APPROVED **[2023] IEHC 490**

THE HIGH COURT

2023 No. 159 MCA

IN THE MATTER OF THE CONSTRUCTION CONTRACTS ACT 2013

BETWEEN

DNCF LTD

APPLICANT

AND

GENUS HOMES LTD

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 11 August 2023

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*".

NO REDACTION REQUIRED

2. These proceedings take the form of an application for leave to enforce two related decisions 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 paying party seeks to resist the application for leave to enforce on the basis that the adjudicator's decision had been reached in breach of fair procedures. It is said, in essence, that the adjudicator had regard to issues which had not been raised by the parties and failed to canvass the views of the parties on these issues.

LEGAL TEST

4. 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. 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.

5. 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 10 to 12):

> "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.
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> 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."

6. One contingency in which the High Court may refuse leave to enforce is where the adjudicator refused even to consider a defence or a right of set-off which had been legitimately asserted by the respondent. The judgment in *John Paul Construction Ltd* outlines the approach to be adopted in this regard as follows (at paragraphs 15 to 17):

> "The High Court will adopt a pragmatic approach in assessing an allegation that there has been a breach of fair procedures by dint of a failure properly to consider the defence made to a claim. The court will have regard to the adjudicator's decision in the round: the decision is not to be parsed line-by-line. Where a respondent has sought to raise a number of distinct defences—for example, by invoking

> contractual time-limits as well as advancing a defence on the merits—or has raised a counterclaim, then the decision should record the adjudicator's findings on each of these distinct defences. The position in respect of a single line of defence which comprises a number of interrelated issues is otherwise: the adjudicator will not necessarily be required to set out separate findings on each and every subtopic. It is sufficient that the substance of the defence have been addressed in the decision.
>
> It is important to distinguish between (i) the rejection of a line of defence as inadmissible, and (ii) the failure to consider a line of defence. This distinction is illustrated by the facts of *Aakon Construction Services Ltd*. It had been alleged there that the adjudicator had failed to consider an alternative line of defence advanced by the paying party, namely that the true value of the works was less than that sought under a payment claim notice. This court held that the adjudicator had not disregarded or ignored the defence, but had rather reached a reasoned decision as to why the paying party was not entitled to pursue that line of defence in the context of the specific adjudication.
>
> Similarly, it is important to distinguish between (i) the dismissal of a defence on the merits, and (ii) the failure to consider a line of defence. Say, for example, that the respondent to a payment claim had sought to assert a right of set-off. Were the adjudicator to refuse to consider the set-off on jurisdictional grounds, i.e. on the mistaken assumption that it did not come within the scope of the payment dispute, then this might well be a ground for refusing to enforce the adjudicator's decision. If, conversely, the adjudicator had considered the asserted set-off on its merits, but had mistakenly concluded that it did not meet the criteria for a contractual set-off, then this would not justify the refusal of leave to enforce. If and insofar as the respondent contended that the finding was incorrect, the remedy would be to pursue the matter by way of separate arbitral or court proceedings."

7. In the present case, the gravamen of the objection made is that the adjudicator failed properly to consider one of the lines of defence advanced on behalf of the respondent. This line of defence related to a payment certificate which had been issued by the architect nominated under the construction contract. The respondent contends that this certificate demonstrated that the applicant had, in fact, been overpaid. I will return to the detail of this line of defence at

paragraph 16 *et seq*. below. For present purposes, the question is one of principle, namely whether conduct of the type alleged against the adjudicator would, if it had occurred, justify the High Court in refusing leave to enforce an adjudicator's decision.

8. The respondent contends, in essence, that the adjudicator dismissed its claim for a set-off by reference to issues which had not been raised by the parties. It is submitted that where an adjudicator regards an issue, which has not been addressed by the parties to date, as material to his decision, it is incumbent upon the adjudicator to canvass that issue with the parties. It is further submitted that the concept of an adjudicator going off on a frolic of his own and arriving at a decision without affording the parties an opportunity to consider and comment upon a matter pertinent to the adjudicator's decision, is well recognised by the courts of other jurisdictions to be a breach of fair procedures. The respondent cites, in this regard, an impressive body of case law from England and Wales and from Scotland. The respondent has also referred to extracts from a number of leading textbooks.

