# Just wait a minute!

Barrister **Karen Gough**, of **39 Essex Chambers**, explains how attempted smash and grab tactics can backfire in adjudications, with reference to a case where she acted for one of the parties. The case also shows the risks of serving adjudication notices by email.

## KEY POINTS

- Claimants' attempts to ambush Defendants in adjudication can backfire, with terrible consequences
- The risks in serving notices of adjudication by email are all too apparent in this example where it all went wrong for the Claimant on enforcement
- The Court held that when giving a notice of adjudication by email, the relevant time is when it is received, not when it is sent
- It is not enough to show that the "send" button was hit first to send the notice, and then to send the request to appoint an adjudicator
- The burden of proving receipt of the emailed notice, is on the Claimant/Referring Party
- The judge held that had the Claimant waited even 5 or 10 minutes before sending a request, the challenge to the Adjudicator's jurisdiction would have been avoided

Being clever is an asset. Being too clever by half is a liability. This is a salutary tale concerning two smash and grab adjudications ("Adjudications 1 and 2") where it was alleged that no notice of withholding was served in relation to interim payment certificates. The Adjudicator was unpersuaded by the employer's claim that the parties had agreed to the deductions from the interim payments so no notices were required and there was no dispute. He held that absent withholding notices, the full sums certified were due, and decided accordingly.

The first lesson is therefore an old one. Even if you think you are making a deduction by agreement, understand that when things get contentious, recollections change, and a fresh pair of eyes may see things altogether differently. So whatever the reason to pay less than the certified sum, always serve a withholding notice. Better the Adjudicator finds it was unnecessary, than necessary but absent.

In this case, the project which was the subject of the Contract and the Adjudications had gone badly wrong. The work which was supposed to have been completed in December 2019, drifted into 2020 with defects, problems with statutory undertakers and continuing delays. After failed attempts to persuade the Contractor to perform, the Employer gave up and sought to terminate. The Contractor withdrew from site when efforts to persuade the Employer to continue even under a new contract were not accepted. At the time, the Contractor seemingly agreed it had caused the failure of the project (you will soon see what I mean about memories). The Employer intimated its wish to resolve matters amicably.

The pandemic intervened, investigation of the defects and remedial works were suspended for a while during the lockdown. As the investigations resumed it became clear that elements of the build were subject to major construction defects which had been deliberately concealed. The evidence was that, if not rectified, they would have presented very serious dangers to health and safety. Nothing more was heard from the Contractor.

Out of the blue in July 2020, the Contractor commenced Adjudications 1 and 2 in rapid succession. The Employer was caught 'on the hop' and was ill-prepared for the speed of the statutory adjudication process. As already noted, the Adjudicator decided in favour of the Contractor on the payment claims.

The Employer pointed out that it was in possession of evidence of fraudulent concealment of dangerously defective works and it would rely on this evidence to resist enforcement.

The Contractor's response was to issue

proceedings in the TCC to enforce the Adjudicators decisions. Directions were given , including the transfer of the hearing to the Central London County Court. The case came before HHJ Monty QC for hearing on 30 October, 20 and 21 December 2020. Judgement was handed down on 10th February 2021: ***London Affordable Homes Limited v Executive Properties Limited*** (hereafter "LAH" and "EPL").

While preparing its evidence in response to the enforcement proceedings EPL noticed that the timings of the notices of adjudication, and the timings of the requests to appoint an adjudicator appeared to be very close together and, that the usual evidence of compliance with the Act was missing from the Claimant's documents. It asked for the documentation proving service.

The statutory Scheme contains very specific provisions requiring the giving of notice of adjudication to the Responding Party, before requesting the appointment of an adjudicator.

Paragraph 2(1)(b) of the Scheme provides:

> "Following the giving of a notice of adjudication… (b) the Referring Party shall request the nominating body named in the Contract to select a person to act as adjudicator,…"

The law on this issue is clear. There is a statutory requirement for the notice of adjudication to be served on the Responding Party before a request is made for the appointment of an adjudicator from a nominating body: Coulson on Construction Adjudication, Fourth Edition, paragraphs 4.35 and 4.36;: ***IDE Contracting Limited v RG Carter Cambridge Limited [2004] EWHC 36 (TCC)***; and ***Vision Homes Limited v Lancsville Construction Limited [2009] EWHC 2042 (TCC)***. A failure to comply with the notice provisions in the Scheme nullifies the appointment and deprives the adjudicator of jurisdiction.

