

Construction Law Update

Are You Adjudicating Against the Right Party?

It is an established principle that an adjudicator does not have jurisdiction in respect of a dispute referred against an entity which was not a party to the contract. However, the recent case of *Gerard Ferns & Kerry-Ann Ferns v Keith West, Adam West and Linda West (t/a Haven Build)* looks at what happens when a party without a separate legal identity, such as a partnership, is named as a party to a contract. This case considers who is the right party to adjudicate against under these circumstances and whether an adjudicator's decision against an entity without a separate legal identity can be enforced.

Background

Mr and Mrs Ferns entered into a contract with an entity called Haven Build to carry out building works at a house which they were planning to move into. Haven Build was not a limited company but rather the trading name of at least Mr Keith West and Mr Adam West but possibly also Ms Linda West. The contract contained an express adjudication provision and so the exception in the Housing Grants Reconstruction and Regeneration Act 1996 (as amended) for the right to adjudicate if it is a residential property was not relevant.

Haven Build withdrew from the site leaving behind defective and incomplete works. Mr and Mrs Ferns issued a notice of adjudication headed: *"In the matter of an adjudication between Mr and Mrs Ferns and Haven Build"*.

The referral notice, and Haven Build's response to that referral, also both described the responding party as Haven Build. Mr and Mrs Ferns were successful in the adjudication and sought to enforce that decision.

Was Haven Build the right party to adjudicate against?

Counsel for Keith West and Adam West argued that the whole adjudication was defective because it had proceeded against Haven Build when it should have been brought against Keith West and Adam West trading as Haven Build.

The court rejected this argument, noting that Mr and Mrs Ferns had replicated the builder's name exactly as it had appeared in the contract, and concluded:

"this point, apart from being wholly without merit, is also a bad one. In law, Haven Build was in effect and in reality, at least Mr Keith West and Mr Adam West, trading as Haven Build, if not including Ms West as well. There is nothing in this point whatsoever, and this attempt to avoid enforcement is, quite correctly, characterised... as a party scrambling around for some reason to try and avoid enforcement of an adjudicator's decision."

Was Haven Build entitled to raise this argument?

Haven Build had a solicitor acting for them throughout, but at no point during the adjudication or subsequently had it suggested that the wrong party was being adjudicated against. The court held that, if this point were to have any prospects of life whatsoever, a reservation of rights would have been required by Keith West and Adam West. Accordingly, the court enforced the decision in favour of Mr and Mrs Ferns.

Analysis

Whilst the argument was definitively rejected, this case serves as a useful reminder of the care which must be taken when preparing documents for adjudication and the potential consequences of failing to proceed against the right party. It also highlights the need for a responding party to raise any potential jurisdictional arguments during the adjudication and avoid making any prejudicial statements. In this case, Haven Build's response to Mr and Mrs Ferns' referral notice described the responding party as Haven Build and there was also no reservation of position. Both of these factors scuppered any chance of Haven Build succeeding in contesting the adjudicator's jurisdiction.

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