APPROVED **[2024] IEHC 205**

THE HIGH COURT

2024 68 MCA

BETWEEN

MCGILL CONSTRUCTION LTD

APPLICANT

AND

BLUE WHISP LTD

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 19 April 2024

INTRODUCTION

1. The Construction Contracts Act 2013 has put in place a statutory scheme whereby payment disputes under construction contracts can be referred to adjudication. An adjudicator's decision is *provisionally* binding on the parties and is subject to summary enforcement. This approach is sometimes referred to informally as "*pay now, argue later*".

2. These proceedings take the form of an application for leave to enforce a decision of an adjudicator. Section 6(11) of the Construction Contracts Act 2013 provides that an adjudicator's decision can, with the leave of the court, be enforced in the same manner as a judgment or order of the High Court.

3. The applicant will be described in this judgment as "*the Referring Party*", and the respondent as "*the Respondent*", to reflect their status in the adjudication process.

4. The Respondent has raised four grounds of opposition to the application to enforce the adjudicator's decision as follows: (i) the notice of intention to refer to adjudication was invalid in that it encompasses a dispute in relation to more than one payment claim notice; (ii) the formal referral of the payment dispute to the adjudicator was made outside the seven day period prescribed; (iii) the adjudicator acted in breach of fair procedures in deferring her decision in respect of a claim for defective works to be addressed in two related adjudications then pending before her; and (iv) there is a question mark over the ability of the Referring Party to repay the adjudicator's award in the event that it transpires that those monies are not properly owing to it. The resolution of the second of these disputes requires consideration of the provisions of section 21 of the Electronic Commerce Act 2000 which governs the timing of the dispatch and receipt of emails.

5. This judgment also addresses the issue of *kompetenz-kompetenz*, i.e. the conferral of competence upon an adjudicator to make a binding determination in respect of their own jurisdiction.

LEGAL TEST

6. The legal test governing an application to enforce an adjudicator's decision has been discussed in a number of recent judgments of the High Court. See, in particular, *Aakon Construction Services Ltd v. Pure Fitout Associated Ltd* [2021] IEHC 562. The default position is that the successful party is entitled to

enforce an adjudicator's decision *pro tem*, with the unsuccessful party having a right to reargue the underlying merits of the payment dispute in subsequent arbitral or court proceedings. The High Court does, however, enjoy a discretion to refuse leave to enforce an adjudicator's decision.

7. The nature and extent of this discretion has been described as follows in *John Paul Construction Ltd v. Tipperary Co-Operative Creamery Ltd* [2022] IEHC 3 (at paragraphs 9 to 12):

> "Importantly, the High Court retains a discretion to refuse leave to enforce an adjudicator's decision. This is so notwithstanding that, on a narrow literal interpretation of section 6 of the Construction Contracts Act 2013, there might appear to be an automatic right to enforce once the formal proofs have been met.
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> The High Court will not lend its authority to the enforcement of an adjudicator's decision, even on a temporary basis, where there has been an obvious breach of fair procedures. This restraint is necessary to prevent an abuse of process and to uphold the integrity of the statutory scheme of adjudication. It would, for example, be inappropriate to enforce a decision in circumstances where an adjudicator had refused even to consider a right of set-off which had been legitimately asserted by the respondent. It would be unjust to enforce such a lopsided decision.
>
> The existence of this judicial discretion represents an important safeguard which ensures confidence in the statutory scheme of adjudication. It should be reiterated, however, that once the formal proofs as prescribed under the Construction Contracts Act 2013 and Order 56B of the Rules of the Superior Courts have been established, then leave to enforce will generally be allowed. The default position remains that the successful party is entitled to enforce an adjudicator's decision *pro tem*, with the unsuccessful party having a right to reargue the underlying merits of the payment dispute in subsequent arbitral or court proceedings. The onus is upon the party resisting the application for leave to demonstrate that there has been an obvious breach of fair procedures such that it would be unjust to enforce the adjudicator's decision, even on a temporary basis. The breach must be material in the sense of having had a potentially significant effect on the overall outcome of the adjudication.