9. As explained in *Aakon Construction Services Ltd v. Pure Fitout Associated Ltd* [2021] IEHC 562, case law from England and Wales must be approached with a degree of caution. This is because there are significant differences between the legislative schemes adopted in the two jurisdictions. There are also significant differences in the procedure governing the enforcement of an adjudicator's decision. These distinctions are all too easy to miss in that many of the concepts underlying the UK legislation seem familiar to us. Care must be taken not to lose sight of the distinctive feature of the Construction Contracts Act 2013, namely that express provision is made under the Act for an adjudicator's

decision to be enforced as if it were an order of court. An adjudicator's decision thus has an enhanced status under our domestic legislation as compared to the UK legislation.

10. The default position in this jurisdiction remains that leave to enforce will generally be allowed 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. The High Court will only refuse leave 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 logic of the "*pay now, argue later*" principle is that the appropriate remedy for a party, who is aggrieved by an adjudicator's decision, will normally be to pursue the issue in subsequent arbitral or court proceedings. In the interim, the party is expected to discharge the sums awarded in the adjudicator's decision: these payments can be recouped if the arbitral or court proceedings are ultimately successful.

11. Of course, if an adjudicator has genuinely gone off on a frolic of his own and has reached a decision by reference to a legal or factual point which had not been advanced by either side, and which the parties could not reasonably have anticipated might be considered relevant, then this would reach the threshold of a blatant or obvious breach of fair procedures. It should be emphasised, however, that the adjudication process is not iterative: an adjudicator is not required to enter into a dialogue with the parties, nor to provide the parties with an indication of his proposed findings. The adjudication process is intended to be expeditious, and the adjudicator is entitled to make use of his specialist knowledge where appropriate. Moreover, an adjudicator is not necessarily

restricted to reaching a conclusion which coincides precisely with the position advocated for by one or other of the parties. Rather, the adjudicator can reach his own conclusions on the basis of the materials before him in respect of which the parties have had an opportunity to make submissions. Thus, for example, if the dispute in an adjudication centres on the correct interpretation of a contractual clause, the adjudicator is not necessarily bound to plump for the interpretation favoured by one or other of the parties.

12. The boundary between what is and is not acceptable is capable of illustration by reference to the case law cited by the respondent. The Courts of England and Wales have refused to enforce adjudicator's awards where:

(i). the adjudicator made good shortcomings in the claimant's case by devising his own critical path analysis (*Balfour Beatty Construction Ltd v. Lambeth London Borough Council* [2002] EWHC 597 (TCC));

(ii). the adjudicator had calculated his own figures for loss of profits from a set of documents that both sides had told him to ignore (*Primus Build Ltd v. Pompey Centre Ltd* [2009] EWHC 1487 (TCC);

(iii). the adjudicator had calculated damages for delay by reference to a different method of assessment than that which had been agreed between the parties (*Herbosh-Kiere Marine Contractors Ltd v. Dover Harbour Board* [2012] EWHC 84 (TCC));

(iv). the adjudicator made a finding that there was no binding agreement as to the scope of a lump sum by reason of the parties' supposed failure to reduce that agreement to writing, in circumstances where this supposed failure was not relied upon or even referred to by the parties (*ABB Ltd v. Bam Nuttall Ltd* [2013] EWHC 1983 (TCC));

(v). the adjudicator had excluded a line of defence, on jurisdictional grounds, without giving either of the parties the opportunity to be heard on that point (*Harrington Contractors Ltd v. Tyroddy Construction Ltd* [2011] EWHC 813 (TCC)).

13. As appears, the type of conduct which has been found to be unfair involves the adjudicator going off on a frolic of his own, i.e. by reaching findings which cut against the agreed position of the parties or by raising an entirely new point which had not been addressed at all by the parties. In none of the case law cited is it suggested that the adjudicator is obliged to seek further and better particulars of a point which has been raised by one of the parties.

