Neutral Citation Number: [2020] EWHC 2338 (TCC)

Case No:HT-2020-MAN-000021

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Date: 28th August 2020

Before :

His Honour Judge Halliwell sitting as a Judge of the High Court at Manchester

- -

Between :

LANE END DEVELOPMENTS CONSTRUCTION LIMITED

Claimant

- and -

KINGSTONE CIVIL ENGINEERING LIMITED

Defendant

Case No:HT-2020-MAN-000173

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Between :

KINGSTONE CIVIL ENGINEERING LIMITED

Claimant

- and –

LANE END DEVELOPMENTS CONSTRUCTION LIMITED

Defendant

- -
- -

Ms Serena Cheng QC (instructed by **Gateley plc**) for **Lane End Developments Construction Limited**
Mr Anthony Philpott (instructed by **Direct Access**) for **Kingstone Civil Engineering Limited**

Hearing date: 30th June 2020

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APPROVED JUDGMENT

I direct that, pursuant to CPR PD 39A para 6.1, no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

HHJ Halliwell:

(1) Introduction

1. These proceedings relate to an adjudicator's decision dated 27th April 2020 ("the 27th April Decision") under the *Scheme for Construction Contracts (England and Wales) Regulations 1998*, as amended ("the *Scheme*").

2. There are two claims before the Court, namely a claim under *CPR Part 8* for a "declaration" that the 27th April Decision "should be set aside and/or not enforced" and a cross claim under *CPR Part 7* for the payment of £358,970.39 under the Decision.

3. Lane End Developments Construction Limited ("Lane End") is the Claimant in the Part 8 proceedings and the Defendant in the Part 7 proceedings. It was the main contractor on a housing development ("the Development") at Rilshaw Lane, Winsford, Cheshire ("the Site"). Kingstone Civil Engineering Limited ("Kingstone") is the Defendant in the Part 8 proceedings and the Claimant in the Part 7 proceedings. It was sub-contracted to carry out enabling works for the Development.

4. Lane End now seeks the substantive determination of its *Part 8* claim and Kingstone seeks summary judgment on its *Part 7* claim.

5. The main issues are whether the adjudicator had jurisdiction to make the 27th April Decision and, if not, whether, as responding party, Lane End has waived the defect by election or is estopped from relying upon it.

(2) Factual and procedural sequence

6. On 19th November 2018, the parties entered into the relevant sub-contract ("the Sub-Contract"). It was denoted as a "Minor Works Sub Contract Agreement" for "the supply of all supervision, labour and materials needed to carry out enabling works including cabin foundations, temporary compound and carpark and connection for cabins at…" the Site. The Sub-Contract sum, fixed for the duration of the main contract, was £54,158.40.

7. The Sub-Contract did not make express provision for disputes to be referred to adjudication. By virtue of *Section 108(5)* and *Section 114(4)* of the *Housing, Grants,*

Construction and Regeneration Act 1996, the *Scheme* applied and the provisions of the *Scheme* were incorporated as implied contractual terms.

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

9. On 20th March, Kingstone submitted a request ("the Request") to the RICS for the appointment of an adjudicator. This request was contained in an email, timed at 07:46, from Mr Barker of Qualsurv Consulting Limited, to the RICS Dispute Resolution Service.

10. Later that day, there was a meeting ("the 20th March Meeting") at Lane End's offices between representatives of Kingstone and Lane End in which Mr Barker gave the representatives of Lane End a document headed "Notice of Referral" recording Lane End's putative 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 and it is now common ground that, subject to issues of timing, it was apt to amount to a notice of adjudication. I shall thus refer to this notice as "the Notice of Adjudication". It has recently emerged that Mr Barker covertly recorded the 20th March Meeting and there is an issue as to whether I should admit, in evidence, his recording together with a witness statement dated 19th June 2019 from Mr Barker incorporating his own commentary based on the recording.

11. By letter dated 23rd March, Mr Paul Jensen advised the parties that the RICS had nominated him to act as Adjudicator and he accepted the nomination. He also made directions providing for Kingstone to send its "Referral" incorporating particulars of the dispute and Lane End to provide its Response.

12. Pursuant to Mr Jensen's directions, Kingstone circulated another document dated 23rd March and headed "Notice of Referral" in which substantial parts of the Notice of Adjudication were copied and pasted.

13. By email timed at 18:25 on 24th March, Lane End through its agent Mr John Mason challenged Mr Jensen's nomination on the grounds that Kingstone had failed to give Lane End notice of adjudication under the Scheme. The email was sent to Mr Jensen himself and copied to Kingstone's representatives. When referred to the Notice of

Adjudication, Mr Mason initially contended that it did not comply with the Scheme but he did so by taking a point of interpretation, suggesting it did not do enough to disclose an intention to refer the dispute to adjudication. Mr Mason did not specifically take a point about the timing of the Notice of Adjudication but, by an email timed at 15:04 on 25th March, he "reserved the position of our client as to the Adjudicator's jurisdiction".

14. By an email timed at 16:17 on 25th March, Mr Jensen advised the parties that, contrary to Mr Mason's comments, "I find that the [Notice of Adjudication] contains a clear intention to refer the dispute described therein to adjudication".

15. By an automatically generated email timed at 8:39 on 8th April, Mr Steven Anders, of Lane End, advised Mr Jensen that "due to the Government guidance relating to the Covid-19 pandemic, Lane End Group is currently closed for business until further notice". In reply, Mr Jensen advised Mr Anders, by email timed at 10:00 that morning ("the Termination Email"), that this "effectively terminates this adjudication. You are of course responsible for my fees and an invoice will be sent later from staff working at home". Mr Jensen copied in Mr Mason but not anyone on behalf of Kingstone. Mr Jensen's invoice dated 8th April for £1,688.40 for his fees as Adjudicator was addressed to each of the parties.

16. Lane End did not notify Kingstone that Mr Jensen had purported to terminate the adjudication until 15th April. By an email timed at 17:04 later that day, Mr Barker requested Mr Jensen to "continue with [his] appointment and issue [his] decision accordingly." In another email to Mr Jensen, timed some three hours later at 20:06, Mr Barker confirmed that Kingstone had "not received any formal notification from the Adjudicator that the Adjudication has been terminated" and submitted that Mr Jensen's purported notice of termination was thus "null and void". Meanwhile, Lane End electronically transferred to Mr Jensen the full amount outstanding under his invoice dated 8th April 2020.

17. By an email timed at 09:18 on 16th April, Mr Jensen advised both parties that it was apparent to him that Lane End was "not closed for business; I have not resigned and therefore I will continue". Some thirty minutes later, at 09:53, Mr Mason asked Mr Jensen for leave to serve a Rejoinder having specifically "reserved [Lane End's] position

as to your jurisdiction". This prompted Mr Jensen to email revised directions to the parties later that morning. At 11:45, Mr Mason emailed Mr Jensen agreeing to his revised directions.

18. By an email timed at 15:44 on 23rd April, Mr Mason emailed Mr Jensen its Rejoinder again having expressly reserved its position as to his jurisdiction.

19. By the 27th April Decision, Mr Jensen concluded that Kingstone was entitled to the full amount in Interim Application No. 17, ie £356,439.19, on the basis it had first become due on 9th March 2020, 7 days after the claim was first issued, and the final date for payment was 26th March, 17 days later, in accordance with *Paragraphs 7(b)* and *9(2)* of *Part II* of the *Schedule* to the *Scheme.* Whilst Lane End had apparently issue a Payment Notice, this was not issued until 26th March 2020 and was thus outside the period allowed by *Paragraph 9(2)* of the *Scheme*, namely five days after the payment due date.

(3) The regulatory framework

20. The *1998 Regulations* were amended by the *Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment)(England) Regulations 2011*. The relevant provisions of the *Scheme* are contained in the Schedule in its amended form. They are as follows.

Part 1

Adjudication

Notice of Intention to seek Adjudication

"1 (1) Any party to a construction contract (the 'referring party') may give written notice (the 'notice of adjudication') at any time of his intention to refer any dispute arising under the contract, to adjudication.