> One inevitable consequence of the existence of this judicial discretion is that parties, in an attempt to evade enforcement, will seek to conjure up breaches of fair procedures where, in truth, there are none. At the risk of belabouring the point, the discretion to refuse to enforce is a narrow one. The High Court will only refuse to enforce an adjudicator's decision on the grounds of procedural unfairness where there has been a blatant or obvious breach such that it would be unjust to enforce the immediate payment obligation. The court will not be drawn into a detailed examination of the *underlying merits* of an adjudicator's decision under the guise of identifying a breach of fair procedures."

COMPETENCE OF THE ADJUDICATOR

Overview

8. The first ground of opposition raised by the Respondent is that the notice of intention to refer is defective. It is said to follow that the entire adjudication process is invalid. Before turning to address the arguments underpinning this ground of opposition, it is necessary to consider whether the parties may be bound by the decision of the adjudicator on this issue. More specifically, it is necessary to consider whether the parties had conferred jurisdiction upon the (then intended) adjudicator to determine conclusively this discrete issue.

9. The relevant chronology is as follows. On the application of the Referring Party, the Chairperson of the Construction Contracts Adjudication Panel appointed Niav O'Higgins as adjudicator in respect of the payment dispute. The date of the appointment is 14 November 2023. It should be flagged now that Ms. O'Higgins is a partner in Arthur Cox LLP and had designated an email address at the arthurcox.com domain to which documents were to be sent. This is relevant to an objection in relation to the service of documents: see paragraphs 35 *et seq*. below.

10. It should be explained that the making of the appointment does not, in and of itself, confer jurisdiction upon the nominated adjudicator to embark upon adjudication of the payment dispute. Rather, a further procedural step is required. It is necessary for the referring party to formally refer the payment dispute to the nominated adjudicator. This must be done within seven days beginning with the day on which the appointment is made.

11. On the facts of the present case, an objection had been raised by the Respondent, by letter dated 16 November 2023, to the effect that the notice of intention to refer was defective. Relevantly, the Respondent requested that the adjudicator have a preliminary hearing on this objection before the formal timetable for the parties to provide the documentation setting out their respective factual and legal positions commenced.

12. By letter dated 17 November 2023, the (then intended) adjudicator expressly invited the parties to confirm whether or not they wished to confer jurisdiction upon her to decide the issue in respect of the validity of the notice of intention to refer.

13. The Respondent replied to this request as follows by letter dated 18 November 2023:

> "We refer to your letter of 17 November where you have invited the parties to confirm whether or not they wish to confer jurisdiction on you to deal with the issue raised.
>
> We agree that you should determine the preliminary issue of jurisdiction. This is without prejudice to our contention that there is no jurisdiction for the appointment of an adjudicator in the first instance to this claim. We reserve our right to expand on this point at a further stage if necessary."

14. The (then intended) adjudicator delivered a written decision on 19 November 2023 to the effect that the notice of intention to refer was not defective and that

the payment dispute referred had been clearly identified as arising from two payment claim notices. The decision also records that both parties had acknowledged that the Construction Contracts Act 2013 expressly permits an adjudicator to deal with more than one payment dispute at the same time.

15. It is apparent from the terms of the (then intended) adjudicator's decision that she understood the parties to have conferred jurisdiction upon her to decide on the validity of the notice of intention to refer. See §4 of the decision as follows:

> "In response to my first question, both parties have confirmed I have jurisdiction to decide whether I am able to proceed to hear the matters referred in the Notice of Intention to Refer:
>
> 4.1 The Referring party confirmed this in its letter (corrected) dated 17 November 2023, received by email at 15.35pm.
>
> 4.2 The Responding Party confirmed this in its letter dated 18 November 2023, received by email at 11.56am.
>
> I am therefore proceeding on the basis that both parties have conferred on me the jurisdiction to decide whether I am able to proceed to hear the matters referred in the Notice of Intention to Refer."

Discussion and decision

16. The general principle is that an adjudicator does not have jurisdiction to make a binding determination in relation to their own jurisdiction. The jurisdiction of an adjudicator to embark upon an adjudication is contingent on their having been validly appointed. The question of the validity of their appointment is one which, ordinarily, may only be conclusively determined by the courts. Were it otherwise, an adjudicator, who has not been properly appointed, might arrogate a jurisdiction which is not properly theirs.

