APPROVED **[2025] IEHC 139**

THE HIGH COURT

2024 566 MCA

IN THE MATTER OF THE CONSTRUCTION CONTRACTS ACT 2013

BETWEEN

TENDERBIDS LTD
TRADING AS BASTION

APPLICANT

AND

ELECTRICAL WASTE MANAGEMENT LTD

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 13 March 2025

INTRODUCTION

1. This judgment addresses a point of procedure in relation to adjudications under the Construction Contracts Act 2013. The point concerns the delivery of a notice of intention to refer a payment dispute to adjudication. The parties to the relevant construction contract had agreed in writing that such notices were to be delivered by registered post. In the event, however, one of the parties purported to deliver

a notice by way of email instead. The question which arises for resolution in this judgment is whether this acknowledged failure to comply with the contractually agreed method for delivery invalidates the adjudication process.

CONSTRUCTION CONTRACTS ACT 2013

2. The right to refer a payment dispute for statutory adjudication is created under section 6 of the Construction Contracts Act 2013 as follows:

> "(1) A party to a construction contract has the right to refer for adjudication in accordance with this section any dispute relating to payment arising under the construction contract (in this Act referred to as a 'payment dispute').
>
> (2) The party may exercise the right by serving on the other person who is party to the construction contract at any time notice of intention to refer the payment dispute for adjudication.
>
> […]"

3. The method of delivery of notices is governed by section 10 of the Act as follows:

> "(1) The parties to a construction contract may agree on the manner by which notices under this Act shall be delivered.
>
> (2) If or to the extent that there is no such agreement, a notice may be delivered by post or by any other effective means.
>
> (3) Where under this Act a notice is required to be delivered not later than a specified number of days after a particular date and the last of those days is a day which is a Saturday or Sunday or a public holiday (within the meaning of the Organisation of Working Time Act 1997), the notice shall be taken to be validly delivered if delivered on the next day which is not such a day."

CONTRACTUAL PROVISIONS

4. The parties to these proceedings had entered into a construction contract on 19 October 2021. The construction contract is in the form of the RIAI (Yellow Form) (August 2017 edition).

5. The articles of agreement provide as follows at clause 5:

> "As allowed under s10 of the Construction Contracts Act 2013 (CCA) all notices arising under the CCA shall be delivered by registered post. Notwithstanding this, a payment claim notice under s4 of the CCA may be delivered by the Contractor to the Architect by means of email to the email address stated in the Appendix with effectiveness of delivery at the risk of the sender. Note: The Parties further agree that the Architect may notify the Contractor of a change of email address after this agreement is made. s4 of the CCA provides for 'another person specified under the construction contract'; the Architect is the person referred to as 'another person' specified under this construction contract."

6. The delivery of notices is also addressed under the conditions of contract. Relevantly, clause 1 (definitions) provides as follows at subparagraph (e):

> "Where under this contract a notice is required to be delivered not later than a specified number of days after a particular date and the last of those days is a day which is a Saturday or a Sunday or a public holiday (within the meaning of the Organisation of Working Time Act 1997), the notice shall be taken to be validly delivered if delivered on the next day which is not such a day. This does not apply to notices under the CCA which are to be delivered under article 5."

PURPORTED REFERENCE TO ADJUDICATION

7. The applicant herein, Tenderbids Ltd, purported to refer a payment dispute to adjudication. The notice of intention to refer was supposedly sent to two directors of the respondent, Electric Waste Management Ltd, by way of email on 21 June 2024. The applicant has adduced evidence, which has not yet been

challenged, to the effect that it received a delivery receipt by email and an "*email opened*" notification.

8. An adjudicator was nominated by the Construction Contracts Adjudication Service ("*CCAS*") on 9 July 2024. The CCAS issued two notices to both parties via ordinary post and email in respect of the appointment of the adjudicator.

9. It is further said that a solicitor acting for the respondent had telephoned the party representative to discuss the adjudication process and the timing of the delivery of a response. In the event, the respondent did not participate in the adjudication process.

10. The adjudicator purported to make a decision on 8 August 2024 directing the payment of €1,531,830.85 within seven days ("*the adjudicator's award*"). The adjudicator purported to find at §11.2 of his decision that the referring party had served a valid notice of intention to refer, saying that delivery by email is a valid method, i.e. an effective means to serve such a notice. (As appears presently, this finding is erroneous in point of law having regard to the agreement between the parties).

11. The applicant instituted these High Court proceedings on 12 November 2024. The proceedings seek leave to enforce the adjudicator's award and, further or in the alternative, an order entering judgment against the respondent in the sum of €1,531,830.85.

12. The proceedings were fixed for hearing on 20 December 2024. The proceedings were part-heard on that date and then adjourned to allow both parties to file written legal submissions in relation to the consequences, if any, of the failure to comply with the prescribed method for the delivery of notices. The parties filed very helpful submissions on 28 January and 20 February 2025, respectively. The

parties also made further oral submissions on 20 February 2025. Judgment was reserved.