14. It should be emphasised that the sole purpose of my referring to this case law is that it provides useful examples of the type of conduct on the part of an adjudicator which might, in principle, be capable of justifying the refusal of leave to enforce. My judgment should not be understood as endorsing all of the legal principles set out in this case law. This is not intended as any disrespect to the undoubted learning shown in this case law. Rather, it reflects the fact that the legislative regime applying in this jurisdiction is very different to that in the United Kingdom, and places a higher premium on the enforcement of an adjudicator's decision.

15. It is not necessary, for the purpose of resolving the present case, to reach a concluded view on whether conduct of the type illustrated in the above case law would justify the refusal of leave to enforce under the Construction Contracts Act 2013. This is because the supposed unfairness complained of here is simply not comparable with the type of conduct considered in the case law. The complaint here amounts to saying that the adjudicator should have requested

further and better particulars from the respondent as to its defence. As explained under the next heading, this, erroneously, entails treating adjudication as an iterative process, whereby the adjudicator is under a positive duty to invite the parties to elaborate upon their submissions.

DISCUSSION

16. For ease of exposition, the parties will be described, in the discussion below, by reference to their status under the relevant construction contract, i.e. the applicant will be referred to as "***the contractor***", and the respondent as "***the employer***".

17. In order to understand the breach of fair procedures alleged by the employer, it is necessary to rehearse, in some detail, the nature of the particular defence being relied upon by the employer before the adjudicator. As an aside, it should be observed that the very fact that it is necessary to descend to this level of detail raises a red flag. The court must be wary lest it be drawn into a detailed examination of the *underlying merits* of the adjudicator's decision under the guise of identifying a breach of fair procedures.

18. One of the lines of defence advanced by the employer in each of the two adjudications had been predicated on a review in February 2023, by the nominated architect, of the value of the contract works. The employer, having made the point that the works under the contract had reached substantial completion on 9 December 2022, and having criticised the contractor for not having submitted any final account for review, stated to the adjudicator that it had proceeded to carry out a full final account review of the project.

19. It was said that the outcome of the review had been that the contractor had, in fact, been *overpaid* on the project to the sum of €1,600,779.88. It was said that—at the request of the contractor and by agreement of the parties—the contractor had been deliberately overpaid during the currency of the works in order to assist the latter's cashflow. The employer stated that the architect had proceeded to issue an up-to-date valuation certificate on 13 February 2023 ("***the February 2023 certificate***").

20. It was submitted to the adjudicator that any additional sums which might have been found to be due to the contractor (none being admitted) could not cause the gross value to exceed the aggregate of payments made. It was further submitted that the contractor could not use the valuation to circumnavigate the payment provisions in the Construction Contracts Act 2013 or in the contract to avoid the overall final account position.

21. The February 2023 certificate had not been included as an appendix to the response submitted by the employer to the adjudicator. However, the employer seeks to attach great significance to the fact that the adjudicator, in an exchange of emails in March 2023, sought clarification as to the payment position. In reply to these emails, the February 2023 certificate was furnished to the adjudicator. No detailed breakdown of the calculation of the figures was furnished. Subsequently, a detailed breakdown was provided to the contractor but not to the adjudicator.

22. The February 2023 certificate is dealt with as follows by the adjudicator in his decisions. The text below is taken from the first of the adjudicator's decisions (14 March 2023).

> "12 Offset.
>
> 12.1 I have to consider whether the certificate of the 13th February 2023 can be used to offset payment of release of retention.
>
> 12.2 I note that I have been given an English High Court decision in the case of 'Downs Road Development v Laxmanbhai Construction' which featured an offset that was allowable and I have taken note of same.
>
> 12.3 I Note that Genus state:-
>
> '……. Following the Referring Party's referral of this issue to Adjudication, the Architect issued a payment certificate releasing 50% of the retention on the 13th of February 2023.'
>
> 12.4 No breakdown has been given to me or indeed to DNCF as to how this valuation has been made.
>
> I do know that the amount certified for work executed is €10,324,146.87 as compared to €11,254,571.50 in the November valuation for work executed by DNCF. This amounts to a difference of €1,320,424.63. There is also a considerable minus difference in the amounts for nominated sub-contractors. The November value for nominated sub-contractors was €548,000.50 this is reduced to €471,645.25 giving a reduction of €76,355.25.
>
> 12.5 No explanation has been given for the reduction in the valuations. Were they Quantity Surveyor's mistakes? How can a Contractor be able to manage a contract if such huge discrepancies occur over a 2 month period?
>
> 12.6 I note that Genus appear to imply that is was a Final Account with regard to the contract. If this was the case they should surely have waited for the production of the documents from the contractor, which I have noted above were not due until 8th March, if the certificate of Practical completion was accepted to be legitimate or at the very least sought same from DNCF.
>
> 12.7 Therefore I will not consider this certificate as providing a possible offset."

