The Virus, Disputes and Challenge under the CCA 2013.

Could it be that the 'macob moment' for adjudication in Ireland is now close?

Following ôBack to Workô day earlier in the summer on 18 May we are now at the beginning of what is now likely to be a long 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 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 that cannot, or will not appreciate the level of forbearance that is needed. There is now a considerable increase in the latitude for disputes.

Conspicuously, since the Construction Contracts Act 2013 (the Act) came into force in July 2016, now over four years ago, there has not been a challenge to the enforcement of an adjudicatorôs decision, despite the Act making provision for this possibility.[1] Indeed there is no jurisprudence, in providing guidance to the construction industry, on the Act at all. This is in marked contrast to when the UK 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 after enactment in February 1999 in *Macob Civil Engineering Ltd v Morrison Construction Limited*[2] from what was then a body of circa 73[3] reported adjudications across the UK.

In the three year cumulative period from the commencement of the Act to July 2019[4] were a total of 52 reported adjudicator nominations through the Construction Contracts 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 CCAS).[5] 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 adjudicatorôs decision can be expected soon.

These statistics are nothing more than indicative where the real issue is 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 sub-contractors 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

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1 Construction Contracts Act 2013 at Section 6.- (10).
2 *Macob Civil Engineering Ltd v Morrison Construction Limited* [1999] EWHC Technology 254.
3 Adjudication Reporting Centre, Glasgow Caledonian University, Report No.3, March 2001, at p.4.
4 OôMalley, Peter. ôThe Irish óConstruction Contracts Act 2013ô: Adjudication ï What Has Happened and Where Next?ô Arbitration: The International Journal of Arbitration, Mediation & Dispute Management 86, no. 2 (2020): at p.146.
5 Fourth Annual Report of the Chairperson of the Construction Contracts Adjudication Panel, sine the commencement of the Construction Contracts Act 2013, prepared by Dr Nael Bunni, August 2020.

methods such as mediation and conciliation, a perception of high cost and risk together with 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 sub-contractors 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 straightened 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 are becoming more attractive. Given the priority for survival it is now likely that more marginal cases will be contended through adjudication over the next twelve 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 sub-contractors, will be tested.

There have been moves towards the courts in the past, a case for enforcement of an adjudicators decision reached the court list in November 2018[6] but was withdrawn following settlement. However, there is now an economic urgency that is likely to give rise to not only new points of dispute, but also new points of defence.

In recent months a dispute between an ICAV[7] managed by Hines and Stewart Construction, part of the JSL Group, reached the courts. The ICAV was seeking a Judicial Review in challenge of the statutory adjudication process, operated by the CCAS[8] on behalf of the Department of Business, Enterprise and Innovation. Twomey J granted leave to bring the review whilst imposing a freezing order, effectively halting the adjudication process whilst the court action was pending. Apart from challenging the jurisdiction of the adjudicator, the ICAV contended that the adjudication process would work to its disadvantage. It was argued that should the adjudication decision be made against the ICAV it would have had 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 ópay now - argue laterô[9] principle of adjudication in the first place. The case has now been settled and struck out.

Although this particularly recent case did not proceed any further in court, the wider implications of the severe negative economic impact of Covid-19 on main contractors and sub-contractors across the industry, resulting from is an increasing prevalence of disputes, would suggest that the ómacob momentôfor adjudication in Ireland could well be close.

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[6] The enforcement was sought under Section 6(11) of the Act through an action of law, namely by issue of a ówinding-up-petitionô under Section 569(d) of the Companies Act 2014. Although the defendant submitted this was an óabuse of processô, a final settlement was reached prior to hearing.

[7] ICAV ï Irish Collective Asset-management Vehicle.

[8] CCAS - Construction Contracts Adjudication Service, being the nominating body for Adjudicators under S6.-4 and S8. of the Construction Contracts Act 2013.

[9] Ackner, Lord, in the House of Lords, *Hansard* (HL debates), Vol 571, 989 - 990 (1996).