

Construction adjudicator fees – Are they unreasonable?

Irish Architectural Archive
45 Merrion Square,
Dublin 2.

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Why ask the question?

- At the recent conference titled **'The Construction Contracts Act 2013 – 7 years on'**, held by Ciarb on 5 July 2023, the question of adjudicator's fees was discussed by one of the speaker panels and the audience.
- In commentary from the audience, it was suggested that fees now charged by adjudicators in construction disputes are so high that some parties, particularly sub-contractors, are reluctant to use an **'open-ended process'**, where the adjudicator's fee is unknown.
- Responding to the key-note speaker, **Mr Bernard Gogarty** advising a reduction in referrals to the Construction Contracts Adjudication Service (CCAS), it was suggested that this was due to the high fees being charged.
- In acknowledging these comments there seemed to be merit in investigating the question of adjudicator fees further, and asking **are they unreasonable**.



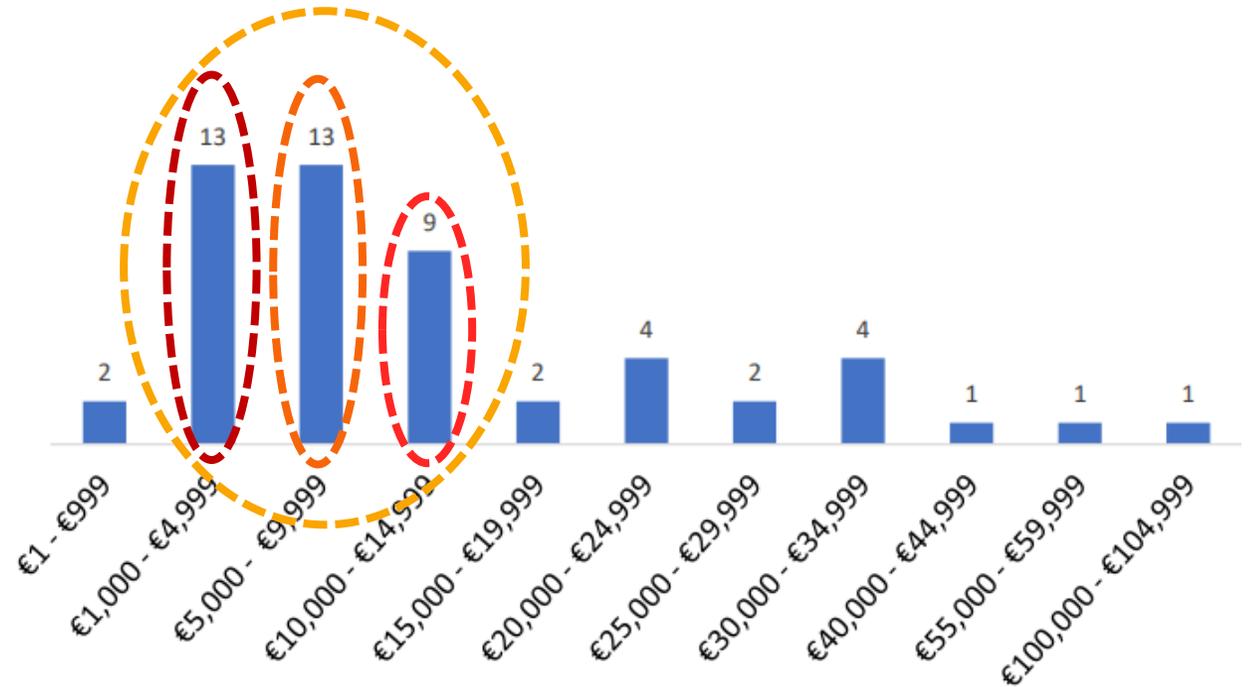
Primary source of data

- The **most comprehensive source of data** on construction adjudication in Ireland is contained in the **Annual Reports** prepared for the Minister of State for Business, Employment and Retail.
- The **Sixth Annual Report** was published in **November 2022**, where the next issue is expected in the coming weeks.
- The data within the reports is compiled using the statistical data returns provided by adjudicators in compliance with the supporting **Code of Practice to the Act, at para 39**.
- Because the data, provided anonymously, is from adjudications that have taken place, the data is considered both **comprehensive and robust**.
- The data, under various relevant headings, is provided in extensive commentary and illustrated in bar chart graphs.