(2) The notice of adjudication shall be given to every other party to the contract.

(3) The notice of adjudication shall set out briefly –

(a) the nature and a brief description of the dispute and of the parties involved,

(b) details of where and when the dispute has arisen,

(c) the nature of the redress which is sought, and

(d) the names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices).

2 (1) Following the giving of a notice of adjudication and subject to any agreement between the parties to the dispute as to who shall act as adjudicator-

(a) the referring party shall request the person (if any) specified in the contract to act as adjudicator, or

(b) if no person is named in the contract or the person named has already indicated that he is unwilling or unable to act, and the contract provides for a specified nominating body to select a person, the referring party shall request the nominating body named in the contract to select a person to act as adjudicator, or

(c) where neither (a) nor (b) above applies, or where the person referred to in (a) has already indicated that he is unwilling or unable to act and (b) does not apply, the referring party shall request an adjudicator nominating body to select a person to act as adjudicator.

(2) A person requested to act as adjudicator in accordance with the provisions of paragraph (1) shall indicate whether or not he is willing to act within two days of receiving the request.

3 The request…shall be accompanied by a copy of the notice of adjudication.

5 (1) The [relevant] nominating body…must communicate the selection of adjudicator to the referring party within five days of receiving a request to do so.

(3) The person requested to act as adjudicator…shall indicate whether or not he is willing to act within two days of receiving the request.

7 (1) Where an adjudicator has been selected…the referring party shall, no later than seven days from the date of the notice of adjudication, refer the dispute in writing (the 'referral notice') to the adjudicator.

(2) a referral notice shall be accompanied by copies of, or relevant extracts from, the construction contract and such other documents as the referring party intends to rely upon.

(3) A referral notice shall, at the same time as he sends to the adjudicator the documents referred to in paragraph (1) and (2), send copies of those documents to every other party to the dispute.

(4) Upon receipt of the referral notice, the adjudicator must inform every party to the dispute of the date that it was received.

9 (1) An adjudicator may resign at any time on giving notice in writing to the parties to the dispute.

(2) An adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication.

(3) Where an adjudicator ceases to act under paragraph 9(1)-

(a) the referring party may serve a fresh notice under paragraph 1 and shall request an adjudicator to act in accordance with paragraphs 2 to 7: and

(b) if requested by the new adjudicator and insofar as it is reasonably practicable, the parties shall supply him with copies of all documents which they had made available to the previous adjudicator.

(4) Where an adjudicator resigns in the circumstances referred to in paragraph (2), or where a dispute varies significantly from the dispute referred to him in the referral notice and for that reason he is not competent to decide it, the adjudicator shall be entitled to the payment of such reasonable amount as he may determine by way of fees and expenses reasonably incurred by him….

Adjudicator's decision

20 The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the

scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute. In particular, he may-

(a) open up, revise and review any decision taken or any certificate given by any person and referred to in the contract unless the contract states that the decision or certificate is final and conclusive,

(b) decide that any of the parties to the dispute is liable to make a payment under the contract (whether in sterling or some other currency) and, subject to section 111(9) of the Act, when that payment is due and the final date for payment,

(c) having regard to any term of the contract relating to the payment of interest decide the circumstances in which, and the rates at which, and the period for which simple or compound rates of interest shall be paid.

Effects of the decision

23 (2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it 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 between the parties.

Part II

Payment

Dates for payment

6 Payment of the contract price under a construction contract (not being a relevant construction contract) shall become due on

(a) the expiry of 30 days following the completion of the work, or

(b) the making of a claim by the payee,

whichever is the later.

7 Any other payment under a construction contract shall become due

(a) on the expiry of 7 days following the completion of the work to which the payment relates, or

(b) the making of a claim by the payee,

whichever is the later.

Final date for payment

8 (1) Where the parties to a construction contract fail to provide a final date for payment in relation to any sum which becomes due under a construction contract, the provisions of this paragraph shall apply.

(2) The final date for the making of any payment of a kind mentioned in paragraphs…6 or 7 shall be 17 days from the date that payment becomes due.

Payment notice

9 (1) Where the parties to a construction contract fail, in relation to a payment provided for by the contract, to provide for the issue of a payment notice pursuant to Section 110A(1) of the Act, the provisions of this paragraph apply.

(2) The payer must, not later than five days after the payment due date, give a notice to the payee complying with sub-paragraph (3).

(3) A notice complies with this sub-paragraph if it specifies the sum that the payer considers to be due or to have become due at the payment due date and the basis on which that sum is calculated."

(4) The covert recording of the 20th March Meeting

21. The hearing before me was fixed simply for the substantive determination of Lane End's *Part 8* claim and Kingstone's application for summary judgment on its *Part 7* claim. Whilst the parties have filed a series of witness statements, it was never envisaged the witnesses would be orally examined. Initially, the 20th March Meeting barely featured in the evidence. However, this appears to have changed when Kingstone filed Martin Barker's second witness statement dated 12th June 2020 stating that Craig Dulson, a director of Lane End, had confirmed receipt of the nomination request from RICS on arrival at Lane End's offices for the 20th March Meeting. On the following day, 13th June 2020, Mr Rudi Haubus, Kingstone's managing director, made a witness statement in slightly different terms stating that, on arrival, "Lane End's representatives" advised him that "they had received the notification". This was in conflict with Craig Dulson's

observation, in a witness statement dated 5th June 2020, that "it was not until after Lane End had received the Adjudicator's Decision…that we appreciated that info@laneend.org had received the RICS's email…the same day that Kingstone handed over its notice of adjudication…"

22. Lane End was thus prompted to file evidence in response. The parties jointly applied for an order permitting Lane End "to serve an additional witness statement dealing with a single point arising from the witness evidence served by [Kingstone] on 12 and 13 June 2020 by 5pm on 17th June 2020 and for Kingstone "to serve rebuttal evidence limited to the single point addressed by [Lane End] by 5pm on…19th June 2020". "The single point" was not identified but it can reasonably be inferred that it related to Mr Dulson's alleged comment about the receipt of the nomination request. In due course, the Court made an order in the terms sought ("the June Order"). Meanwhile, Mr Dulson made a witness statement dated 17th June 2020 in which he confirmed the following.

> "[6.3] I…did not see or speak to Mr Haubus or any other Kingstone representative prior to or during the meeting on 20 March 2020. I was not involved in the meeting and remained upstairs in my office until after the meeting had concluded. I then met with Mr Haubus privately to discuss resolving any potential disputes between Lane End and Kingstone.
>
> [6.4] As stated in my first witness statement, I have never been involved in adjudication proceedings before. I was therefore unaware that an application to the RICS would have been made and what role that RICS played in the adjudication. I certainly would not have had the knowledge to allow me to have a discussion with Mr Haubus or any other person about what had or had not been received from the RICS or otherwise".

23. In response, Kingstone has filed witness statements dated 19th June 2020 from Messrs Haubus and Barker. These witness statements are not limited to the issue about Mr Dulson's alleged comment about the nomination request. However, Mr Haubus confirms that, immediately prior to the 20 March Meeting, Mr Dulson stated that Lane End were aware of Kingstone's "application to the RICS". Messrs Haubus and Barker

both confirm that Mr Haubus subsequently whispered that Lane End knew of the application or request.

24. In his witness statement dated 19th June 2020, Mr Barker stated that he had "voice recorded" the 20th March Meeting and he exhibited the recording on an electronic storage device. Based on this, his witness statement included a running commentary of the meeting itself. Mr Barker suggests that it is possible to discern a point in the conversation in which Mr Haubus whispered to him, albeit in terms that are barely audible, and that Mr Barker could himself be heard to whisper that he was surprised the RICS had acted so quickly.