17. This general principle is subject to the exception that the parties to a construction contract can, *by agreement*, confer jurisdiction upon the adjudicator to make a

determination on jurisdiction which is binding upon them. The parties can agree to be bound by the adjudicator's decision on a jurisdictional objection. A similar concept arises in the context of arbitration agreements. This concept is sometimes referred to as *kompetenz-kompetenz*, i.e. the conferral of competence upon a decision-maker to make a determination in respect of their own jurisdiction.

18. It is a question of fact in any particular case as to whether the parties have reached such an *ad hoc* agreement to allow the adjudicator to make a binding determination on their own jurisdiction. As with the interpretation of any consensual agreement, the starting point is that the words actually used by the parties should, generally, be given their natural and ordinary meaning, and fall to be interpreted objectively. A party, who has made an outward representation that they would be bound by a decision of the adjudicator on a jurisdictional issue, should not normally be permitted to resile from that representation. It would be unfair to allow the first party to seek to reagitate the jurisdictional objection after the other party and the adjudicator have been put to the time and trouble of participating in the adjudication process on the understanding that the jurisdictional objection had been conclusively determined.

19. In the present case, the Respondent had raised, from the outset, an objection to the validity of the notice of intention to refer. This objection was raised *prior* to the formal commencement of the adjudication process by the making of a referral. Once this objection had been raised, the (then intended) adjudicator was required, as a matter of practical necessity, to inquire into this objection as a preliminary issue. There would be no point in the adjudicator embarking upon the adjudication process unless she were satisfied that her appointment was

valid. The precise status of the adjudicator's decision on the preliminary issue would depend on the attitude of the parties. The parties could, in theory, agree in advance to be bound by the adjudicator's decision. If this had happened, then it would not be open to either party to seek to challenge the substantive decision on the adjudication on the grounds that the adjudicator had not been validly appointed.

20. It is evident from the correspondence that the (then intended) adjudicator was alive to the concept of *kompetenz-kompetenz*, and expressly canvassed with the parties the possibility of their conferring jurisdiction upon her to decide the issue in respect of the validity of the notice of intention to refer.

21. The Respondent's reply to this request has been set out at paragraph 13 above. As appears, the Respondent expressly agreed that the (then intended) adjudicator "*should determine the preliminary issue of jurisdiction*". The reply goes on to state that such agreement was "*without prejudice*" to the Respondent's contention that there was no jurisdiction for the appointment of an adjudicator in the first instance to this claim. This statement had been made at a time *prior* to the formal commencement of the adjudication process by the making of a referral. On any objective reading, this statement amounts to no more than an indication that the conferral of a specific jurisdiction to determine the preliminary issue in respect of the notice of intention to refer should not be taken as acknowledging the validity of the initial appointment. Put otherwise, the Respondent was making it explicit that by conferring a specific jurisdiction on Ms. O'Higgins to determine a preliminary issue, it was not to be taken to be waiving or conceding its objection to the validity of her appointment as adjudicator.

22. Similarly, the next sentence in the reply amounts to no more than an indication that the Respondent reserved the right to expand upon its arguments for saying that the notice of intention to refer had been defective. This statement was made in the context of a letter which enclosed written legal submissions on that point.

23. Counsel on behalf of the Respondent sought to argue, at the hearing before me, that the statement in the reply should be regarded as a reservation of position and that the Respondent is not bound by the (then intended) adjudicator's findings on the preliminary issue. With respect, the language used in the letter of 18 November 2023 is incapable of bearing this alternative meaning. The natural and ordinary meaning of the letter is unequivocal: the Respondent has answered in the affirmative the request that the parties confirm whether or not they wished to confer jurisdiction on Ms. O'Higgins to decide the preliminary issue. This answer is not negated by the following two sentences for the reasons explained above.

24. Accordingly, the adjudicator's finding that the notice of intention to refer had been valid is binding on the parties. It is not open to the Respondent, having conferred jurisdiction on the adjudicator to determine this issue, to seek to challenge the adjudicator's finding in these enforcement proceedings. For completeness, however, and out of deference to the detailed submissions made, I propose to address *de bene esse* the question of statutory interpretation which arises. This is done under the next heading below.