Sixth Annual Report
of the
Chairperson of the Construction Contracts Adjudication Panel
to
Mr Damien English T.D.
Minister of State for Business, Employment and Retail

Fees charged

- The **'Total fees charged'** is presented in eleven bands of value from €1 to €104,999, for **52 known fee values**, where the three fees at the extremes would be outliers, resulting in a data sample of 49 values.
- 26.5% (13)**, or a quarter, of the total fees charged are up to **€4,999**.
- Similarly, **26.5% (13)** or a further quarter of the fees are between **€5,000 and €9,999**.
- 71% (35)** of the total fees charged are up to **€14,999**.
- Fees charged above €34,999 are relatively rare at 3 occurrences, or twice with the omission of the upper outlier.



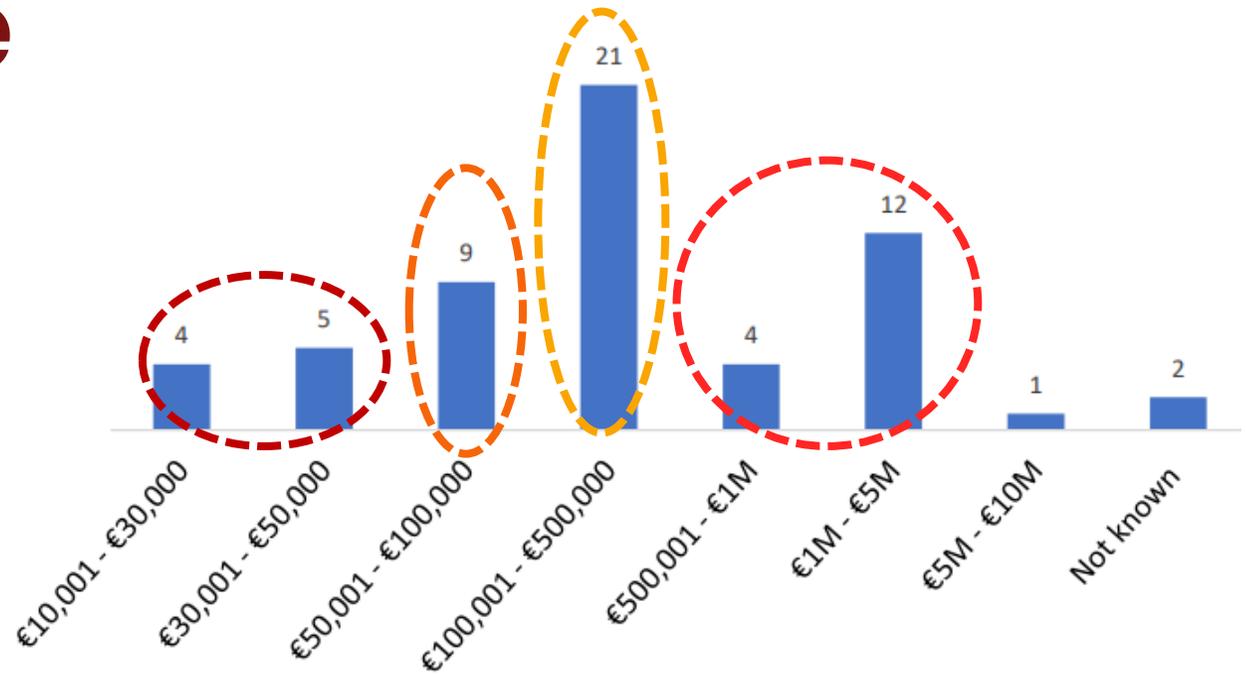
Total fees charged

	Band % of total	Cumulative %
13 adjudicator fees up to €5,000	26.5%	26.5%
13 adjudicator fees between €5,000 and €10,000	26.5%	53%
9 adjudicator fees between €10,000 and €15,000	18%	71%
Average fee using 50% mid-point values = €7,100		

% of fees charged in value bands up to €15,000

Amounts in dispute

- The **'Amount in dispute'** is presented in eight bands of value from €10,001 to €10m, from **56 known values**, where there were 2 returns submitted of unknown value.
- Just over **15% (9)** of decisions are at a disputed value of less than **€50,000**.
- A further **16% (9)** are between **€50,001 and €100,000** in disputed value.
- Just over one third of decisions, **37% (21)** are at a disputed value of between **€100,001 and €500,000**.
- **28% of decisions (16)** are in respect of a disputed value between **€500,001 and €5M**, where the €1M to €5M band represents a broad range.



