

## Construction Law Update

### Appointing an Adjudicator Before Serving a Notice of Adjudication – a Fatal Mistake

In the recent case of *Lane End Developments Construction Limited v Kingstone Civil Engineering Limited* the court considered a claim for a declaration that an adjudicator's decision should be set aside and/or not enforced as well as a cross claim for the payment of circa £360,000 under the adjudication.

#### Background

On 19 November 2018, Lane End Developments Construction Limited ("**Lane End**") and Kingstone Civil Engineering Limited ("**Kingstone**") entered into a sub-contract (the "**Sub-Contract**"). The Sub-Contract did not make express provision for disputes to be referred to adjudication, but by virtue of Section 108(5) and Section 114(4) of the Housing, Grants, Construction and Regeneration Act 1996 (as amended), the Scheme for Construction Contracts 1998 (the "**Scheme**") applied and the provisions of the Scheme were incorporated as implied contractual terms.

On 2 March 2020, Kingstone issued Interim Payment Application No. 17 in the sum of £356,439.19 for the period ending on 29 February 2020. Lane End did not serve a Pay Less Notice nor, until 26 March, did it serve a Payment Notice.

#### The adjudication

On 20 March, Kingstone submitted a request via email (timed at 07:46) to the RICS Dispute Resolution Service for the appointment of an adjudicator. Later that day, there was a meeting at Lane End's offices between Kingstone and Lane End in which Lane End were given a document headed "Notice of Referral" recording their failure to make payment and seeking redress, at adjudication, in the sum of £356,439.19. This notice was apparently served shortly after 11 am.

By letter dated 23 March, Mr Paul Jensen (the "**Adjudicator**") advised the parties that the RICS had nominated him to act as Adjudicator and he accepted the nomination.

On 24 March Lane End challenged the Adjudicator's nomination on the grounds that Kingstone had failed to give them notice of adjudication under the Scheme. Lane End argued that the notice given to them at the 20 March meeting did not comply with the Scheme because it did not do enough to disclose an intention to refer the dispute to adjudication. Lane End did not specifically take issue with the timing of the notice of adjudication but, by an email on 25 March, reserved their position as to the Adjudicator's jurisdiction.

The adjudication continued and, in his decision, the Adjudicator concluded that Kingstone were entitled to the full amount in Interim Application No. 17.

#### The proceedings

Lane End commenced court proceedings seeking a determination that the Adjudicator's decision should be set aside and/or not enforced. Kingstone sought summary judgment for payment of the sum awarded by the Adjudicator.

The main issues in dispute were whether the Adjudicator had jurisdiction to make his decision and, if not, whether Lane End had waived their right to object to the sequence in which Kingstone had served the notice of adjudication and applied to the RICS for appointment of an adjudicator.

#### Was the Adjudicator validly appointed?

The TCC considered a number of authorities and concluded that the Adjudicator was not validly appointed because, as the referring party, Kingstone had submitted their request for appointment of an adjudicator **before** issuing their notice of adjudication to Lane End, thereby breaching paragraph 2(1) of the Scheme. This breach meant that the Adjudicator had no jurisdiction to make his decision and the decision was void.

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Whilst Kingston attempted to get around the court's finding by arguing that Lane End had waived their right to object to this procedural error by participating in the adjudication, the court held that Lane End could not have waived the error even if they wanted to. This was not a situation in which the Adjudicator was appointed but there was a defect in the appointment or the adjudication, rather the situation was that the Adjudicator was not appointed to act in the adjudication at all. Notwithstanding this, the court also found that Lane End had not waived their right to object, particularly given that they had insufficient knowledge of the facts to enable them to give such a waiver.

### Analysis

This decision is a stark reminder to that when starting an adjudication, the referring party **must** serve the notice of adjudication on the responding party **before** submitting their request for appointment of the adjudicator. Failure to do so is fatal.

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