(1). RIGHT TO REFER AND "PAYMENT DISPUTE"

25. The Respondent contends that the notice of intention to refer is invalid on the grounds that it relates to more than one payment dispute. This contention

appears to be advanced on the assumption that the concept of a "*payment dispute*" under section 6 of the Construction Contracts Act 2013 is largely synonymous with a "*payment claim*" under section 4.

26. 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 I.L.R.M. 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.

27. 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.

28. I turn now to apply these principles to the interpretation of the Construction Contracts Act 2013. Section 6 of the Act provides that a party to a construction contract has the right to refer a "*payment dispute*" for adjudication. A "*payment dispute*" is defined, under section 6, as meaning any dispute relating to payment arising under the construction contract. The definition of "*payment dispute*" has to be read in conjunction with sub-section 6(9) as follows:

> "The adjudicator may take the initiative in ascertaining the facts and the law in relation to the payment dispute and may deal at the same time with several payment disputes arising under the same construction contract or related construction contracts."

29. It is apparent from the foregoing that the legislature intended that an adjudicator should have a broad jurisdiction. The Construction Contracts Act 2013 is different from the analogous provisions in England and Wales. There, an adjudicator must have the *consent* of all the parties to those disputes before he or she may adjudicate, at the same time, on more than one dispute under the same construction contract.

30. The Respondent contends that a "*payment dispute*" must be confined to a complaint that an individual "*payment claim notice*" has not been paid. A "*payment claim notice*" is defined, under section 4, as meaning a notice specifying (a) the amount claimed (even if the amount is zero), (b) the period, stage of work or activity to which the payment claim relates, (c) the subject matter of the payment claim, and (d) the basis of the calculation of the amount claimed. On the Respondent's interpretation, therefore, the Referring Party was required to serve a *separate* notice of intention to refer in respect of each of the

two payment claim notices which it alleges have not been fully paid. On this argument, the referral to adjudication is invalid because it is grounded on more than one payment claim notice.

31. The interpretation contended for on behalf of the Respondent is inconsistent with the ordinary and natural meaning of the statutory language and with the purpose of the legislation as evident from the provisions of sub-section 6(9). The statutory language is broad: there is nothing in the wording which confines a "*payment dispute*" to the amount claimed in an individual "*payment claim notice*". It is sufficient that the dispute relates to payment arising under the construction contract.

32. The contended-for interpretation necessitates reading down the statutory language so as to restrict the right to refer to adjudication to a dispute relating to an individual "*payment claim notice*". It also necessitates disregarding the fact that the legislature deployed a different concept, namely that of a "*payment dispute*", when delimiting the right to refer to adjudication under section 6. As stated in *Heather Hill* (above), the onus is upon the 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. 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.

33. Here, the Respondent has been unable to point to any purpose which such a procedural requirement, i.e. that a party must make a series of separate referrals in respect of a payment dispute relating to the same construction contract, might

usefully serve. Such a procedural requirement would be formalistic and would be inconsistent with one of the principal purposes of the Construction Contracts Act 2013, namely that the adjudication process be expeditious.

34. There is no legislative requirement, therefore, that there be separate referrals in respect of individual "*payment claim notices*". The claim advanced in the present case is correctly characterised as a singular "*payment dispute*" and it was properly advanced in one notice of intention to refer.

(2). WHETHER REFERRAL TO ADJUDICATOR MADE WITHIN TIME

35. Section 6(5) of the Construction Contracts Act 2013 provides that the referring party shall refer the payment dispute to the adjudicator within seven days of their appointment. The referring party is obliged, at the same time, to provide a copy of the referral and all accompanying documents to the other party to the construction contract.

36. On the facts of the present case, the Adjudicator had been appointed by the Chairperson of the Construction Contracts Adjudication Panel on 14 November 2023. The Respondent contends that the referral was not made to the Adjudicator until 22 November 2023 and that, in consequence, the entire adjudication process is invalid. This contention is premised on an argument that, when sent by way of email, a referral is not made until such time as it reaches the email inbox of the intended recipient. On this argument, it is not sufficient that the email have entered into the IT system of the intended recipient within time.