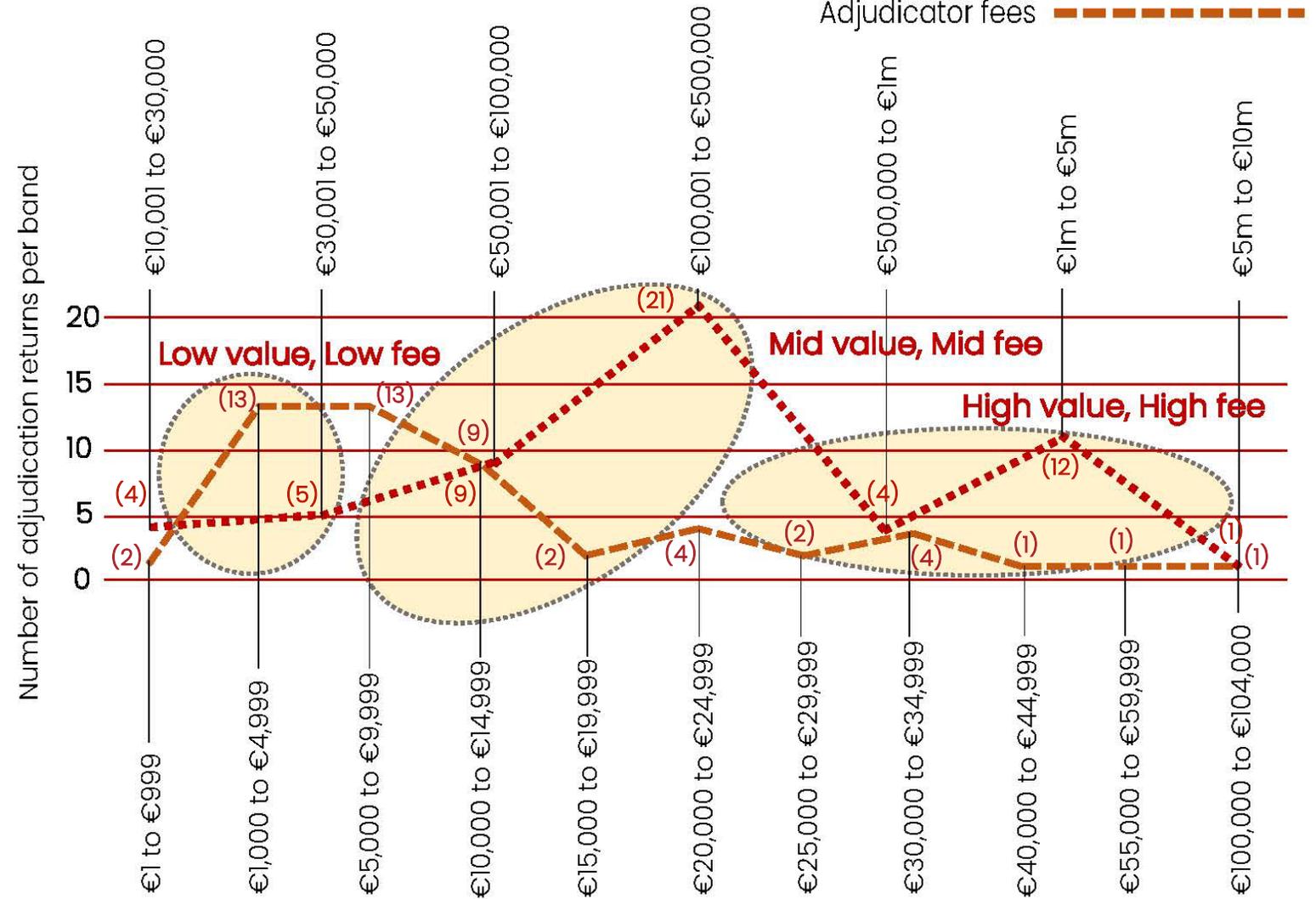
Amount in dispute

	Band % of total	Cumulative %
4 disputes, amount €10,001 to €30,000	7%	7%
5 disputes, amount €30,001 to €50,000	9%	16%
9 disputes, amount €50,001 to €100,000	16%	32%
21 disputes, amount €100,001 to €500,000	37%	69%

% of dispute values in bands up to €500,000

Overlaying of data

- An overlaying of data for **'Amount in dispute'** and the **'Total fees charged'** identifies three broad categories of 'fees charged against value'.
- At the lower end of values there is a **'Low value, Low fee'** cluster.
- The mid-range data could be categorised as the **'Mid value, mid fee'** cluster.
- The upper end of data could be described as the **'High value, high fee'** cluster.