23. The text of the second of the adjudicator's decisions (2 April 2023) is materially the same. The principal differences being (i) there is an additional line of text at §12.2; (ii) the quoted summary of the employer's position at §12.3 is different;

(iii) there is an additional line of text at §12.4; and (iv) there is a reference to the contingency sum as follows at §12.5:

> "12.5 It is further to be noted that the contingency sum which is noted in the correspondence amounts to €500,000 and does not account for the major difference in value between November and February."

24. As appears from the first decision, the adjudicator makes two principal findings in relation to the February 2023 certificate. First, the adjudicator notes the significant disparity between the amount certified in February 2023 as compared to that in November 2022. The adjudicator also notes that no breakdown had been given to him as to how this valuation of the work had been made.

25. Secondly, the adjudicator raises an issue as to the legal basis upon which a final account could have been prepared. Specifically, the adjudicator states that the employer should surely have awaited the production of documents from the contractor if the certificate was to be accepted as legitimate.

26. Counsel on behalf of the employer is highly critical of the adjudicator's approach. Five principal criticisms are made as follows. First, it is said that there was an obligation on the adjudicator to alert the employer to his intention to rely, in reaching his decision, on the absence of a breakdown of the figures in the February 2023 certificate. This, it is said, would have allowed the employer the opportunity to submit a breakdown which would have substantiated the figures. The employer concedes, very properly, that the adjudicator "*was entitled to note the discrepancy and the lack of explanation*" between the November 2022 and February 2023 certificates but goes on to submit that the adjudicator was obliged to afford the employer an opportunity to respond to his "*observations*".

27. Secondly, it is suggested that the adjudicator is to be understood as having expressed a concern, in the first decision, in relation to the quantity surveyor and the sub-contractors. It is, again, submitted that if these factors were to be taken into account by the adjudicator, then the employer should have been given an opportunity to address same. It is further submitted that if the adjudicator considered that the answers to these (rhetorical) questions would be relevant, then the adjudicator should have put these questions to the parties. It is further submitted that the detailed breakdown would have shown clearly that the reductions in value were fully capable of explanation and were most certainly not the subject of quantity surveyor's mistakes.

28. Thirdly, it is said that the reference, in the second decision, to the contingency sum of €500,000 is irrelevant and incorrect. It is further said that it had never been contended before the adjudicator, by either party, that the contingency sum was responsible for the major difference between the valuations in November 2022 and February 2023.

29. Fourthly, it is said that if and insofar as the adjudicator thought that it formed any part of the employer's case that a final account was being issued, this was a significant mischaracterisation of the case actually being made by the employer. It was further submitted that the adjudicator had made an error of law in that he must also have misunderstood the contractor's case which was to the effect that it treated the issue of the certificate of practical completion in December 2022 as a *repudiation* of the contract.

30. Finally, it was submitted that the wording of the last paragraph of each of the adjudicator's decisions was significant in that, on one reading at least, it was open to the interpretation that the adjudicator was refusing even to consider the

possible offset. It will be recalled that the last paragraph of each decision reads: "*Therefore I will not consider this certificate as providing a possible offset*".

31. At an earlier stage in his oral submission, counsel suggested that the language used by the adjudicator chimed with that used in the case law when discussing the distinction between (i) the dismissal of a defence on the merits, and (ii) the failure to consider a line of defence. Very properly, counsel confirmed towards the end of his oral submission that the wording of the decisions was, at least, ambiguous, and the decisions were open to the alternative interpretation that the defence of set-off had been considered on the merits but rejected. Put otherwise, the adjudicator could be understood as saying that he did not consider that the February 2023 certificate provided a set-off in the absence of a detailed breakdown, rather than as an outright refusal even to consider the question of whether it might provide a possible set-off.