PRINCIPLES OF STATUTORY INTERPRETATION

13. The proper approach to statutory interpretation has recently been restated by the Supreme Court in *Heather Hill Management Company v. An Bord Pleanála* [2022] IESC 43, [2022] 2 ILRM 313 ("*Heather Hill*"). Murray J., writing for the Supreme Court, emphasised that the literal and purposive approaches to statutory interpretation are not hermetically sealed. In no case can the process of ascertaining the legislative intent be reduced to the reflexive rehearsal of the literal meaning of words, or the determination of the plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and purpose for which, it was enacted. Rather, it is necessary to consider the context of the legislative provision, including the pre-existing relevant legal framework, and the object of the legislation insofar as discernible.

14. The words of the section are the first port of call in its interpretation, and while the court must construe those words having regard to (i) the context of the section and of the Act in which the section appears, (ii) the pre-existing relevant legal framework and (iii) the object of the legislation insofar as discernible, the onus is on those contending that a statutory provision does not have the effect suggested by the plain meaning of the words chosen by the Legislature to establish this. The "*context*" that is deployed to that end, and "*object*" so identified, must be clear and specific, and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an

alternative construction that is itself capable of being accommodated within the statutory language.

SUBMISSIONS OF THE PARTIES

15. It is common case that the notice of intention to refer to adjudication was not delivered in the manner which had been agreed between the parties under the express terms of the construction contract.

16. Counsel on behalf of the applicant submitted that this failure is not fatal and that service ought to be deemed good in circumstances where—or so it is said—the respondent has not suffered any prejudice by reason of the alleged defect in service. Counsel submitted that service by way of email was "*the preferable method of service between the parties*". It was further submitted that the evidence indicates that the respondent had received the notice of intention to refer by way of email. Counsel cited, in particular, *Lancefort Ltd v. An Bord Pleanála* [1997] IEHC 38 (unreported, High Court, Morris P., 13 May 1997); *In the matter of Sean Dunne (A Bankrupt)* [2015] IESC 42, [2015] 2 ILRM 103; and *O'Brien v. Meehan* [2021] IECA 205.

17. The applicant submitted that the respondent ought to have "*reserved its right*" to bring a jurisdictional challenge in the form of the adjudication process at the earliest opportunity.

18. In reply, counsel for the respondent took the court through what he described as the "*sequential framework*" under the Construction Contracts Act 2013, in support of a submission that an adjudicator's jurisdiction is dependent upon a notice of intention to refer having been validly served. Counsel submitted that there is a clear and unequivocal written agreement between the parties, taken in

conjunction with section 10 of the Construction Contracts Act 2013, that all notices arising under the Act shall be delivered by registered post, save for a payment claim notice under section 4. It was further submitted that the clear statutory intent of the Legislature is to preserve parties' contractual autonomy in commercial contracts of this nature.

19. Counsel also referred to a number of judgments from England and Wales. These are discussed at paragraphs 28 to 31 below.

DISCUSSION AND DECISION

20. The terminus of the applicant's argument, when pursued to its logical conclusion, is that it is sufficient to ground a valid adjudication process that the notice of intention to refer has been delivered by any effective means. Put otherwise, the litmus test is whether the referring party can demonstrate that service has been effected upon the responding party. The difficulty with this formulation is that it renders the first subsection of section 10 of the Construction Contracts Act 2013 superfluous. Under the applicant's argument, the section must be read as if it provided that a notice may be delivered by post or by any other effective means *notwithstanding* that the parties to a construction contract have agreed on the manner by which notices under the Act shall be delivered. This necessitates displacing the clear language of the section.

21. With respect, this is not a permissible approach to statutory interpretation. The Legislature has ordained that the parties are entitled to prescribe the method by which notices are to be delivered. Here, the parties expressly agreed in writing that all notices arising under the Construction Contracts Act 2013 (other than

payment claim notices) shall be delivered by registered post. The legislation requires that this choice must be respected.

22. As emphasised by the Supreme Court in *Heather Hill* (cited above), the onus is upon a party, who contends that a statutory provision does not have the effect suggested by the plain meaning of the words chosen by the Legislature, to establish this. Here, the applicant has not sought to identify any factor which would justify a departure from the plain meaning of section 10 of the Construction Contracts Act 2013.

23. The applicant has sought to argue, by analogy with the case law cited at paragraph 16 above, that service "*ought to be deemed good*". The difficulty with this argument is that each of the judgments relied upon had been decided in the context of legislation which expressly allowed for a departure from the strict rules in respect of service. In *Lancefort Ltd v. An Bord Pleanála*, the High Court held that service had, in fact, been effected in compliance with the Companies Act 1963. The judgment goes on to state that—even if there had not been strict compliance with the statutory provisions—the court would have unhesitatingly declared that the service was sufficient under Order 9, rule 15 of the Rules of the Superior Courts. In *Sean Dunne (A Bankrupt)* and *O'Brien v. Meehan*, the issue of service had been addressed by reference to Order 9, rule 15 and/or Order 124.

24. This case law is all addressed to the service of court proceedings and the express provisions of the Rules of the Superior Courts which allow for the court, upon just grounds, to declare the service actually effected sufficient (Order 9, rule 15) and to address non-compliance and irregularities (Order 124).