25. Under *CPR 32.1*, the Court is entitled to control the evidence. This includes a power under *CPR 32.1(2)* to exclude evidence that would otherwise be admissible. Under these provisions, Ms Serena Cheng QC, for Lane End, submitted that I should exclude Mr Barker's witness statement dated 19th June 2020 and the audio recording itself on the basis it was of limited probative value. She also submitted that the evidence had been adduced at short notice without allowing Lane End a proper opportunity to deal with it and that to admit it would be contrary to Mr Dulson's right of privacy under *ECHR Article 8.* The issue was also canvassed as to whether, by covertly recording the meeting, Mr Barker processed "personal data" within the meaning of *GDPR Article 4(1)* without complying with the regulatory requirements of the *GDPR* and thus acted unlawfully.

26. In response, Mr Anthony Philpott submitted that the relevant evidence was probative of the issue "of whether Lane End knew or should have known that they should have specifically reserved jurisdiction on 20 March 2020 or thereabouts…because Kingstone says Mr Dulson and the personnel and representatives of Lane End were informed that Kingstone had commenced Adjudication that morning and that they had commenced the Adjudication by submitting the Adjudication nomination form to the RICS" (Kingstone's Written Submissions dated 20th July 2020). He also submitted that "the recording was produced in good time for the hearing on 30 June 2020 and the solicitors for Lane End remained silent in the face of it and raised no objection to it" (Para 39). It is at least implicit in his submissions that Lane End's representatives at the 20th March Meeting – Messrs Ian Power, Michael Cunningham and Tom Hogan – could not have had any reasonable expectation of privacy at the meeting. Mr Philpott also sought to

emphasise that Mr Barker recorded the meeting simply to assist in the preparation of his own notes and ensure that he had not misheard or misunderstood anything, not with any ulterior motive. Mr Philpott submitted that there could be no issue in relation to the application of the GDPR since Mr Barker had taken the recording as "a natural person in the course of a purely personal or household activity" within the meaning of *GDPR Article 2(c)* or the data had been gathered or processed for the purpose of exercising or defending legal rights.

27. In the exercise of my case management powers, I must apply the overriding objective in *CPR 1.1*, including the requirement that the case is dealt with justly and at proportionate cost, ensuring that the parties are on an equal footing, saving expense and applying the principles of proportionality and fairness. Having read Mr Barker's witness statement dated 19th June 2020 and listened to the recording *de bene esse,* I am satisfied that I should exclude them for the following reasons.

    27.1. Firstly, the relevant evidence is of only limited probative value. The main issue to which it pertains is Lane End's knowledge of the defect, if any, in Mr Jensen's appointment. For reasons to which I shall refer later, this means knowledge not only of the relevant facts but also of its right to waive the defect. The defect arose from the sequence in which Kingstone served the Notice of Adjudication and the Request. Kingstone contends that, prior to the meeting, Mr Dulson knew that it had already submitted the Request. However, Mr Dulson did not attend the meeting itself and was thus not present when Kingstone served the Notice of Adjudication. Since he did not attend the meeting, the recording does not show that, by then, he had knowledge of the Request. At its highest, it is consistent with the Kingstone's contentions that, by that stage, Mr Haubus had been advised Lane End was aware of the Request or, at least, believed Lane End was aware of it. It is consistent with Kingstone's contentions that, during the meeting, Mr Haubus advised Mr Barker that this was the case. It also appears from Mr Barker's evidence that, during the meeting, he stated that "*as you are aware*, we've commenced two adjudications this morning…" Again, this is consistent with the possibility that Mr Barker perceived Lane End's representatives were aware that an adjudication had started *prior to the meeting*. However, if Mr Barker had such a perception, it was misconceived. The

Adjudication could not have commenced until Notice of Adjudication was served. According to Kingstone's own case, such notice was only served during the meeting itself. This is not fertile ground on which to found a case based on the proposition that Lane End was aware of the material defect and its legal consequences or ought to have been by the time of the meeting.

27.2. Secondly, to admit the relevant evidence would give rise to procedural unfairness. The June Order was made after Messrs Baker and Haubus filed their witness statements dated 12th and 13th June challenging Mr Dulson's evidence in relation to Lane End's initial knowledge of the Request. The June Order thus provided Lane End an opportunity to respond and for Kingstone to file evidence in rebuttal. Lane End duly filed a short witness statement from Mr Dulson stating that he did not see or speak to Mr Haubus or any other Kingstone representative prior to or during the 20th March Meeting; indeed, he confirmed, in his statement, that he did not attend the meeting. In response, however, Kingstone ultimately filed witness statements which did more than simply rebut Mr Dulson's observations about his own involvement. Mr Haubus and Mr Barker's witness statements dated 19th June 2010 each encompassed events at the meeting itself. As already mentioned, Mr Barker's witness statement contained a running commentary and exhibited his recording. In her submissions, Ms Cheng described the delivery of this evidence as an "ambush" and suggested that, owing to the imminence of the hearing, her client had been denied a proper opportunity to respond. Based only on inference, there is no room for a submission that Kingstone embarked on a preconceived strategy to preclude Lane End from fully responding to Kingstone's evolving case in relation to the meeting. Nevertheless, since Kingstone has raised the issue of Lane End's knowledge in order to found a case based on waiver, the burden of proof is on Kingstone. Had Kingstone provided the audio recording (together with Mr Barker's running commentary) substantially earlier in the proceedings, Lane End would then have been presented with a reasonable opportunity to respond. Kingstone did not do so and, in consequence, Lane End has been placed at a significant tactical disadvantage.

27.3. Thirdly, the relevant evidence brings into play new issues under the *Human Rights Act 1998* and the *GDPR* with which Lane End has not been presented an opportunity to engage properly in evidence.

27.3.1. When commencing proceedings under C*PR Part 8*, Lane End was unaware that Kingstone intended to rely on a covert recording of the 20th March Meeting. In those circumstances, it confirmed, on the Claim Form, that the claim did not include any issues under the *Human Rights Act 1998.* It has not filed evidence in relation to the covert recording. Indeed, until Kingstone served the recording together with Mr Barker's witness statement dated 19th June 2020, Lane End had no reason to do so. It follows that Lane End has not filed evidence in relation to matters pertaining to the rights of privacy of the individuals who attended the meeting on its behalf, in particular it has not filed evidence in relation to their reasonable expectations. Before me, however, Ms Cheng sought to develop a case based on the following propositions.

27.3.1.1. Covertly recording the inter-action of persons is potentially capable of amounting to an interference with their rights of privacy, under *ECHR Article 8*, even if conducted in a public context. This may include activities of a professional or business nature and measures effected outside a person's home or private residence. A person's reasonable expectation to privacy is a significant though not necessarily conclusive factor, *Vukota-Bojic v Switzerland (ECHR 61838/10, Paras 52-54).*

27.3.1.2. In considering whether to exercise its discretion to exclude evidence, the court must act compatibly with Convention rights, including the rights of the persons in attendance at the 20th March Meeting, *Jones v University of Warwick [2003] 1 WLR 954.*

27.3.1.3. Since Mr Barker's covert recording of the 20th March Meeting is likely to have amounted to an unlawful interference with the rights of privacy at least of the persons attending on behalf of Lane End, the Court should thus exercise its statutory discretion to exclude the relevant evidence.

27.3.2. This case was initially canvassed before me orally at the hearing on 30th June. However, I gave Lane End permission to advance additional written submissions on this issue following the hearing. Lane End's additional written submissions were duly filed on 21st July 2020.

27.3.3. In response, Mr Philpott submitted that *Vukota-Bojic* and *Jones* were distinguishable from the present case on their facts. He took the opportunity to deliver written submissions dated 20th July 2020, prior to the delivery of Lane End's submissions, confirming that, unlike the *Jones* case, the recording was made as an *aide memoire* rather than to advance Kingstone's case in disputed litigation. Contrary to any suggestion that Lane End's representatives might have been entitled to an expectation of privacy, Mr Philpott submitted, at Para 34, that "there was no requirement expressed by Lane End that this meeting should be kept private and confidential".