37. Insofar as relevant to this issue, the chronology is as follows. Upon her appointment, the (then intended) adjudicator wrote to the parties on 14 November 2023 and stated as follows:

> "The Referring Party is required pursuant to section 6(5) of the Construction Contracts Act 2013 to furnish me the Referral and a copy of the documentation set at paragraphs 21 and 22 of the Code of Practice within seven (7) days, starting with the day of my appointment. Given the short timeframe within which an adjudication is to be conducted, I would be grateful if the Referring Party would, as soon as possible, provide me with a copy of the application and supporting documentation issued to the Chairperson of the panel for this appointment."

38. The "*supporting documentation*", which had been appended to the notice of intention to refer, is enumerated at §8.1 thereof. This indicates that the "*supporting documentation*" included, relevantly, a copy of the construction contract in full; a copy of the building cost agreement; a copy of the EOT settlement agreement; and copies of the payment claim notices dated 21 February 2023 and 5 May 2023, respectively. It appears, although this is not on affidavit for the reasons explained below, that the Referring Party complied with the adjudicator's request to furnish copies of this "*supporting documentation*" by way of email on 15 November 2023.

39. Thereafter, at 23.59 hours on 21 November 2023, the Referring Party's solicitor sent a document, described as a "*Referral to Adjudication*", to the email address which had been designated by the Adjudicator. The Adjudicator has since confirmed that this email arrived into Arthur Cox's IT system at 23.59 hours on 21 November 2023. The Adjudicator has also confirmed that the email is date stamped as having arrived in her inbox on 00.01 hours on 22 November 2023. (The Adjudicator had nominated an email address at the arthurcox.com domain to which documentation was to be sent by the parties).

40. The Respondent argues that the email should be regarded as only having been received once it arrived in the Adjudicator's inbox. On this argument, the referral was late by one minute, i.e. on the assumption that the seven day time-limit expired at midnight on 21 November 2023.

41. The Respondent relies in this regard on the Electronic Commerce Act 2000. Sub-sections 21(2) and (3) provide as follows:

> "(2) Where the addressee of an electronic communication has designated an information system for the purpose of receiving electronic communications, then, unless otherwise agreed between the originator and the addressee or the law otherwise provides, the electronic communication is taken to have been received when it enters that information system.
>
> (3) Where the addressee of an electronic communication has not designated an information system for the purpose of receiving electronic communications, then, unless otherwise agreed between the originator and the addressee, the electronic communication is taken to have been received when it comes to the attention of the addressee."

42. An "*electronic communication*" is defined, under section 1 of the Act, as meaning information communicated or intended to be communicated to a person or public body, other than its originator, that is generated, communicated, processed, sent, received, recorded, stored or displayed by electronic means or in electronic form. An "*information system*" is defined as meaning a system for generating, communicating, processing, sending, receiving, recording, storing or displaying information by electronic means.

43. The combined effect of these statutory provisions is that where, as in the present case, the intended recipient has designated an email address at which electronic communications are to be received, then an email is *deemed* to have been received at the time it enters the information system (rather than the time when it comes to the attention of the addressee). On the facts of the present case, the

relevant "*information system*" is Arthur Cox's IT system. The email is deemed to have been received from the moment of its initial entry into the information system, i.e. upon its receipt by the mail server. It is this event, not the subsequent transmission to an individual email inbox, which is crucial. An individual email inbox does not constitute an "*information system*" for the purpose of the statutory definition. Rather, the information system is the mail server; an individual email inbox is, at the very most, a component of the overall "*information system*".

44. It follows that the referral to adjudication in the present case was thus deemed to have been received at 23.59 hours on 21 November 2023, i.e. within the seven day time-limit.