Note: Number of returns in brackets

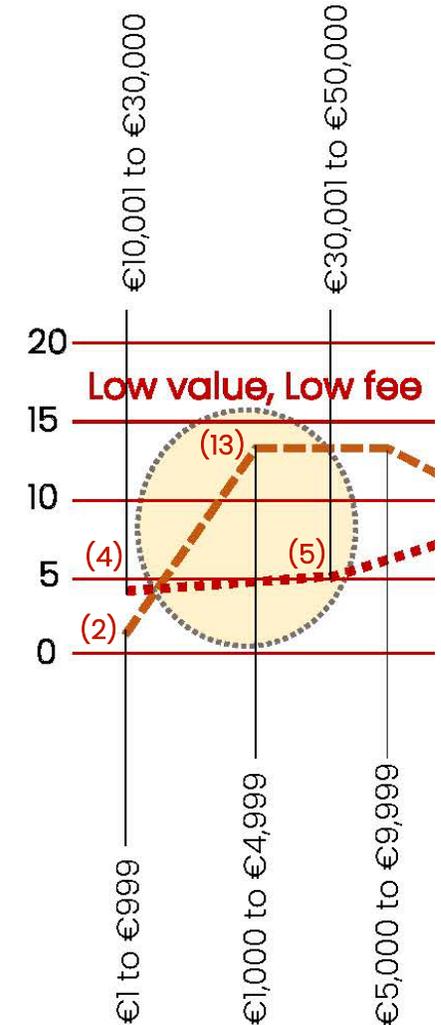
Low value – Low fee

- **13 returns** detailed a fee charged up to **€4,999** where the correlating amount in dispute was up to **€50,000**, as in **9 returns**.
- At first instance the fees may seem high relative to the amount in dispute, but these are **'up to' bands** where actual fees are likely to be substantially lower.
- As band 1 is considered an outlier, a more realistic approach is to use the mid-range value for band 2, resulting in **average fee of circa €3,000**.
- Given that adjudications are required to follow the same process, notwithstanding level of value in dispute, this fee level probably represents the **minimum fee to engage in the process**.
- The level of fees charged as mid-values of circa €3,000 for a circa €30,000 value in dispute **compares favourably with the proposed Low Value Dispute Procedure (LVDP)** presently at consultation.

Claim value	Adjudicators fee
Up to €10,000	€2,000
€10,001 up to €25,000	€3,500
€25,001 up to €50,000	€6,000
Over €50,000	Negotiable

Proposed LVDP fees

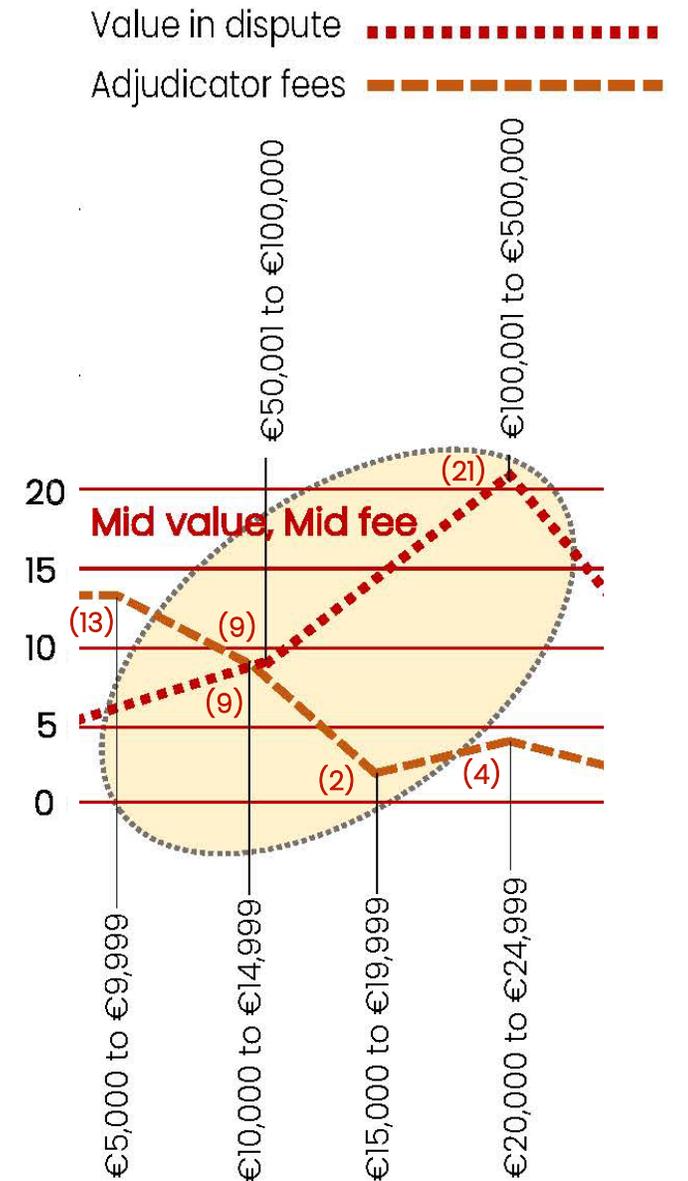
Value in dispute
 Adjudicator fees -----