25. There is no equivalent legislative framework which would allow the court to "*forgive*" a failure to comply with the provisions of section 10 of the

Construction Contracts Act 2013. The Act creates a statutory scheme of adjudication which is predicated on the principle "*pay now, argue later*". This principle is very much to the benefit of a referring party. The gateway to the statutory scheme is the service of a notice of intention to refer. There is nothing in the Act which authorises the court to dispense with the prescribed method of service agreed by the parties. The provisions of the Rules of the Superior Courts in relation to service are inapplicable in that a notice of intention to refer is not a court pleading governed by the Rules.

26. Separately, the applicant, in its written submissions, had sought to attach significance to the fact that "*the common and established form of communication practice*" between the parties had been by way of email. Counsel confirmed, in response to a direct question, that the applicant was not contending that the respondent had waived the contractual provisions in respect of the delivery of notices. This concession was sensibly made. It is apparent from the wording of the contractual provisions that the parties had expressly addressed their mind to the possible use of email communication for the purposes of the Construction Contracts Act 2013 and had agreed that it was only a payment claim notice which might validly be delivered in this manner. There is nothing in the subsequent conduct of the parties that could amount to a waiver. The use of email for other day-to-day communications cannot constitute an implied waiver: there is nothing inconsistent in a party, who engages in email communication for other purposes, insisting that the contractual formalities in relation to the delivery of statutory notices be complied with. For similar reasons, the suggestion that service by way of email was "*the preferable method of service between the parties*" is not well founded. The parties had expressly identified their

preference in the construction contract, namely that statutory notices be delivered by registered post.

27. The applicant submits that the respondent ought to have "*reserved its right*" to bring a jurisdictional challenge in the form of the adjudication process at the earliest opportunity. The implication of this submission seems to be that the respondent should have engaged with the adjudication process to the extent of raising an objection that the adjudication process was invalid. With respect, there is no such requirement. The entire adjudication process was a nullity in consequence of the failure of the applicant to deliver a notice of intention to refer in the manner prescribed. The respondent was not obliged to engage with a nullity.

28. For completeness, the case law in respect of the equivalent legislative provision in the United Kingdom will be considered briefly. As explained in *Aakon Construction Services Ltd v. Pure Fitout Associated Ltd* [2021] IEHC 562 (at paragraphs 39 to 46), case law from England and Wales must be approached with a degree of caution. Subject to this caveat that the domestic legislation must be interpreted on its own terms, it is instructive to note that the High Court in England and Wales has consistently held that failure to comply with the prescribed method of service invalidates the adjudication process.

29. Coulson J. (as he then was) observed in *Primus Build Ltd v. Pompey Centre Ltd* [2009] EWHC 1487 (TCC), 126 ConLR 26 (at paragraph 15) that because an adjudicator derives his jurisdiction from the notice of adjudication, if it is proved that the notice has not been validly served, it will generally operate to deprive the adjudicator of any jurisdiction. On the facts, it was held that there had been compliance with the contractual requirements.

30. A similar approach has been endorsed, more recently, in *AM Construction Ltd v. Darul Amaan Trust* [2022] EWHC 1478 (TCC). It was held, at paragraph 13, that unless a notice of adjudication has been properly served by the referring party on the responding party, there is no jurisdiction and the adjudication process is a nullity.

31. The applicant sought to rely on the judgment in *Rhode v. Markham-David* [2007] EWHC 1408 (TCC) as authority for the proposition that fair procedures are achieved where an adjudicator affords the responding party ample opportunity to engage with and respond to the adjudication process. The applicant's submission tends to overlook the principal finding made in that judgment, namely that the adjudication there was never validly started due to the non-service of the adjudication notice on the responding party in accordance with the statutory requirements. The judgment is not authority for the proposition that a surfeit of fair procedures can confer jurisdiction on an adjudicator who has never been validly appointed.

CONCLUSION AND PROPOSED FORM OF ORDER

32. It is common case that the notice of intention to refer to adjudication was not delivered in the manner which had been agreed between the parties under the express terms of the construction contract. The legal consequence of this failure is that the payment dispute was never validly referred to adjudication. It follows that the purported adjudicator's award is a nullity. Accordingly, the application for leave to enforce the adjudicator's award must be refused.

33. As to legal costs, my *provisional* view is that the respondent is entitled to recover the costs of these proceedings as against the applicant. It is correct to say that

the respondent only raised the jurisdictional objection at the eleventh hour. Had the applicant withdrawn its proceedings at that point, it might well have had good grounds for resisting a costs order. In the event, however, the applicant elected to pursue the proceedings in the teeth of the jurisdictional objection and has been unsuccessful.

34. If either party wishes to contend for a different form of costs order, that party should notify the registrar within fourteen days and arrange to have the matter relisted. If no such notification is received, a costs order will be drawn up as *per* the provisional view indicated above.

Appearances

Catherine Needham for the applicant instructed by Byrne Wallace Shields LLP
David O'Brien for the respondent instructed by AMOSS LLP