27.3.4. The 20th March Meeting was apparently held for business purposes only, namely to review the parties' state of account and resolve their differences. This is certainly how it was characterised in Paragraph 6.4 of Mr Power's witness statement dated 5th June 2020 on behalf of Lane End. No doubt, it would have been good practice, at the outset, for Mr Barker to have advised the individuals in attendance, that he intended to record the meeting. He did not do so. However, Lane End has not filed evidence pertaining to the expectations of privacy of the individuals present at the meeting, indeed its evidence is not tailored to the issue since Kingstone only sought to deploy Mr Barker's recording at a late stage. In the absence of further evidence, Lane End has not done enough to establish that there has been an unlawful interference with Article 8. Moreover, the issues in relation to GDPR have not been fully argued. Lane End will thus have been put to a significant tactical disadvantage if I permit Kingstone to rely on Mr Barker's witness statement dated 19th June 2019 or his recording of the 20th March Meeting.

28. Lane End does not take any issue about Mr Haubus's witness statement dated 19th June and, although Mr Haubus himself took the opportunity to give evidence in relation to the meeting itself, his evidence was much more limited than Mr Barker's evidence. I

have thus admitted such evidence and taken it into consideration in reaching my overall conclusions.

(5) Was Mr Jensen validly appointed as adjudicator under the Scheme?

29. On this question, Lane End's case is simple and straightforward. It no longer contends that the Notice of Adjudication - served at the 20th March Meeting - was not apt to amount to a notice of adjudication within the meaning of the *Scheme.* However, *Paragraph 2(1)* of *Part 1* provides for the referring party to submit its request for the appointment of an adjudicator "*following* the giving of a notice of adjudication". In view of the fact that Kingstone submitted the Request prior to the 20th March Meeting, Lane End contends that the request cannot have been served following the giving of notice of adjudication, as statutorily required. Construed together, the *Act* and the *Scheme* comprehensively govern the appointment of adjudicators. Lane End thus submits that Mr Jensen cannot have been validly appointed as adjudicator and, if he was not validly appointed as adjudicator, he did not have jurisdiction to make the 27th April Decision.

30. On this issue, Ms Cheng QC relied on the judgment of Christopher Clarke J (as he was) in *Vision Homes Ltd v Lancsville Construction Ltd [2009] BLR 525* in which the referring party initially submitted notice of its intention to refer the dispute to adjudication before its request for the appointment of an adjudicator but, critically, elected to revise the notice afterwards. Ultimately the revised notice was served no more than 18 minutes after the request. However, this was adjudged to invalidate the appointment. At Paragraph 56 (p538), the judge stated as follows.

    "Not without some misgiving I accept that the adjudicator had no jurisdiction to act, as he did, under the second notice of 14 May because that notice was not followed but preceded by a request to the nominating body under 2(1)(b) of the Scheme. It is not possible, in my judgment, to regard the request as continuing so that it may be regarded as made both before and after the second notice. Clauses 2(1) and 3 of the Scheme refer to a request in writing which accompanies (rather than precedes) the relevant notice of adjudication. Further I am persuaded…that if the provisions which establish the jurisdiction of the adjudicator are not complied with it is irrelevant whether or not the other party has suffered prejudice by that non-compliance".

31. In answer to Ms Cheng's submissions on this issue, Mr Anthony Philpott, for Kingstone, contended that *Vision Homes* should not be followed since the *Scheme* has subsequently been amended to provide, in *Paragraph 1(1)* of *Part I*, that notice of adjudication can be given *at any time*. However, in my judgment, Mr Philpott's submissions on this issue are misconceived. Whilst it is correct that, in 2011, the Scheme was amended in this way, the logical basis for the *Vision Homes* decision is undisturbed. Christopher Clarke J reached his conclusion on the basis that *Paragraph 2(1)* of the *Scheme* required the *request* to be submitted following the notice of adjudication. His conclusion was not based on the interpretation of *Paragraph 1(1)* as to the time for delivery of the notice of adjudication.

32. There is nothing to suggest that the amendment to *Paragraph 1(1)* might somehow have been intended to alter or modify the sequence in which a party could be expected to serve notice of adjudication and submit its request to the adjudicator or nominating body. Had he intended to alter or modify the relevant sequence, the Secretary of State could have been expected to do so in clear terms. He did not do so. Moreover, it remains the case that the request must itself be accompanied by a copy of the notice of adjudication, under *Paragraph 3*, which is itself consistent with the proposition that the request should not precede the notice itself. The amendment to *Paragraph 1(1)* aligns the *Scheme* with *Section 108(2)(a)* of the *1996 Act* which provides for construction contracts to enable a party to give notice *at any time* of its intention to refer a dispute to adjudication. It was no doubt intended to eliminate uncertainty and ensure there was no limit on the time for service rather than to alter or modify the sequence for delivery of the notice of adjudication and the request for appointment. Consistently with this, Miss Cheng referred me to the analysis in *Paragraphs 2.100 to 2.110* of *Coulson on Construction Adjudication (4th edn*) and the uncertainty which might otherwise arise in cases, for example, where there are collateral proceedings, the underlying contract has come to an end or there is delay prior to the commencement of the adjudication. In *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25*, Lord Briggs observed, at *Para 13*, that "…Parliament chose to confer the right to adjudicate 'at any time', so that it can be and is used to resolve disputes eg about final accounts between parties after practical completion, rather than merely at the interim stage"

implicitly endorsing the commentary of Dyson LJ in *Connex South Eastern Ltd v MJ Building Services Group plc [2005] 1 WLR 3323* and his conclusion that "the phrase 'at any time' means exactly what it says'".

33. Mr Philpott submitted that it would give rise to an "absurd anomaly" for the *Scheme* to require notice of adjudication to precede any request for appointment if this does not replicate the requirements of a "construction contract" in *Section 108(2)* of the *1996 Act.* However, I can see no good reason for the *Scheme* to mirror the statutory requirements of a construction contract in this way. No doubt, the *Act* and the *Scheme* should be construed together. They should also be construed so as to achieve a consistent outcome. However, it is possible to do so without construing *Paragraph 2(1)* of the *Scheme* so as to permit requests for appointment to precede delivery of the notice of adjudication. To do so does not, in my judgment, give rise to any anomaly.

34. Mr Philpott did not submit that the Request might be validated by drawing an analogy with the common law principle that, in computing periods of time, fractions of a day should be discounted, *Halsburys Laws of England (5th edn) (2010) Para 345* nor, indeed, the principle that, where a period is fixed for a person to act, the day of the event from which the period runs should be excluded, *Halsburys Laws Para 336* (See also *Lewison "the Interpretation of Contracts" (6th edition 2015 Paras 15.07 and 15.08*). No doubt, the latter principle applies to the five-day period for the nominating body to communicate selection of an adjudicator under *Part 1, Para 5(1)* of the Scheme or the two-day period for an adjudicator to indicate whether he is willing to act under *Para 5(3)* of the *Scheme*. However, it is not suggested that this could affect the time at which the Request should be deemed to have been delivered. *Paragraph 2(1)* of the Scheme is focussed on the sequence rather than the time for delivery of the notice of adjudication and the request for appointment. It is conceivable that, in cases of uncertainty, there might be room for the presumption of regularity but there is no such uncertainty in the present case.

35. Since Mr Jensen was not appointed under a request that was duly issued under *Paragraph 2(1)* of the *Scheme*, I am satisfied that he was not validly appointed as adjudicator and, subject to Kingstone's submissions based on waiver and estoppel, he did not have jurisdiction to make the 27th April Decision.

(6) Alternatively, did Mr Jensen cease to have jurisdiction following the Termination Email?

36. On behalf of Lane End, Ms Cheng submitted that, by transmitting the Termination Email to Messrs Anders and Mason, Mr Jensen resigned and thus vacated office as adjudicator.

37. Contrary to the suggestions of Mr Jensen in the Termination Email itself, Mr Anders's automatically generated email did not somehow terminate the adjudication. The questions that arise are whether, the Termination Email was apt to amount to notice of resignation and, if so, whether it operated to terminate the adjudication.