Note: Number of returns in brackets

Mid value – Mid fee

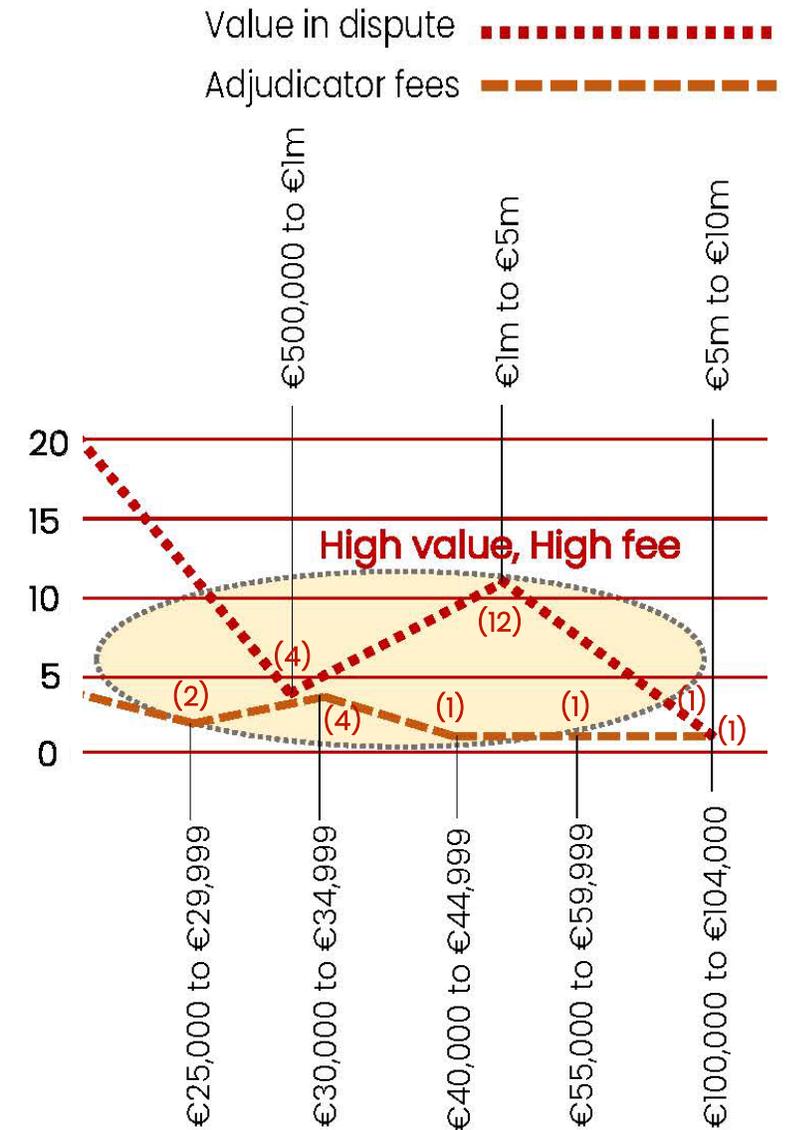
- Within this category there were **30 returns** for value in dispute, equating to **over 50% of 56 known value returns**, ranging from **€50,001 to €500,000** in two bands.
- Using the 50% mid-point in each band results in an **average value in dispute of €230,000**.
- The corresponding **28 returns for fees charged**, across four fee bands, also represents over **50% of the total returns**.
- Using the **50% mid-point value** for each of the four bands results in an **average fee charged of €12,000**.
- This level of **average fee of up to circa 5% of the average value in dispute of circa €230,000**, compared to those in the 'Low value, low fee' category, is commensurate to the increase in complexity that can be expected in higher value disputes.



