HAMMER TO FALL

The virus, disputes, and challenges under the *CCA 2013*. Is the '*Macob* moment' for adjudication in Ireland now close? **Peter O'Malley** thinks so

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Following 'back-to-work day' earlier this year on 18 May, we are now at the beginning of the journey of living with the continuing presence of COVID-19. We now have to face the reality of a construction industry that has been starved of its lifeblood, namely cash flow. With resources heavily depleted, supply chains severely disrupted, and a significantly increased risk profile for continuing projects, it is clear that the full impact of the pandemic has yet to be fully quantified.

Against this backdrop, there is now a realisation that, for ongoing projects, the original programmes are no longer relevant, deadlines have been missed, and there is now the certainty of substantial and increasing delay.

Can forbearance from employers be relied upon in recognition of the difficulties that have, and will continue to occur? In many cases, it is hoped so – but it is likely that there will be some employers who cannot, or will not, appreciate the level of forbearance that is needed. There is now a considerable increase in the likelihood for disputes to take place.

I want it all

Conspicuously, since the *Construction Contracts Act 2013* came into force in July 2016 – now nearly four years ago – there has not been a challenge to the enforcement of an adjudicator's decision, despite the act making provision for this possibility (see section 6(10)). Indeed, there is no jurisprudence at all on the act that could provide guidance to the construction industry.

This is in marked contrast to when Britain's equivalent of the act, the *Housing Grants Construction and Regeneration Act 1996* (HGCRA), came into force in May 1998. The first challenge was submitted to the courts only nine months later, in February 1999, in *Macob Civil Engineering Ltd v Morrison Construction Limited* ([1999] EWHC Technology 254), from what was then a body of approximately 73 reported adjudications across Britain.

In the three-year cumulative period from the commencement of the act to July 2019, there were 52 reported adjudicator nominations through the Construction Con-tracts Adjudication Service (CCAS). The recent release of data from the CCAS confirms a total of 46 adjudicator nominations for the last 12-month period to July 2020. These statistics do not include the data from other nominating bodies in the industry or party-agreed appointments. We now have a considerable body of adjudication cases that is increasing rapidly, which would suggest that a challenge to an adjudicator's decision can be expected soon.

Another one bites the dust

These statistics are nothing more than indicative of where the real issue lies – the state of the economy, which (according to recent reports) is either in or on the brink of recession. If this is the case, the single priority for many contractors and subcontractors will be simply survival, where it is likely that many will turn to adjudication for assistance.

There has, undoubtedly, been a past reluctance to engage in adjudication. Some of the reasons for this are its adversarial nature, the success of other established methods (such as mediation and conciliation), a perception of high cost and risk, as well as technical issues, such as the ability to enforce a decision and the impact of the Constitution.

Compared to other forms of dispute resolution, adjudication offers the distinct advantages of speed and certainty of decision. Without doubt, adjudication is intense and requires meticulous preparation. But, at least from the beginning, the conclusion and end-date are within sight, which is not the case for mediation, conciliation or arbitration.

It follows that, for finance directors and senior managers of main contractors and subcontractors seeking to limit exposure of time and resource in disputes, adjudication provides a practical approach to the recovery of cost where representations in negotiation have failed. In straitened times, where the potential for dispute has been significantly increased and recalcitrance is present, the advantages of adjudication in facilitating a quick and relatively certain decision in seeking recovery of cost appear to be becoming more attractive.

PIC: SHUTTERSTOCK

Bicycle race

Given a priority for survival, it is now likely that more marginal cases will be contended through adjudication over the next 12 months. There will be a temptation to bring disputes that are less certain to adjudication, which, in more favourable times, may have been directed to mediation or conciliation in order to seek quick resolution. Loyalties, particularly between main contractors and subcontractors, will be tested.

There have been moves towards the courts in the past – a case for enforcement of an adjudicator's decision reached the court list in November 2018, but was withdrawn following settlement. (The enforcement was sought under section 6(11) of the act through an action of law, namely by issue of a 'winding-up petition' under section 569(d) of the *Companies Act 2014*. Although the defendant submitted this was an 'abuse of process', a final settlement was reached prior to hearing.)

There is now, however, an economic urgency that is likely to give rise to not only new points of dispute, but also new points of defence. In recent weeks, a dispute between an Irish collective asset-management vehicle (ICAV), managed by Hines and Stewart Construction, part of the JSL Group, has reached the courts.

In this case, the ICAV is seeking a judicial review in challenge of the statutory adjudication process operated by the CCAS on behalf of the Department of Business, Enterprise and Innovation. (CCAS is the nominating body for adjudicators under section 6(4) and section 8 of the act.) Twomey J granted leave to bring the review, while imposing a freezing order, effectively halting the adjudication process while the court action is pending.

Apart from challenging the jurisdiction of the adjudicator, the ICAV is contending that the adjudication process works to its disadvantage.

It is being argued that, should the adjudication decision be made against the ICAV, it will have to immediately comply with the decision, and then accept the risk of pursuing recovery of the principal and legal costs through challenge. This, of course, is entirely consistent with the 'pay now – argue later' principle of adjudication in the first place.

Although there is some way to go in this dispute, the wider implications of the severe negative economic impact of COVID-19 on main contractors and subcontractors across the industry, resulting from an increasing prevalence of disputes, would suggest that the '*Macob* moment' for adjudication in Ireland could, indeed, be close.

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