

# The Construction Contracts Act 2013, four years on, edging closer to our ‘Macob’

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 adjudicator’s decision, despite the Act making provision for this possibility.<sup>1</sup> As time goes on it is conspicuous that 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*<sup>2</sup> from what was then a body of circa 73<sup>3</sup> reported adjudications across the UK.

In the three year cumulative period from the commencement of the Act to July 2019<sup>4</sup> there 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.<sup>5</sup> These statistics do not include the data from other nominating bodies in the industry or party agreed appointments. As a result it would be reasonable to estimate that there have been over 150 adjudication cases in Ireland since the Act came into force, or twice as many as when Macob reached the England and Wales court in 1999, which would suggest that some form of jurisprudence on the Act is now well overdue. This jurisprudence could have been expected in November 2018<sup>6</sup> when a case for enforcement of an adjudicator’s decision was included on the court list, but the case was withdrawn following settlement.

At the beginning of the summer a dispute between an ICAV<sup>7</sup> managed by Hines and Stewart Construction, part of the JSL Group, reached the courts. The ICAV sought a Judicial Review<sup>8</sup> in challenge of the statutory adjudication process, operated by the CCAS<sup>9</sup> 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 an 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’<sup>10</sup> principle of adjudication in the first place, where the case was settled between the parties before proceeding further.

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<sup>1</sup> Construction Contracts Act 2013 at Section 6.- (10).

<sup>2</sup> *Macob Civil Engineering Ltd v Morrison Construction Limited* [1999] EWHC Technology 254.

<sup>3</sup> Adjudication Reporting Centre, Glasgow Caledonian University, Report No.3, March 2001, at p.4.

<sup>4</sup> O’Malley, Peter. ‘The Irish Construction Contracts Act 2013 & Adjudication: What Has Happened and Where Next?’ *Arbitration: The International Journal of Arbitration, Mediation & Dispute Management* 86, no. 2 (2020): at p.146.

<sup>5</sup> Fourth Annual Report of the Chairperson of the Construction Contracts Adjudication Panel, since the commencement of the Construction Contracts Act 2013, prepared by Dr Nael Bunni, August 2020.

<sup>6</sup> 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.

<sup>7</sup> ICAV is Irish Collective Asset-management Vehicle.

<sup>8</sup> *Hines Greit II Ireland Fund ICAV v Bunni & Others* [2020] IEHC 314 JR.

<sup>9</sup> CCAS - Construction Contracts Adjudication Service, being the nominating body for Adjudicators under S6.-4 and S8. of the Construction Contracts Act 2013.

<sup>10</sup> Ackner, Lord, in the House of Lords, *Hansard* (HL debates), Vol 571, 989 - 990 (1996).

As we end 2020 we may now be edging closer to the Macob moment in Ireland. Earlier this year a dispute between OCS One Complete Solution Limited as applicant and the Cork County Committee of the GAA<sup>11</sup> (in the name of Kevin O'Donovan as chief executive of the Cork County Committee) as respondent, was referred to adjudication (despite an arbitration having already been commenced). Following the appointment of an adjudicator by the CCAS, the respondents immediately raised a jurisdictional challenge. The challenge was made in respect of the appointment of the adjudicator and applicability of the Act to the dispute in relation to the date of commencement of the Act. On the adjudicator then confirming his jurisdiction the respondents withdrew from the adjudication and then obtained leave of the High Court on 19 November 2020 to challenge the jurisdiction of the adjudicator. The respondents obtained a stay on the adjudication pending determination of the judicial review proceedings.

Following this decision the applicants sought an order to lift the stay on the adjudication on the basis that it was grossly unfair on the notice party for the court not to lift the stay, as its continued imposition would effectively deny the applicants of its rights under the 2013 Act<sup>12</sup>. It was further argued that lifting the stay would merely permit the adjudication process to proceed to a determination, but would have no practical adverse effect on the applicants, because the adjudicator's award could only be enforced by an application to court, at which stage the applicants would be entitled to raise the jurisdiction issue<sup>13</sup>. Furthermore it was submitted that the proceedings constituted an attack on the dispute resolution process that had been put in place by the Oireachtas in the 2013 Act<sup>14</sup>. Reference was made to the recent *Bresco v Lonsdale*<sup>15</sup> case where the court refused to grant an injunction restraining the adjudication pending the determination of legal proceedings concerning the jurisdiction of the adjudicator to enter on the dispute<sup>16</sup>.

In countering the lifting of the stay it was advanced that the notice party was not being deprived of its right to adjudication by the stay, it was merely being postponed, in the event that the jurisdiction issue was determined in its favour<sup>17</sup>. It was further submitted that the notice party's application to lift the stay was futile where if a decision was given by the adjudicator the applicants could challenge that decision at enforcement. Notwithstanding the particular issues of the case, including what was described as the inordinate delay by the notice party in invoking the adjudication process, Barr J determined that the interests of justice are best served by continuing the stay which has been put in place<sup>18</sup>. The proceedings are due to be heard in February 2021. This case is not one of enforcement but of jurisdiction. However, should it proceed the construction industry can expect to receive jurisprudence as valuable guidance on jurisdiction in adjudication early next year. With the glass ceiling broken it is likely that a Macob case on adjudication enforcement could shortly follow.

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<sup>11</sup> OCS One Complete Solution Limited v Kevin O'Donovan and the Cork County Committee of the GAA.

<sup>12</sup> Kevin O'Donovan and the Cork County Committee of the GAA and Nael G. Bunni and James Bridgeman and OCS One Complete Solution [2020] IEHC 623 at 9.

<sup>13</sup> n11 at 10.

<sup>14</sup> n11 at 12.

<sup>15</sup> Bresco Electrical Services Ltd (In liquidation) v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25.

<sup>16</sup> n11 at 18.

<sup>17</sup> n11 at 22.

<sup>18</sup> n11 at 50.