45. The default position under section 21 of the Electronic Commerce Act 2000 is displaced where "*the law otherwise provides*". Counsel on behalf of the Respondent argued that this exception is engaged here and that the Construction Contracts Act 2013 represents a law which makes alternative provision in respect of the dispatch and receipt of electronic communications. With respect, this argument is untenable. There is nothing in the Construction Contracts Act 2013 which addresses the mode by which a referral is to be made to an adjudicator. Section 6(5) simply provides that the referring party shall "*refer*" the payment dispute to the adjudicator within seven days. The Act does not expressly distinguish between the dispatch of a referral by the referring party and the receipt of same by the adjudicator. Still less does the Act address the question of when an email is deemed to have been received. It does not, for example, provide that a referral is not to be regarded as having been received until such time as it comes to the attention of the adjudicator. In circumstances where the

Construction Contracts Act 2013 is entirely silent on these issues, the default position under the Electronic Commerce Act 2000 applies.

46. An attempt was made at the hearing before me to introduce a new argument in relation to the making of the referral. More specifically, it was suggested that the referral was deficient on the separate and distinct ground that, supposedly, it had not been accompanied by all of the documents which had been cited in the referral.

47. This argument was advanced, for the first time, at the hearing before me. This argument had not been raised in the written legal submissions filed, still less had it been raised before the Adjudicator. This is unfair. The failure to raise the argument earlier had the practical effect of depriving the other side of an opportunity to address the point by way of evidence. As noted at paragraph 37 above, the Adjudicator had requested the referring party to furnish her with copies of the "*supporting documentation*" which had been appended to the notice of intention to refer. If this request had been complied with, then the Adjudicator would already have had all of the relevant documentation in her possession prior to the making of the referral on 21 November 2023. Certainly, the Adjudicator would have had all of the documentation cited at §22 of the statutory code of practice issued pursuant to section 9 of the Construction Contracts Act 2013. The supposed failure to provide *duplicate* copies of this documentation, under cover of the email of 21 November 2023, would not have invalidated the referral made on that date. The Adjudicator had specifically requested that the documentation be furnished to her ahead of time, i.e. during the interregnum between her appointment and the formal referral. In the light of this express request, any assessment of the validity of the referral would have to have regard

not only to the comprehensive 175 page referral but also to the documentation previously furnished. It would be artificial to view the email of 21 November 2023 in isolation.

48. There is no direct affidavit evidence before the court on the question of whether the "*supporting documentation*" had been furnished to the adjudicator on 15 November 2023. This is because this issue had only been raised, for the first time, at the hearing before me.

49. Had the Respondent raised the argument earlier, the Referring Party would have been able to put evidence before the High Court as to what documents had already been sent to the Adjudicator in advance of the making of the referral on 21 November 2023. The Referring Party might, for example, have been able to demonstrate that all of the documentation, which the Code of Practice suggests should be provided, had been furnished to the Adjudicator.

50. These enforcement proceedings have been case managed and the parties were directed to file written legal submissions in advance of the hearing. The Respondent had been directed to file its submissions first in order to ensure that the grounds upon which the application was being opposed were identified and the Referring Party given an opportunity to address same. The Respondent was given the last word, by being allowed to file supplemental submissions on the morning of the hearing. Having regard to these case management directions, it is not now open to the Respondent to introduce a *new* ground of opposition during the course of oral submission. It would be unfair to allow this to happen. For similar reasons, a related new argument, to the effect that the Respondent had not been served, on 21 November 2023, with a copy of the referral and all accompanying documents, is not admissible.

51. For completeness, the supposed failure to furnish the appendices to the referral within seven days of the date of appointment would not, in any event, have invalidated the referral. It is a question of fact in any particular case as to whether the material, which has been furnished to an adjudicator within the seven day time-limit, is sufficient to constitute the making of a referral. The principal determinant of the validity of a referral is whether the content of same (and such supporting documentation, if any, as accompanies it) describe the nature and extent of the payment dispute in sufficient detail to allow the adjudicator to understand same and to allow the other party a meaningful opportunity to respond to same. Here, the referral runs to some 175 pages. The nature and extent of the payment dispute is comprehensively set out. The referral is capable of standing on its own. The referral clearly identifies the construction contract and cites the relevant provisions of same. The construction contract is a standard form contract and the supposed failure to furnish a copy of same would not have been fatal. (As discussed above, it appears that all of the relevant documentation had actually been furnished to the adjudicator on 15 November 2023).