38. In the Termination Email, Mr Jensen did not purport to resign in express terms; he simply stated that Mr Anders's email had "effectively" terminated the adjudication. However, it was accompanied by his observation that "you are of course responsible for my fees". No doubt it was sent in error. Contrary to the impression Mr Jensen had apparently formed, Lane End had not ceased business and, had it done so, that would not have constituted good reason to terminate the adjudication. Moreover, it was sent only to Messrs Anders and Mason, each of whom represented Lane End. It was not sent to anyone on behalf of Kingstone nor, indeed, was it addressed for the attention of anyone on behalf of Kingstone. However, it is to be objectively construed in accordance with the principles in *Mannai v Eagle Star [1997] AC 749* by asking how it would appear to a reasonable recipient in the same factual context. I am satisfied, on balance, that it was intended to as notice of resignation and is to be construed as such.

39. By virtue of *Paragraph 9(1)* of the *Scheme*, Mr Jensen was entitled to resign by giving "notice in writing to the parties to the dispute". However, the Termination Email did not satisfy this provision because it was addressed to and served on only one of the parties to the dispute. In these circumstances, Ms Cheng did not seek to argue that the Termination Notice satisfied *Paragraph 9(1).* However, in Paras 45-47 of her Skeleton Argument, she submitted that *Paragraph 9(1)* did not "provide that an adjudicator may *only* resign by written notice and/or otherwise cease to act if that resignation is effected by written notice to both parties" and that, by serving the Termination Notice on her clients, the adjudicator had thus surrendered his jurisdiction to adjudicate upon the substantive dispute.

40. I am not persuaded by this analysis. In my judgment, *Paragraph 9(1)* of the *Scheme* can be taken to have provided comprehensively for an adjudicator's method of resignation. If, in any event, an adjudicator can resign by serving notice on one of the parties only, there can have been no obvious reason to provide specifically for an adjudicator to serve notice on each party in *Paragraph 9(1)* unless this was to take separate advantage of the provision for the service of fresh notices under *Paragraph 9(3).* However, it is difficult to discern any logic in drawing such a distinction for this limited purpose. Moreover, it is obviously good practice for adjudicators to serve notice of resignation on each party and it is difficult to see why adjudicators should be entitled to resign by serving notice on one of the parties only.

41. At no point did Mr Jensen serve or purport to serve notice of resignation on Kingstone prior to his email timed at 09:18 to the parties on 16th April 2020 in which he stated that he had not resigned and would thus continue with adjudication.

42. I am satisfied the Termination Email did not operate to terminate the adjudication. If, at that stage, Mr Jensen was in office as adjudicator, he remained in office following the Termination Email.

(7) Waiver by election

43. If the defect in Mr Jensen's appointment was only procedural, it was open to Lane End to waive the defect by election, *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850.* In considering whether it did so, the following questions arise.

    (a) Did the defect in Mr Jensen's appointment present Lane End with the opportunity to make a relevant election?

    If so,

    (b) did Lane End know of the facts giving rise to its right of election and, indeed, of its right of election?

    (c) did Lane End elect to waive the defect or lose its right of election by participating in the adjudication without doing enough to reserve its rights?

(a) Did the defect in Mr Jensen's appointment present Lane End with the opportunity to make a relevant election?

44. A person waives, by election, its right to assert a substantive right by acting inconsistently with the right when presented with a choice. In *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850*, the House of Lords were satisfied that this principle is capable of applying to statutory procedural requirements if imposed solely for the protection or benefit of one party (for example, the time limits to be observed by a tenant applying for a new business tenancy). At *883 A-C*, Lord Diplock observed that this type of waiver "…arises in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is consistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be the legal consequence of what he did. He is sometimes said to have 'waived' the alternative rights, as for instance a right to forfeit a lease or to rescind a contract of sale for wrongful repudiation or breach of condition; but this is better categorised as 'election' rather than as 'waiver'".

45. To successfully invoke this principle, Kingstone must thus show that the issue in relation to Mr Jensen's appointment was the function of a defect which furnished Lane End with a relevant choice.

46. Ms Cheng submitted that, in the present case, there is no room for this principle because the defect arises from Kingstone's decision to request nomination of an adjudicator *before* serving notice of adjudication on Lane End and that, since the whole process of adjudication cannot start until notice of adjudication has been served, any step taken before service of the notice is a nullity. In support of this proposition, Ms Cheng relied on the commentary in *Para 4.35* of *Coulson on Construction Adjudication (4th edn) Para 4.35* ("Paragraph 2(1) makes plain that the first thing that must happen is the giving of the notice of adjudication. Only after that does the procedure involving the nominating body come into play"), *Ecovision Systems Ltd v Vinci Construction UK Ltd [2015] EWHC 587* (HHJ Havelock-Allen QC, at *Para 92*: "any step taken before issue of the Notice of Adjudication is a step taken before proceedings have been commenced and for that reason is a nullity"), *Primus Build Ltd v Pompey Centre Ltd [2009] EWHC*

1487 (TCC) (Coulson J, at *Para 15*, "…because an Adjudicator derives his jurisdiction from the Notice of Adjudication, if it is provided that the Notice had not been validly served, it will generally operate to deprive the Adjudicator of any jurisdiction") and *IDE Contracting Ltd v RG Cambridge Ltd [2004] EWHC 336 (TCC)* (HHJ Havery QC) in which it was adjudged the adjudicator lacked jurisdiction because steps had been taken to obtain his nomination before service of the notice of adjudication. There can be no reason to doubt the commentary or authorities upon which Ms Cheng relies and their logic is clear.

47. In the present case, the Request preceded the Notice of Adjudication. For that reason, any appointment under the Request could not take effect as an appointment in the adjudication. Since Mr Jensen was appointed pursuant only to the Request, his appointment was void. Since it was not made pursuant to a statutory notice of adjudication, the RICS nomination was not capable of conferring on him jurisdiction.

48. On this basis, I am satisfied Lane End was not presented with a relevant choice. There could be no adjudication until the Notice of Adjudication was served. Until then, no opportunity could have arisen for Lane End to choose between two alternative courses of action. Once the Notice of Adjudication was served, Kingstone regarded Mr Jensen as adjudicator but he was not appointed as such nor, indeed, was there any purported appointment in the adjudication. This is not a case in which he was appointed as adjudicator but there was a defect in the process of appointment and adjudication. He was not appointed to act in the adjudication at all.

49. It follows that Lane End was not presented with a choice under which it was furnished with the opportunity to cede a right. The relevant defect arises from *Paragraphs 1(1)* and *2(1)* of the *Scheme* under which a party to a construction contract is afforded the right to serve notice of adjudication and request the appointment of an adjudicator. There is an obvious logic in providing for the referring party to serve notice of adjudication prior to the request for appointment. No doubt, this also provides a measure of protection to the responding party. However, it would be unduly simplistic to characterise these provisions – in the manner identified by the House of Lords in *Kammins v Zenith (supra)* – as procedural requirements imposed solely for the protection or benefit of the responding party.

50. I am thus satisfied that the defect in Mr Jensen's appointment was not procedural only and, in any event, it did not present Lane End with the opportunity to make a relevant election. The relevant defect was not and is not susceptible to waiver by election. Although sub-questions (b) and (c) no longer arise, I shall consider them on a hypothetical basis.

(b) If the relevant defect was capable of waiver, did Lane End know of the facts giving rise to its right of election and, indeed, of the right of election itself?

51. No person can meaningfully make an election if unaware of his opportunity to do so. It requires knowledge of all the facts giving rise to the relevant right and of the right of election itself, *Peyman v Lanjani [1985] Ch 457*.