Note: Number of returns in brackets

High value – High fee

- The balance of 17 returns by known value is 30% of the total, albeit a wide banding, by value and the 9 fees charged is 17% of the total for fees.
- Although lesser in number, the fees charged in this category are greater, reflecting a higher level of complexity and time expenditure, than in the previous two categories.
- From the total of 16 returns of known value, where the one in the €5m to €10m band is an outlier, using a 50% mid-point value gives an average dispute value of €2.34m, which is likely to be greater than reality.
- The corresponding four fee bands for fees charged are €25,000 to €29,999 up to €55,000 to €59,999. The 50% mid-point value gives an average fee value of €35,600, or circa 1.5% of the average dispute value.
- This pattern reflects greater complexity where the fee is proportionately lesser to the value in dispute, when compared to the previous two categories.



Note: Number of returns in brackets

Comparison with United Kingdom

- Reference to the **King's College Report***, with a UK wide data set, is comparable with the **Annual Report** to the Minister.
- For time to issue a decision, the King's report advises **16% of decisions issued within 28 days**, with **56% issued between day 29 and 42**. In Ireland, the equivalent figures are comparable, with **16% of decisions issued within 28 days** and **42% within 42 days**.
- **95%** of the UK survey respondents agreed that hourly rates between **£252 and £400** were most common, with the majority between **£251 and £300**. In Ireland, the average hourly rate across the **52 sample returns is €300**, which compares favourably with rates in the UK.
- This is consistent with the author's anecdotal research, where most adjudicators spend between **30 and 50 hours** on a dispute of average complexity. This results in a fee of between **€9,000 and €15,000** using the rate of **€300ph**.



*King's College London, The Dickson Poon School of Law, Centre of Construction Law & Dispute Resolution in conjunction with the Adjudication Society. 2022 Construction Adjudication in the United Kingdom: Tracing trends and guiding reform. Professor Renato Nazzini and Aleksander Kalisz, October 2022.

Nature of the adjudicator's role

- Adjudicators **are called upon at short notice** without any previous knowledge of the dispute.
- They must **assimilate large amounts of often complex information** in a short time, identifying relevant evidence.
- They often need to deal with **recalcitrance and challenges** whilst preserving the principles due process and natural justice.
- They must deal with unexpected matters, such as **jurisdictional challenges, extensions of time and requests for further submissions**, expediently and conclusively.
- The **time restrictions of the process** will often require late evening and weekend working.
- A construction adjudicator will have **deep subject matter knowledge** derived from extensive experience.
- The role of an adjudicator is comparable to those at the senior level of the legal and construction professions.



View of the courts of England and Wales

- There are several aspects of the Act that are absent of jurisprudence, including commentary on adjudicator fees. There is however **commentary from the jurisdiction of England and Wales**, where Waksman J has said:

'The work has to be undertaken at considerable speed, and sometimes with moving targets in the sense of what the core issues underlying the adjudication are, or become; by analogy, where work is done by solicitors on an urgent basis, this is frequently advanced as a reason why the Court should award more than the guideline rate of costs.'