52. It is not necessary, for the purposes of determining the present proceedings, for me to express a concluded view on whether a failure to make a referral within seven days is fatal to the validity of the adjudication process. Whereas the view has been expressed, in some of the case law in relation to similarly worded provisions in the United Kingdom, that compliance with the time-limit is mandatory (*Hart Investments Ltd v. Fidler* [2006] EWHC 2857 (TCC)), the reasoning has been criticised (Emden's Construction Law by Crown Office Chambers, Issue 221, §24.78). A final decision on the effect of the provisions

of the Construction Contracts Act 2013 will have to await a case where the resolution of this issue is critical to the outcome.

(3). WHETHER FAILURE TO CONSIDER A DEFENCE

53. The Respondent alleges that there has been a breach of fair procedures in that, or so it is said, the Adjudicator failed to consider a defence advanced on behalf of the Respondent. More specifically, it is said that the Respondent had sought to argue that any monies payable to the Referring Party should be reduced by way of set-off or damages for allegedly defective works.

54. This allegation that the Referring Party's works were defective had, in fact, been raised by way of two parallel referrals to adjudication made on behalf of the Respondent. The parties had agreed that these parallel referrals should be heard and determined by the self-same adjudicator as was presiding over the adjudication the subject-matter of these enforcement proceedings.

55. The decision of the adjudicator, the subject-matter of these enforcement proceedings, was made on 31 December 2023. Relevantly, the decision of the Adjudicator indicated at §12 that the payment was to be staggered.

> "(d) In light of the other adjudications which are on foot, save for the unpaid amount due on foot of interim certificate number 37 referred to at paragraph 12.1(c) above, which I direct be paid within 7 days of the date of this decision, I direct that other payments on foot of my decision be made within 21 days of today's date.
>
> […]
>
> (f) I make no finding with regard to the Responding Party's claim for defects which will be addressed in the two further adjudications which are before me."

56. The Adjudicator subsequently delivered her decisions in relation to the two further adjudications on 18 January 2024. As appears from the chronology, the

decisions in respect of the two latter adjudications were made *prior* to the expiration of the twenty-one day period allowed for the making of payment in respect of the first adjudication.

57. In assessing the complaint of unfairness, it is necessary to recall the rationale underlying the principle that the court will not enforce an adjudication decision which has been reached in breach of fair procedures. As explained in the judgment in *John Paul Construction Ltd v. Tipperary Co-operative Creamery Ltd* [2022] IEHC 3 (at paragraphs 9 to 12), the court will not lend its authority to an unfairness: the relevant passages have been cited at paragraph 7 above.

58. This, then, is the touchstone against which the complaint of alleged unfairness falls to be assessed. Here, it is correct to say that the question of the allegedly defective works was not determined as part of the (first) adjudication. Crucially, however, it was determined in the context of the two later adjudications and, importantly, the timing of the payment in respect of the first adjudication was deliberately staggered. Looking at the matter in the round, therefore, there has been no breach of fair procedures. The Respondent has been afforded a full opportunity to ventilate its argument in relation to the allegedly defective works and a determination made in advance of its obligation to discharge the first adjudication award coming into force.

59. This approach was, in truth, in ease of the Respondent. As appears from §11.10 of her decision, the Adjudicator queried whether the alleged "*defects*" should be more properly characterised as either incomplete works or snagging items. The adjudicator stated as follows at §11.11(d):

> "With regard to the claim in respect of the alleged defects in the works, I am very conscious of the fact that there are a further two adjudications already commenced by the Responding Party, which are concerned principally with the

> claims advanced by the Responding Party in respect of these alleged defects in the works. I am inclined to agree that those other adjudications, having already been initiated by the Responding Party, remain the forum for dealing with these claims, as the issue cannot be decided twice."

60. The fact that this issue was left over for determination in the context of the parallel adjudications meant that the Respondent was, in effect, given an opportunity to make a better case in the two parallel adjudications.