    51.1. *Peyman v Lanjani (supra)* involved the right of a purchaser to rescind a contract for the sale of land but the Court of Appeal clarified the principles more generally so as to include cases where a party seeks to take advantage of a statutory irregularity. The purchaser sought to rescind a contract for the sale of leasehold property on the basis that the title was defective because the landlord had been misled at meetings in which the vendor had been impersonated in order to obtain licence to assign. At first instance, Dillon J dismissed this part of the claim on the grounds that the purchaser had affirmed the contract by making a payment to the vendor and taking possession. The Court of Appeal allowed the purchaser's appeal on the grounds that, since he did not know of his right of election, he did not have sufficient knowledge to affirm notwithstanding that his daughter advised him the vendor had been impersonated and his solicitor was provided with information about least one of the occasions on which the vendor was impersonated.

    51.2. At *487F-G*, Stephenson LJ confirmed that "knowledge of the facts which give rise to the right to rescind is not enough to prevent the plaintiff from exercising that right… he must also know that the law gives him that right yet choose with that knowledge not to exercise it". He adjudged that "the plaintiff can therefore rely on his own unchallenged ignorance of the law, unless he is precluded from doing so either by what he has done or by his solicitor's knowledge of the law". His solicitor's knowledge was not imputed to the purchaser because there was no suggestion his

solicitor had advised him that, by reason of the relevant defect in title, he was entitled to rescind.

51.3. May and Slade LJJ each agreed with Stephenson LJ's judgment in its entirety. At *501D-E*, Slade LJ confirmed that, in the absence of knowledge of his legal right to rescind, the purchaser's conduct in entering into possession and making payment could not amount to an election to affirm the contract.

51.4. There was no room in Stephenson LJ's analysis for the purchaser to be deemed to have *constructive* knowledge owing simply to carelessness or a failure to make proper inquiries. It is apparent from the judgment of May LJ, at *494D-E*, that the Court of Appeal were mindful of the fact that, once a party makes its election, its choice is deemed to be irrevocable regardless of whether the other party has changed position. For this reason, *actual* knowledge of the relevant facts and the right of election itself are essential.

52. In *Stevens & Cutting v Anderson [1990] 1 EGLR 95*, the Court of Appeal applied these principles to a tenant's application for a new business tenancy under *Part II* of the *Landlord and Tenant Act 1954*, issued less than two months after its requests for a new tenancy contrary to the requirements of the statutory regime which then applied. The landlord knew nothing of this nor, indeed, of his right to rely on it. However, he engaged a solicitor whose knowledge could reasonably have been imputed to him. His solicitor was aware of the relevant dates and thus had knowledge of the facts giving rise to his client's relevant rights but gave evidence that he did not know, at any relevant time, of his client's right of election. On this basis, the Court of Appeal concluded that the landlord did not have sufficient knowledge to make an election and had not waived his right to rely on the irregularity.

53. Had the putative defect been capable of waiver, I am satisfied Lane End did not have sufficient knowledge to make an election at any time prior to the Adjudicator's decision. It did not know of all the facts giving rise to its right to make an election nor, indeed, did it know of the right itself.

53.1. As it happens, Kingstone commenced two adjudications against Lane End on the same day, 20th March. The present proceedings relate only to an adjudication in

respect of a project at Rilshaw Lane, Winsford. On behalf of Lane End, Mr Ian Power, a managing surveyor, had overall responsibility for the Rilshaw Lane project. However, Mr John Mason of Contract Dispute Solutions Limited, a chartered quality surveyor and accredited mediator, was instructed to provide professional services on Lane End's behalf.

53.2. At an early stage, Lane End sought to challenge the jurisdiction of the adjudicator. This was essentially on the basis that, in the absence of a notice of adjudication, he had not been appointed to act as a statutory adjudicator. It did not identify, as a potential issue, the sequence in which Kingstone made the Request and served the Notice of Adjudication. This issue was not investigated and thus did not come to light until after the adjudicator's decision.

53.2.1. By its email to Lane End at 10:22 on 20th March ("the RICS Email"), the RICS advised Lane End that it had received an application for the nomination of an adjudicator in respect of the dispute between the parties in respect of the site at Rilshaw Lane, Winsford. Since the RICS Email preceded the 20th March Meeting, at which Kingstone served the Notice of Adjudication, Lane End's employees might have been expected to infer that the Request had been made first had the RICS Email been brought to their attention at the time. However, it does not appear Lane End was copied into the Request and the RICS Email was sent to the general email address on Lane End's website, not a specific address for Lane End's employees. It appears from Craig Dulson's witness statement dated 5th June 2020, that this was not immediately brought to the attention of Lane End's employees and they were unaware that the RICS Email had been sent on the same day as the Notice of Adjudication until after they received the Adjudicator's decision. In any event, it was only at that stage that Lane End took legal advice about the effect of this.

53.2.2. By letter dated 23rd March, Mr Jensen advised the parties that he had been nominated by the RICS to act as adjudicator. However, this letter did not record the time or date of the Request. The letter appears to have been emailed to the parties and their advisers, Messrs Mason and Barker on the same day, 23rd March.

53.2.3. It appears from Paragraph 11.3 of Mr Mason's witness statement dated 5th June 2020 that, at his request, the RICS subsequently sent him a copy of the Request and Mr Barker's covering email to show him that Kingstone had referred or purported to refer the matter to adjudication pursuant to the *Scheme*. However, he did not investigate and thus cannot have advised Lane End about the sequence in which they had been delivered.

53.2.4. Had Lane End or its agents been aware of the relevant defect in Mr Jensen's jurisdiction or, indeed, of its right of election, they would obviously have taken the point specifically at the time. It would have made no sense to pursue their point about the validity of the Notice of Adjudication without also taking a point about the sequence in which the Request and the Notice of Adjudication were issued and served.

(c) Did Lane End elect to waive the defect or, alternatively, lose its right of election by participating in the adjudication without doing enough to reserve its rights?

54. Lane End cannot have elected to waive the defect because it did not have sufficient knowledge to do so. The issue is thus whether it lost its right of election prior to the delivery of the adjudicator's decision by participating in the adjudication without doing enough to reserve its rights.

55. It is apparent from the judgments of the Court of Appeal in *Peyman v Lanjani (supra)* that, regardless of knowledge, a party loses its right of election if it fails to exercise a right and, in consequence, the other party is "adversely affected", *491C* (Stephenson LJ). In *Scarf v Jardine (1882) 7 App. Cas. 345* at *360*, Lord Blackburn observed as follows.

> "We think so long as he has made no election he retains the right to determine it either way, subject to this, that is if in the interval whilst he is deliberating an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind".

56. In the case of adjudications under the *1996 Act* and the *Scheme*, special considerations come into play. In *Bresco Electrical Services Ltd v Lonsdale [2019] EWCA Civ 27*, Coulson

LJ made the following observations in a judgment with which the President of the Family Division and King LJ agreed.

> "91. In my view, the purpose of the *1996 Act* would be substantially defeated if a responding party could, as a matter of course, reserve its position on jurisdiction in general terms at the start of an adjudication, thereby avoiding any ruling by the adjudicator or the taking of any remedial steps by the referring party; participate fully in the nuts and bolts of the adjudication, either without raising any detailed jurisdiction points, or raising only specific points which were subsequently rejected by the adjudicator (and the court); and then, having lost the adjudication, was allowed to comb through the documents in the hope that a new jurisdiction point might turn up at the summary judgment stage, in order to defeat the enforcement of the adjudicator's decision at the eleventh hour. To that extent, therefore, I consider that the position in adjudication is rather different to that in arbitration, and, unlike Ramsey J, I am not persuaded that the reasoning in *The Marquess de Bolarque* and *Allied Vision* is of direct application to the general reservation of a responding party's position as to an adjudicator's jurisdiction.
>
> 92. In my view, informed by that starting-point, the applicable principles on waiver and general reservations in the adjudication context are as follows:
>
> i) If the responding party wishes to challenge the jurisdiction of the adjudicator then it must do so "appropriately and clearly". If it does not reserve its position effectively and participates in the adjudication, it will be taken to have waived any jurisdictional objection and will be unable to avoid enforcement on jurisdictional grounds (*Allied P&L*).
>
> ii) It will always be better for a party to reserve its position based on a specific objection or objections: otherwise the adjudicator cannot investigate the point and, if appropriate, decide not to proceed, and

the referring party cannot decide for itself whether the objection has merit (*GPS Marine*).

iii) If the specific jurisdictional objections are rejected by the adjudicator (and the court, if the objections are renewed on enforcement), then the objector will be subsequently precluded from raising other jurisdictional grounds which might otherwise have been available to it (*GPS Marine*).

iv) A general reservation of position on jurisdiction is undesirable but may be effective (*GPS Marine; Aedifice*). Much will turn on the wording of the reservation in each case. However, a general reservation may not be effective if:

> i) At the time it was provided, the objector knew or should have known of specific grounds for a jurisdictional objection but failed to articulate them (*Aedifice, CN Associates*);
>
> ii) The court concludes that the general reservation was worded in that way simply to try and ensure that all options (including ones not yet even thought of) could be kept open (*Equitix*)."