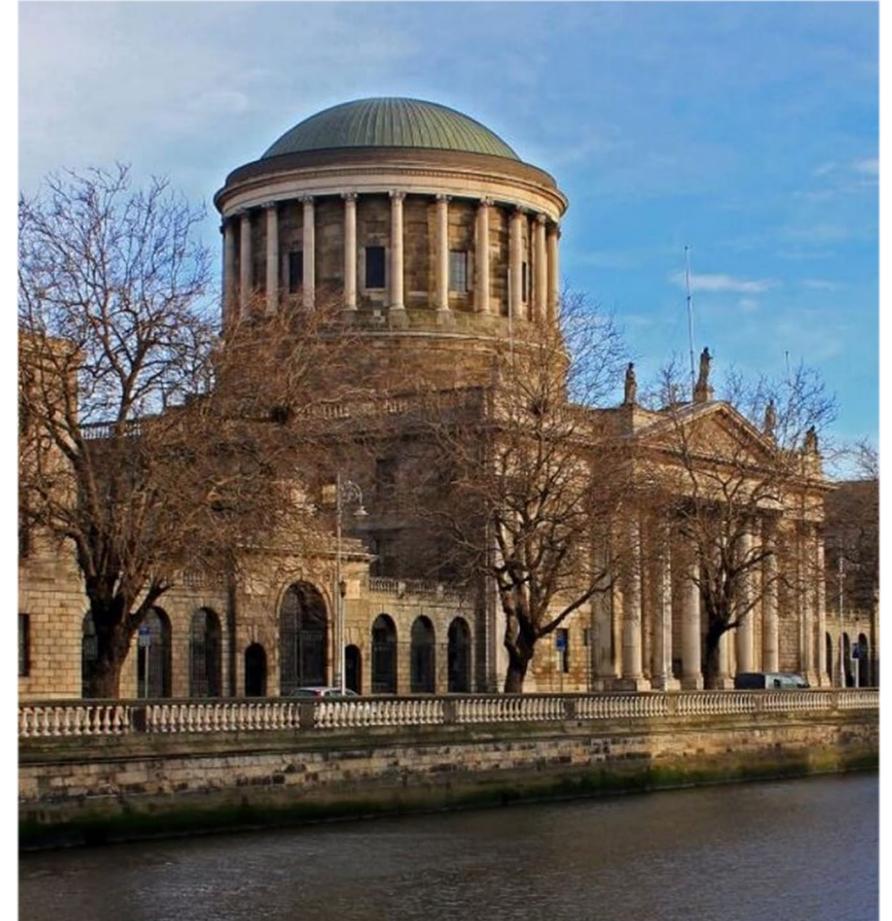
*'Accordingly, in relation to hourly rates, provided that the rate claimed is not clearly outside an overall band of reasonableness, there will be no basis to interfere, even if it could be shown that a different adjudicator, especially an adjudicator with different qualifications, may have charged less or even significantly less.'**



* *Fenice Investments Inc v Jerram Falkus Construction Ltd* [2011] EWHC 1678 (TCC), per Waksman J at [32-38].

View of the courts in Ireland

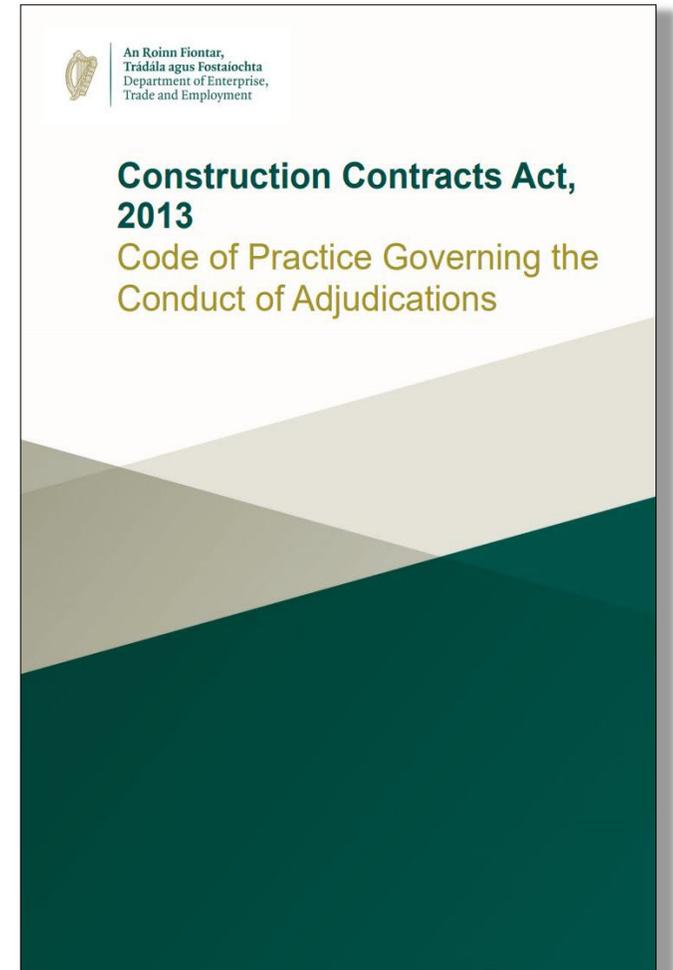
- *“The High Court will only refuse to enforce an adjudicator’s decision on the grounds of procedural unfairness where there has been a blatant or obvious breach such that it would be unjust to enforce the immediate payment obligation. The court will not be drawn into a detailed examination of the underlying merits of an adjudicator’s decision under the guise of identifying a breach of fair procedures.”**
- Can an alleged excessive adjudicator fee be so substantive, such as to prevent the enforcement of an adjudication decision?
- Can an alleged excessive adjudicator fee be ever considered a breach of procedural fairness?
- At what point does an alleged excessive adjudicator fee become a blatant or obvious breach?