32. In response to the employer's submissions, counsel on behalf of the contractor has drawn my attention to extracts from the exchange during the course of the adjudication process wherein the contractor had raised questions in relation to the valuation in the February 2023 certificate. The contractor expressly described it as "*suspicious*" that the architect had provided no detail of the valuations. The contractor had further stated that it would be "*very interested*" in seeing the detail of the valuation supporting the purported payment certificate. Counsel submits that the differential or discrepancy whereby the value of the works had supposedly decreased by a sum of in excess of one million euro was a "*live issue*" between the parties.

DECISION

33. For the reasons which follow, I have concluded that there is no basis for saying that there had been a breach of fair procedures on the part of the adjudicator. The fundamental flaw with the employer's argument is that it necessitates regarding adjudication as an iterative process, whereby the adjudicator is under a positive duty to invite the parties to elaborate upon their submissions. This is not what the law requires. As discussed in more detail in *Aakon Construction Services Ltd v. Pure Fitout Associated Ltd* [2021] IEHC 562 (at paragraphs 5 to 10), statutory adjudication is designed to be far more expeditious than conventional arbitration or litigation. The default position is that the adjudicator shall reach a decision within 28 days beginning with the day on which the referral is made. To achieve this expedition, the adjudication process will, of necessity, be less elaborate than conventional arbitration or litigation. This is not an accident: rather this is the precise purpose of the legislation. The Oireachtas has put in place a special dispute resolution mechanism, at first instance, for construction contracts which is intended to fulfil the need for prompt payments in the construction industry. This does not affect the right of either party to pursue arbitration or litigation thereafter. It would undermine the legislative policy of "*pay now, argue later*" were the court to refuse to enforce an adjudicator's decision precisely because the adjudicative process failed to replicate that of conventional arbitration or litigation.

34. It is not a matter for an adjudicator to "*advice proofs*" for any party. On the facts of the present case, the onus lay with the employer to put forward such evidence as it thought fit to substantiate its defence. There was no obligation upon the

adjudicator to assist the employer to make its case, i.e. by requesting the employer to submit further and better particulars.

35. Here, the employer had chosen to advance, as one of a number of lines of defence, an argument to the effect that a review, by the architect, of the value of the contract works had disclosed that the contractor had been overpaid. The argument being advanced by the employer was, on any view, an audacious one. It should have been obvious to the employer that the existence of a significant differential between the value of the works as *per* the February 2023 certificate and that issued in November 2022 was something that called for explanation. The differential was in excess of one million euro, in the context of a contract with a nominal value of some 11.2 million euro. The contractor had called out the lack of an explanation for this differential during the course of the exchange of submissions.

36. In all the circumstances, it did not represent a breach of fair procedures for the adjudicator to find that the employer had not established an entitlement to offset the contractor's payment claim by reference to the supposed overpayment to date. An adjudicator does not have a role in cajoling the parties to elaborate or improve upon their cases. The adjudicator was entitled, consistent with fair procedures, to reach a decision on the basis of the materials put before him by the parties. The adjudicator was not obliged to enter into a dialogue with the employer nor to invite the employer to shore up its defence by adducing further evidence. Indeed, there would be no such obligation on a court of law to do so in similar circumstances.

37. Crucially, this is not an example of a decision-maker embarking upon "*a frolic of their own*", to borrow the phrase used in some of the case law cited by the

employer. That line of case law is concerned with circumstances where a decision-maker determines a case by reference to an entirely new issue in respect of which the parties had no notice and which they could not reasonably have anticipated. Here, it was the employer itself which sought to raise the issue of the supposed overpayment as a defence to the claim. It chose to do so in a perfunctory manner: initially, the employer simply referred to the February 2023 certificate in its written response, and subsequently provided a copy of the certificate to the adjudicator without any detailed breakdown. Such a perfunctory approach always carried with it the risk that the adjudicator would find that this line of defence was not substantiated.