This requirement was debated in the recent case of ***Kingstone Civil Engineering Limited v Lane End Developments Construction limited [2020] EWHC 2338 (TCC)***, a judgment of HHJ Halliwell, sitting as a judge of the High Court in Manchester. The judge upheld Lane Ends challenge and found that as a result of Kingstone's failure to serve Lane End with a notice of adjudication prior to its application to secure the appointment of an adjudicator, the adjudicator was without jurisdiction to make his decision. The judgment of Christopher Clarke J in ***Vision Homes v Lancsville Construction Limited*** [ibid], where the difference between the timing of the request and service of the effective notice of adjudication was 18 minutes, but still considered fatal, was applied.

So what happened in ***LAH v EPL***? If the law is clear on the point, what taxed the Court for a substantial part of the 2 ½ days of hearing? It was this:

On receipt of the service information, the following facts were revealed:

Adjudication 1: On 15 July 2020, the email to EPL was timed at 15.43pm, and the email to the RIBA at 15.44 pm. There was effectively no lag between the dispatch of the two emails from LAH. The email to RIBA, not sent to EPL, confirmed LAH's intention to launch 3 successive adjudications.

Adjudication 2: On 21 July 2020, the email to EPL with the notice of adjudication was timed at 14.04pm, and the email to RIBA requesting the appointment of the adjudicator was also timed at 14.04pm. The two emails from LAH were apparently sent at the same time.

EPL took the service point. On 30 October 2020, LAH presented screen shots from its claims consultant's computer log showing that in Adjudication 1 the email to EPL had been "sent" by the computer a few seconds before the email to RIBA. In Adjudication 2, it showed the reverse. LAH's evidence was that in both cases it had hit "send" to EPL before RIBA.

The hearing was adjourned to a two day window in December. Both parties filed further evidence and submissions and both sides sought to provide assistance from their respective IT providers. The hearing took a full two days and judgment was reserved.

LAH focused its arguments on when the emails were sent, and offered no evidence of when the emails would have been received. EPL focused its evidence on the timing of the receipt of the emails. The Scheme requires a notice to be "given" and the Court held that "given" meant the notice had to be "served", although not necessarily "seen" by the intended recipient: see ***Bernuth Lines Ltd v High Seas Shipping Ltd [2005] EWHC 3020 [Comm] and The Pendrecht [1980] 2 Lloyd's Rep 56***. It was therefore necessary to consider the evidence as to when the emails were received. The

Judge commented:

> "71. It is perhaps no consolation to note that none of this would have been necessary had the emails to [EPL] been sent say 5 or 10 minutes before the emails to RIBA. But they were not..."

EPL's IT consultants provided evidence which explained EPL's solicitors internet security filters which meant that any email sent to the firm bearing a time stamp of its receipt could in fact take up to 5 minutes or so to actually reach the recipients inbox by reason of both scanning for a secondary security check and complex routing used within the firm for its email traffic.

An enquiry of the RIBA produced a response confirming only receipt of the emails by reference to times stated on the emails.

In the event the Judge concluded that on the evidence before him he could not be satisfied in either case, even on the balance of probabilities, that the emails were received by EPL before they were sent to RIBA. Summary enforcement of Adjudication Decisions 1 and 2 was therefore refused because the Court could not be satisfied that the Defendant had no real prospects of defending the claim on the ground of lack of jurisdiction. The Judge concluded:

> "It is a matter of considerable regret that so much turns on the timing of these emails, a difficulty for the claimant [LAH] which plainly could have been avoided."

As a matter of interest the Judge dismissed other arguments going to jurisdiction, including EPL's submission that in "teeing" up the RIBA for the appointments and pre-paying the appointment fees well in advance of sending the completed application forms, LAH had not taken any, or any sufficient step in the nomination process so as to offend s2(1)(b). Those steps did not amount to a "request" for the nomination. The Court also held that if it had concluded that the tenor of the communications was a request, then the failure to attach the notice of adjudication would have been a further reason to hold that the appointment was invalid, and not a reason to hold that the steps did not amount to a request.

The point is however, that the burden is on a Claimant in summary enforcement proceedings to show that there is no real prospect of defending the claim and no other reason for the claim to be tried. A defendant therefore need raise just one arguable defence.

So the second lesson from this sorry tale, if not already indelibly etched on the minds of the representatives of every Referring Party in adjudication, is that it is imperative to ensure not just that a notice of adjudication has been sent to the Responding Party before sending a request for an appointment to an adjudicator nominating body, but also that there is proof of its receipt by the Responding Party before the request is sent. It is not enough to hit the "send" button on the computer sequentially.

If a notice is being served by email, while the email need not have been read by the intended recipient, proof of its receipt is essential. Ensuring the notice has been received before any request is sent by any means requesting an appointment is the minimum step to be taken. Safer still, serve the notice by hand, get a receipt, then, and only then if the element of surprise by even minutes is so important (and really, is it ever that critical?), hit the send button on a computer or send in the courier to hand deliver the request.

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