr Hickey. It seems to me to concentrate on the existence of any cross-claim or set-off, rather than defining the legal right, whether by contract or quantum meruit, for recovery of the alleged debt. Mr Lee was not aware that the Respondent's Notice raised this additional argument. Assuming, however, that it does, I cannot accept Mr Hickey's submission.

64. The Particulars of Debt given in the statutory demands are couched so as to rely upon the decision of the adjudicator. I have held that the adjudicator was not validly appointed, and so his decision is a nullity. The Particulars of Debt also refer to the existence of a standard NAM/SC subcontract, and to remittance advice slips provided under that contract. I have held, however, that the learned Judge was fully entitled to conclude that there was no contract on the NAM/T form incorporating NAM/SC. Accordingly, the statutory demands do not properly show the legal basis for the debt demanded.

65. In any event, if the basis of the alleged debt is now said to be based on a right to payment on a quantum meruit, but there is an allegation by the Appellants that they have suffered loss and damage by reason of the conduct of the First Respondent in carrying out the work, and the evidence as a whole is directed to the issue of whether or not the adjudication process was valid, I do not consider that it would be right to permit the statutory demands to stand. On the current state of the evidence, the threat of insolvency proceedings would not be the proper way to resolve the dispute between the parties.

Application to amend the Respondent's Notice

66. As I have mentioned earlier in this judgment, Mr Hickey applied for permission to amend the Respondent's Notice to include a number of additional arguments to support the refusal of the learned County Court Judge to set aside the statutory demands. That application was opposed by Mr Lee on behalf of Oakley.

67. The application to amend was made orally during the course of Mr Mickey's submissions in answer to Mr Lee. No prior notice had been given to the Appellants of the intention to make the application or that the additional arguments would be advanced. There is no written application setting out the precise terms of the amendments. The application to amend amounted, as Mr Lee submitted, to a wish to have the original application re-tried by adding a wide-ranging battery of points to the grounds on which the learned Judge reached his decision. Further, to permit the amendments would have significantly extended the hearing of the appeal, which had already substantially exceeded its original time estimate and which, in the event, considerably exceeded its revised time estimate. Mr Lee would have been justified in requesting that the proposed amendments be reduced to writing and that, once he had received the written amendments, he and his clients should have time to consider them and, in particular, the application of the law and the evidence to the new points. This might have required an adjournment, albeit a short one. In ail the circumstances, bearing in mind particularly the lateness of the application, the delay in and prolongation of the appeal to which the amendment of the Respondent's Notice would give rise, considerations of fairness to the Appellants and the efficient conduct of court business, I refuse the application to amend the Respondent's Notice.

Other arguments

68 . In view of my decision on the question of the validity of the adjudicator's appointment and of his adjudication, it is not necessary for me to consider a number of further arguments advanced on the appeal as to the existence of a cross-claim or set-off by Oakley or the appropriateness of seeking to enforce the decision of the adjudicator by way of bankruptcy proceedings.

The merits

69. The 1996 Act was designed, among other things, to introduce a speedy mechanism, in the form of adjudication, for settling disputes in construction contracts on a provisional and interim basis, and for discouraging delay in payment by spurious cross-claims which might take a considerable time finally to resolve by court proceedings or arbitration. That procedure would have been available to the First Respondent if there had been a subcontract in the NAM/T form, incorporating NAM/SC. The Appellants themselves acted, certainly in relation to the purported appointment of an arbitrator, and possibly also in other respects, consistently with the existence of such a contract. The Appellants,

however, chose to adopt a quite different view about the existence of such a contract when the First Respondent sought to pursue a process, the adjudication process, which was not favoured by the Appellants and which, in the event, resulted in a decision substantially in favour of the First Respondent. This inconsistency on the part of the Appellants, driven by tactical considerations, may be said in broad terms to constitute the non-legal merits of the First Respondent's case. It is possible that they underlie the learned Judge's analysis in paragraphs 58 to 60 of his judgment.

70. In my judgment, however, this is an uncertain analysis for reaching any conclusion as to the legal result in these proceedings. The First Respondent, as well as the Appellants, changed its position as to the existence of a contract in the NAM/T form, and the application of the NAM/SC conditions, in accordance with changing perceptions of what would be tactically advantageous. The First Respondent's original position was that there was no contract at all between the First Respondent and the Appellants, as exemplified by the letter from the First Respondent dated 1 February 2000, and the submissions written on behalf of the First Respondent by Mr Cowen in June 2000.

71. Parliament has provided, by sections 107 and 108 of the 1995 Act, that only certain contracts will carry with them the right to the adjudication process. If a contract does not fall within those provisions, then the adjudication process, however desirable either generally or on the facts of a particular case, simply does not apply: see, for example, **The Project Consultancy Group v The Trustees of the Gray Trust** [1999] BLR 377, in which Dyson J held that, on the facts of that case, the adjudication provisions of the 1996 Act did not apply to the construction contract there under consideration, notwithstanding the decision of the adjudicator to the contrary. In the present case the learned County Court Judge rightly, in my judgment, came to the conclusion that there was no formal written contract made by the parties which fell within the provisions of sections 107 and 108 of the 1996 Act.

72. The learned County Court Judge held, however, that, by virtue of their conduct and common assumptions, the Appellants were bound by an estoppel by convention from denying that there was a subcontract in the NAM/T form, incorporating NAM/SC and, in particular, their dispute resolution provisions. As I have said, however, such an estoppel binds the parties if and to the extent only that asserting the true legal or factual position would be unconscionable in view of the detriment that would be suffered by the other party as a result of resiling from the common assumption. In the present case, the learned Judge held, in paragraph 58 of his judgment, that the Appellants sought to resile from the common assumption as to the NAM/T contract, and the application of the NAM/SC conditions, by its letter of 5 September 2000. Certainly, it is clear from his adjudication decision that the adjudicator took that letter to be a denial of his jurisdiction. There is no challenge to that important finding by the Judge in the Respondent's Notice. Accordingly, the resiling from the common assumption by the Appellants was at the earliest possible stage of the adjudication process. The evidence simply does not appear to be directed to, and does not, in my judgment, establish what was the detriment suffered by the First Respondent that rendered it unconscionable for the Appellants to withdraw from the common but incorrect assumption at that time. That, it seems to me, lies at the heart of the legal and non-legal merits of this case.

Conclusion

73. For the reasons in this judgment, I allow this appeal. I shall hear counsel as to the form of the order.

Mr JONATHAN LEE (instructed by Messrs Hugh James Ford Simey, Cardiff CF10 3QB) appeared on behalf of THE APPELLANTS
Mr ALEXANDER HICKEY (instructed by Messrs Coles Miller, Dorset BH15 2PG 2PG) appeared on behalf of THE RESPONDENTS