(4). ALLEGED INABILITY OF REFERRING PARTY TO REPAY AWARD

61. An adjudicator's decision does not represent a final and conclusive determination of the rights of the parties. The adjudicator's decision is *provisional* only. The unsuccessful party is entitled to a full rehearing of the underlying payment dispute—in subsequent arbitral or court proceedings—and has a right to recoup any monies paid pursuant to the adjudicator's decision if successful. The legal effect of an adjudicator's decision is merely to impose an obligation to make a payment in the interim.

62. The Respondent submits that there is a question mark over the ability of the Referring Party to repay the adjudicator's award in the event that it transpires that monies are not properly owing to it. The Respondent cites, by analogy, the judgment in *Wimbledon Construction Company 2000 Ltd v. Derek Vago* [2005] EWHC 1086 (TCC), 101 ConLR 99. There, the High Court of England and Wales accepted, in principle, that the "*probable inability*" of a claimant in an adjudication to repay the judgment sum (awarded by the adjudicator and enforced by way of judgment) at the conclusion of an arbitration may render it appropriate for the court to grant a stay on the enforcement of the adjudicator's award. Crucially, however, the High Court of England and Wales emphasised

that adjudicators' awards are intended to be enforced summarily and the successful party in the adjudication should not generally be kept out of its money. On the facts of that case, the High Court of England and Wales held that the paying party had not demonstrated a probable inability on the part of the claimant to repay the judgment sum if required to do so following the outcome of an ongoing arbitration process.

63. It is not necessary, for the purpose of resolving the present proceedings, to consider the circumstances, if any, in which an application to enforce an adjudicator's award under the Construction Contracts Act 2013 might be stayed by reference to the inability of the claimant to repay the adjudicator's award. The reason that this is unnecessary is that the Respondent has failed to adduce any credible evidence which might suggest that the Referring Party is in financial difficulties such that it would be unable to repay the judgment sum if required to do so. The Respondent has failed to take even the basic step of putting the filed financial accounts of the company before the court. The most that the Respondent has done is to identify the existence of three sets of proceedings against the Referring Party. This material, in and of itself, is meaningless. The court has not been provided with details as to the strength or otherwise of the claims against the Referring Party nor as to its ability to satisfy same if well founded.

64. The Respondent has failed to discharge the evidential burden upon it of demonstrating a probable inability, on the part of the Referring Party, to repay the adjudicator's award. Accordingly, it is neither necessary nor appropriate to consider, in the context of these proceedings, the difficult question of whether, having regard to the "*pay now, argue later*" principle which underpins the

Construction Contracts Act 2013, it would ever be appropriate to refuse to enforce an adjudicator's award by reference to the financial position of the claimant.

CONCLUSION AND PROPOSED FORM OF ORDER

65. For the reasons explained, the Respondent has failed to establish any grounds for refusing the application to enforce the adjudicator's award. Accordingly, it is proposed to make the following orders:

(1). An order pursuant to Section 6(11) of the Construction Contracts Act 2013 and Order 56B of the Rules of the Superior Courts granting the applicant leave to enforce the adjudicator's decision of 31 December 2023.

(2). An order pursuant to Section 6(11) of the Construction Contracts Act 2013 and Order 56B of the Rules of the Superior Courts entering judgment against the Respondent in the sum of €1,252,135.21 (exclusive of VAT) or the balance remaining to be paid thereof on foot of the adjudicator's decision of 31 December 2023.

(3). In circumstances where a sum of €20,483.32 has already been paid by way of interest as directed by the adjudicator, it would seem to follow that any additional interest will only be payable from the date of the High Court judgment.

(4). The Applicant, having been entirely successful in the proceedings, is entitled to recover the costs of the proceedings against the Respondent pursuant to Section 169 of the Legal Services Regulation Act 2015. Such costs to be adjudicated under Part 10 of the Act in default of

agreement. The costs include the costs of the written legal submissions and all reserved costs.

66. In the event that either party wishes to contend for a different form of order than that proposed, they should file and exchange written submissions by close of business on 24 April 2024. This matter will be listed before me, for final orders, on Friday 26 April 2024 at 10.45 o'clock.

Appearances

Patricia Hill for the applicant instructed by Maples and Calder (Ireland) LLP
Martin Hayden SC and James Burke for the respondent instructed by Ogier (Ireland) LLP