57. On this basis, a party will generally be taken to have waived any jurisdictional objection and thus lose its right of election if it participates in the adjudication without reserving its position in clear and appropriate terms. To do so effectively, it will generally be expected to reserve its rights in terms tailored, no doubt, to the jurisdictional challenge. In the absence of good reason, a general reservation will be ineffective if the nature of the jurisdictional challenge is not identified.

58. In the present case, Lane End challenged Mr Jensen's appointment at an early stage. By his email timed at 17:44 on 24th March 2020, Mr Mason advised Mr Jensen that his firm had been instructed to act on behalf of Lane End and that, they "reserve[d] the position of our client as to your jurisdiction until such time that we have taken further instructions and interrogated the Referral". At this point he did not specify any ground

for challenge. However, by his email timed later that evening, at 18:26, Mr Mason advised Mr Jensen that his nomination was invalid and he thus lacked jurisdiction on the basis that Kingstone had "…failed to give the required notice of adjudication of its intention to refer the dispute to adjudication and has 'jumped' straight to the Referral".

59. This was followed by an email timed at 09:08 on 25th March 2020 from Mr Mason to Messrs Jensen and Barker "reserv[ing] our clients position as to your jurisdiction". It was then observed that the Notice of Adjudication was labelled a "Notice of Referral" and did "…not express any intention to refer a dispute to adjudication". Later in the email, Mr Mason took the point, more generally, that "…any decision would be unenforceable due to the procedural irregularities which undermine the Adjudicator's threshold jurisdiction". Mr Jensen resolved in favour of Kingstone Mr Mason's argument about the "Notice of Referral" on the basis that it amounted to a Notice of Adjudication within the meaning of the *Scheme*. He did so by email timed at 13:59 on 25th March 2020.

60. By an email timed at 15:04 on 25th March 2020 to Messrs Jensen and Barker, Mr Mason again reserved Lane End's "position…as to the Adjudicator's jurisdiction", stating that the Notice of Adjudication "…does not express any intention to refer a dispute to adjudication as required by the scheme and as such is not a 'Notice of Adjudication'". Later in the email, Mr Mason insisted that he was not taking "an interpretation point at all but a procedural fact based failure point".

61. Following Mr Jensen's email timed at 09:18 on 16th April in which Mr Jensen confirmed that he had not resigned and thus intended to continue the adjudication, Mr Mason emailed him shortly afterwards, at 09:53, to advise Mr Jensen, again, that Lane End "reserves its position as to your jurisdiction". Later that morning, Mr Jensen emailed revised directions to Mr Mason and, upon receipt, he advised Mr Jensen that the revised directions were agreed. In doing so, Mr Mason did not purport to reserve Lane End's position. Nevertheless, when, on 23rd April 2020, he forwarded to Mr Jensen a copy of Lane End's Rejoinder, he confirmed, again, that Lane End "reserve[d] its position as to the jurisdiction of the Adjudicator". Moreover, he continued to reserve Lane End's position on jurisdiction in correspondence with the Adjudicator following the 27th April Decision.

62. It can thus be seen that Mr Mason repeatedly sought to reserve Lane End's rights in his correspondence with the Adjudicator and Kingstone. He did not reserve Lane End's right to take specific jurisdictional objections; he simply reserved Lane End's position about the Adjudicator's jurisdiction. However, it was apparent from the correspondence that he was seeking to preserve its right to challenge Mr Jensen's "threshold jurisdiction". In broad terms, this was on the basis that, since he had not been appointed under a valid statutory notice of adjudication, he had not been appointed under the *Scheme*. However, at this stage, Mr Mason's argument was that the Notice of Adjudication was not apt, on its true construction, to amount to notice of adjudication within the meaning of the *Scheme.* Ms Cheng wisely chose not to pursue this argument at the hearing before me.

    62.1. Mr Mason's initial reservation in his email, timed at 17:44 on 24th March 2020, was intended as a short "holding" reservation whilst Mr Mason and his clients considered the position. Although it was not linked to any specific jurisdictional challenge, I can see no substantial reason to preclude a party making a reservation of this kind for a short period of time, fixed in advance, for the legitimate purpose of allowing time for a party to examine its rights. In the present case, Mr Mason did not specify the period required. Had the issue arisen, he could reasonably have been asked to do so. However, this email was superseded by his email, timed, no more than 41 minutes afterwards, at 18:25, setting out specific grounds for jurisdictional challenge.

    62.2. Mr Mason's emails, on 25th March, commenced with a sentence reserving Lane End's position in general terms ("We reserve our clients' position as to your jurisdiction" and "we reserve the position of our client as to the Adjudicator's jurisdiction"). Having done so, however, they contained arguments about the validity of his appointment based on the proposition the Notice of Adjudication did "…not express any intention to refer a dispute to adjudication" and was thus not apt to amount to a notice of adjudication within the meaning of the Scheme. When considered objectively and as a whole, these reservations can be seen to have been made to preserve a specific jurisdictional challenge on the basis that Mr Jensen had not been appointed under a valid statutory notice of adjudication.

62.3. Miss Cheng submitted that if, indeed, the 25th March emails operated only to reserve Lane End's rights to advance a specific jurisdictional challenge, this challenge encompassed the defect on which Lane End now relies based on the sequence in which the Request and the Notice of Adjudication were issued and served. In support of this submission, Ms Cheng relied on the email timed at 18:25 on 24th March 2020 from Mr Mason to Mr Jensen taking the point that "…the Referring Party has failed to give the required notice of adjudication of its intention to refer the dispute to adjudication and has 'jumped' straight to the Referral." When this email is construed together with Mr Mason's other emails on 24th and 25th March 2020, it is apparent this point was being taken on the grounds that the Notice of Adjudication did not amount to a notice of adjudication within the meaning of the *Scheme*. However, a distinction must be drawn between the conceptual basis for the jurisdictional challenge and the arguments deployed in support.

62.4. Mr Mason's email timed at 09:53 on 16th April also contained a general reservation of Lane End's rights in respect of the Adjudicator's jurisdiction. This email did not refer to any grounds for jurisdictional challenge. Nevertheless, it was prompted by Mr Jensen's 09:18 email confirming that, contrary to Mr Mason's submissions, he had not resigned and the adjudication would thus continue. This reservation was apparently made for the purpose of preserving Mr Mason's challenge on the grounds of Mr Jensen's resignation although, out of an abundance of caution, he may thus be seen to have taken the opportunity to renew his reservation in respect of the earlier grounds.

63. On the hypothesis that the defect in Mr Jensen's appointment was susceptible of waiver, I have reached the conclusion, on balance, that Mr Mason successfully reserved Lane End's right to challenge Mr Jensen's appointment. The reservations in Mr Mason's emails of 25th March were not expressly limited to a specific jurisdictional objection. However, the emails contained jurisdictional objections and it was implicit that the reservations were based on these objections in the sense envisaged by Coulson LJ in *Bresco (supra).* The conceptual basis for the objections was that Mr Jensen had *not* been appointed under a valid statutory notice of adjudication. Whilst Lane End has not

pursued the main argument it initially advanced in support of the objections, it has successfully deployed in these proceedings an argument based on the sequence of the Request and the Notice of Adjudication. In my judgment, this falls within the scope of the reservation since it furnishes Lane End with a challenge on the ground that Mr Jensen was not appointed under a statutory notice of adjudication.