** Paul Construction Ltd v. Tipperary Co-Operative Creamery Ltd [2022] IEHC 3, Simons J at 12.*

The Code of Practice

- The Code of Practice to which adjudicators must comply contains **reasonableness** provisions, where the adjudicator must:
 - *Paragraphs 9 & 19* - ‘...**provide** the parties with his/her terms and conditions...including the basis for his/her fees, costs and expenses’
 - *Paragraph 26* - ‘...**inform** the parties of the procedures that he/she intends to apply during the adjudication process.’
 - *Paragraph 27* - ‘...shall **ensure** that the procedure adopted is commensurate with the nature and value of the payment dispute...’
 - *Paragraph 28* - ‘...use **reasonable** endeavours to process the payment dispute between the parties in the shortest time and at the lowest cost’.
 - *Paragraph 36* - ‘...adjudicator’s fees, costs and expenses shall be **reasonable** in amount having regard to the amount in dispute, the complexity of the dispute, the time spent by the adjudicator and other relevant circumstances.’



Comparison with other ADR processes

- A comprehensive comparison with the other process of dispute resolution is beyond the remit of this paper, where there will always be **a time and place for each process.**
- However, it is the case that **mediation and conciliation** can only provide a **consensual resolution**, that can be rejected by either party. **Arbitration and litigation** are generally viewed as long drawn-out proceedings, that whilst providing a binding decision, **come at a significantly higher cost.**
- The unique characteristic of adjudication is its capacity to provide a **'to all intents' binding resolution** in a construction dispute within a relatively **short timescale.**
- The courts have and continue to support adjudication as a timeous and robust dispute resolution process for construction disputes.

“In reality, it is the only system of compulsory dispute resolution of which I am aware which requires a decision by a specialist professional within 28 days, backed up by a specialist court enforcement scheme which (subject to jurisdiction and natural justice issues only) provides a judgment within weeks thereafter.”

Coulson LJ in *John Doyle Construction Ltd (In Liquidation) v Erith Contractors Ltd* [2021] EWCA Civ 1452, [2021] Bus LR 1837, [2021] WLR(D) 516.

Can adjudicator fees be estimated

- The interrogation of the publicly available CCAS data **can provide a reasonably robust pre-estimate** of what a party could expect by way of an adjudicator's fee, based upon the amount in dispute as follows:

Amount in dispute	Adjudicators fee %	Band %
Up to €50,000	Up to 10%	5% to 10%
€50,000 to €500,000	Up to 5%	2.5% to 5%
€1m to €5m	Up to 1.5%	0.75% to 1.5%

- It should be borne in mind that these figures are **'up to' values** and are generally the maximum fee and considered to be at the upper end of the fee bands.
- For the majority of cases the adjudicator's fee will be less, as demonstrated by fee bands.



Conclusion

- Any professional fee charging structure should be **open to scrutiny**, adjudication should be no exception.
- Due to the expedient timescales in which adjudication is invoked, **it is impractical to seek comparative bids** in the traditional sense from several adjudicators.
- A comparison of available **data confirms that adjudication fees in Ireland compare favourably with the UK** across several metrics, including the hourly rates charged.
- **There is a risk, albeit low, of** an individual adjudicator charging a high, or what could be considered **an excessive fee**, as is the case with all professions.
- However, this should be weighed against the **now significant body of acceptable outcomes secured, with reasonable fees charged**, protecting the cashflow of the industry and **reducing the necessity to resort to the courts**.



To answer the question

- In answer to the question posed, '*Construction adjudicator fees – Are they unreasonable?*,' I would conclude, based upon the analysis and findings in this paper, that **the level of fees charged are not unreasonable.**
- I would suggest that adjudicator **fees charged are not less, nor greatly more than could be reasonably anticipated** for a professional undertaking a similar task of similar nature.
- I would suggest that the fees, as demonstrated by the research within this paper, are **commensurate with what could be expected** of any specialist professional working to a tight timescale, with a high degree of responsibility and a duty of care to parties, to provide a **just and certain decision within a short time.**
- A full copy of the paper, from which this presentation has been drawn, can be made available in PDF format on request.



Thank you

Complete paper available at:
www.peteromalley.ie/blog-2/

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