64. If it remains necessary to apply the test suggested in Stephenson LJ in *Peyman v Lanjain (supra)* and ask whether Kingstone has been "adversely affected" by Lane End's conduct, in particular the steps it has taken participating in the process of adjudication, I am satisfied it hasn't been. Lane End successfully reserved its rights to participate without conceding the relevant jurisdictional objection. Moreover, there is no convincing evidence that, had Lane End taken a different stance, Kingstone would have changed position.

(8) Estoppel

65. In his written submissions dated 10th July 2020, Mr Philpott contended that Lane End was estopped from challenging the adjudicator's jurisdiction. He relied on four alternative species of estoppel, namely promissory estoppel, estoppel by acquiescence, estoppel by representation and estoppel by convention. Each of these have distinct historical origins and operate according to different principles. Promissory estoppel, estoppel by acquiescence and estoppel by representation share features which are not present in estoppel by convention. In broad terms, they can be invoked where a party acts to its detriment in reliance upon a belief or understanding created or encouraged by the other. By contrast, estoppel by convention is based on a common belief or assumption and is capable of furnishing the parties with an independent cause of action, regardless of whether it relates to an interest in land.

66. Although this part of Kingstone's case was presented with ingenuity, in my judgment it is without foundation.

67. In support of his case based on promissory estoppel, Mr Philpott submitted, in Para 41, that "Mr Mason made a clear and unequivocal representation that Lane End would not challenge the Adjudicator's jurisdiction other than for the challenges they made in the adjudication…" No doubt this could qualify as a representation in the nature of a

promise or assurance. However, contrary to Mr Philpott's submission, Lane End's challenge before the Adjudicator was essentially on the basis he had not been properly appointed under the Scheme, a challenge renewed before me. In support of its case before the adjudicator, Mr Mason deployed unpersuasive arguments. However, he did not say or do anything to suggest Lane End would seek to limit itself to these particular arguments in its challenge to the Adjudicator's jurisdiction nor did anyone, on behalf of Lane End, make promises or assurances to submit to the Adjudicator's jurisdiction in the future.

68. Mr Philpott also submitted that Mr Mason acquiesced "…in the conduct of the Adjudication and in not making the challenges that Lane End now makes he is estopped by acquiescence by his silence in respect of these particular specific challenges to jurisdiction that Lane End now makes" (Para 33). Estoppel by acquiescence arises most commonly under the doctrine of proprietary estoppel. However, mere silence is insufficient. To establish such a case, it would be necessary to show that Lane End is culpable for knowingly taking advantage of a mistake on the part of Kingstone, through its officers or employees. Knowledge of Kingstone's mistaken belief about Lane End's inconsistent right is essential, *Kammins v Zenith (see above) 884-885.* Kingstone's case appears to be founded on the basis it mistakenly believed Lane End would, in future, limit itself to specific arguments rather than upon a mistaken belief about Lane End's rights. It is doubtful whether this would, in itself, be capable of furnishing Kingstone with a sound case. More significantly, however, there is no substantial evidence that Kingstone was mistaken in this way or, indeed, that Lane End was aware of Kingstone's mistaken belief. This is fatal to a case based on estoppel by acquiescence.

69. In relying on estoppel by representation, Mr Philpott submitted that "the actions of Lane End can be objectively characterised as an unequivocal representation that it was waiving the right to challenge the Adjudicator's jurisdiction on this and all grounds of objection that they now seek to raise retrospectively" (Para 29). In substance, this is more in the nature of a promise than a representation of fact or mixed fact and law. It is also difficult to see how Lane End's conduct could be said to amount to a clear and unequivocal representation. However, I am not satisfied it is possible to infer from Lane End's conduct a representation that Lane End had somehow released or surrendered

any rights it might have had to challenge to the Adjudicator's jurisdiction given the lengths to which it went to reserve its rights to do so. When seeking to reserve its rights, Lane End advanced specific arguments about the Adjudicator's jurisdiction and, more particularly, the validity of his appointment. However, nowhere can an intention be discerned to limit, in some way, the nature of his arguments on the issue.

70. In Para 24, Mr Philpott submitted that Lane End is "…estopped by convention…from now challenging the Adjudicator's jurisdiction on new grounds not raised in the adjudication". He did not identify the parties' shared assumption of fact or law. It is presumably a shared assumption that Lane End was not entitled to challenge the Adjudicator's jurisdiction otherwise than by relying on the arguments specifically advanced in correspondence at some point in time in the past. However, in my judgment no evidential basis for such an assumption is disclosed in the evidence.

71. In the hypothetical event that Kingstone could identify a promise, representation or mistaken belief with which to advance a case based on promissory estoppel or estoppel by representation or acquiescence, it would remain necessary for Kingstone to show that it acted to its detriment in reliance upon it. In my judgment, there is no evidence on which I can reasonably reach such a conclusion. Kingstone has at all times resisted Lane End's jurisdictional challenge and continued to do so, regardless of the arguments Lane End deployed in support of the challenge. At the hearing before me, it has continued to argue that Mr Jensen acted with statutory jurisdiction regardless of its estoppel arguments. If, indeed, it is Kingstone's case that, had it not been for the putative promise, representation or mistaken belief, it would have conceded its case and accepted Lane End's jurisdictional challenge, this is inherently unlikely. It is thus un-necessary for me to consider whether, in substance, Kingstone is relying on these forms of estoppel defensively.

72. Estoppel by convention operates according to different principles. If Kingstone's case is based on a shared assumption that Lane End was limited to the arguments specifically advanced in correspondence, no doubt it would need to establish that, had it not been for this assumption, Kingstone would have acted differently. Again, I am not satisfied it would have done so. On this somewhat unrealistic hypothesis, I am not satisfied that

Kingstone would have acted differently, in a material way, had it known that Lane End might advance revised or additional arguments in support of its case on jurisdiction.

73. For these reasons, Kingstone's case based on estoppel fails.

(9) Different dispute

74. Lane End presented an alternative case based on the proposition that the Adjudicator ultimately purported to determine a different dispute to the one referred to him in the Notice of Adjudication. At the hearing before me, Mr Philpott submitted that he had been taken by surprise in view of the fact that, although the evidential basis for Lane End's alternative case could be discerned from the witness statement and exhibits, it formed no part of the case set out in Lane End's Part 8 Claim Form. Moreover, the issue was not fully canvassed in the parties' initial written submissions. At the end of the hearing, I thus permitted the parties to file written submissions on this issue in addition to the issue arising from the covert recording of the 20th March Meeting.

75. Ultimately, Kingstone delivered additional written submissions dated 10th, 20th and 24th July and Lane End delivered additional written submissions dated 21st July 2020. By letter dated 27th July 2020, Lane End's solicitors contended that, since I had not provided for Kingstone to file the additional written submissions dated 20th and 24th July, I should not consider these submissions without first providing Lane End with an opportunity to respond. In view of my above conclusions, the "different dispute" issue is now entirely hypothetical. In these circumstances and, to avoid further un-necessary argument, I shall not consider this issue further. I shall not rule on the hypothetical question of whether, had the Adjudicator been validly appointed, his determination could have been successfully challenged on the basis it was directed to a different dispute from the one referred to him in the Notice of Adjudication. Subject to this, I have taken into consideration each of Mr Philpott's additional written submissions.

(10) Disposal

76. I shall thus give judgment for Lane End on its *Part 8* Claim and I shall dismiss Kingstone's application for summary judgment on its *Part 7* Claim. I am minded also to give judgment for Lane End on the *Part 7* Claim. However, I shall hear further from counsel in relation to the form of the order and all consequential matters, including costs.