38. At the cost of repetition: it should have been obvious to the employer that the existence of a significant differential between the value of the works as *per* the February 2023 certificate and that issued in November 2022 was something that called for explanation.

39. The circumstances of the present case stand in marked contrast to the type of conduct by an adjudicator which is criticised in the case law discussed earlier.

40. Counsel for the employer was critical of what he characterised as the adjudicator sitting on the side lines of the email exchange between the parties in March 2023. Again, this is to misunderstand the nature of the adjudication process. The adjudication process is, primarily, adversarial in nature. Whereas an adjudicator has discretion to adopt an inquisitorial role, he is not obliged to do so. Here, the parties were ably represented and had been able to formulate detailed submissions in accordance with the timetable directed by the adjudicator. The formal exchange of submissions had come to an end. The adjudicator then made a very specific query of the parties. This was responded to and there was no

obligation upon the adjudicator to seek further and better particulars from the parties.

41. The employer, in an attempt to assimilate the circumstances of the present case to those considered in the English case law, has sought to suggest that the reference in the adjudicator's decision to quantity surveyors and sub-contractors should be characterised as the raising of new issues. With respect, such a characterisation is artificial. The ordinary and natural meaning of the relevant paragraph of the decision is that the adjudicator was asking a rhetorical question with a view to underscoring the point that no explanation had been provided by the employer for the very significant differential between the two valuations. The adjudicator was not, on any sensible reading of the decision, attempting to introduce an entirely new issue, calling for evidence from the quantity surveyors. The adjudicator was simply highlighting that, in the absence of a detailed breakdown, one could only speculate as to what the explanation might be. The adjudicator concluded—entirely reasonably—that in the absence of an explanation, the February 2023 certificate did not substantiate a defence by way of set-off.

42. As to the reference, in the second decision, to the contingency sum of €500,000, same does not disclose a breach of fair procedures. On its ordinary and natural meaning, this reference indicates no more than that the adjudicator had considered—and dismissed—the possibility that the discrepancy might have been caused by a difference in approach taken to the treatment of the contingency sum as between the valuations in November 2022 and February 2023.

43. I turn next to the criticism that the adjudicator mischaracterised or misunderstood the case being made by the employer. This criticism does not disclose a breach

of fair procedures. The adjudicator queried whether it was open to the employer to issue a final account other than in accordance with the procedure prescribed under the construction contract. This refers to Clause 35 of the construction contract which allows a period of three calendar months from the date of the completion of the works for a contractor to furnish the architect with all documents necessary for the purposes of the computations required. It is apparent from the submissions made to the adjudicator that the employer had contended that the terms of the construction contract did not prevent the architect from issuing a payment certificate as and when they saw fit. The employer asserted that there would be a clear entitlement to do so in circumstances of overpayment, defects, employer's claims and the like. At the hearing before me, counsel submitted that the adjudicator failed to take into account the fact that the contractor, by letter dated 13 January 2023, had elected to treat the contract as having been repudiated in December 2022, and that, accordingly, the contractor was never going to submit documents pursuant to Clause 35.

44. These arguments in relation to the contractual basis upon which the employer would be entitled to issue a final account are ones which go to the substantive merits of the adjudication. Even if it were to transpire, in subsequent arbitral or court proceedings, that the adjudicator had erred in his analysis of the legal effect of the events of December 2022, this does not represent a breach of fair procedures. It goes, instead, to the merits. It certainly does not represent a mischaracterisation of the employer's case. It is clear from the language used in the various response submissions that the employer was maintaining the position that it was entitled to issue a final account. Irrespective of whether there are

grounds for debate as to the precise contractual basis for this, it certainly was the case they were making.

45. The final criticism made by the employer is in relation to the use of the phrase "*will not consider*" in the last paragraph of each decision. As already noted, counsel very properly conceded at the hearing before me that the wording of the adjudicator's decisions in this regard is, at least, ambiguous. I am satisfied that, on its ordinary and natural meaning, what the adjudicator is saying is that he does not consider the February 2023 certificate as giving rise to a defence by way of offset. The wording cannot be understood as a blanket refusal even to consider set-off as a possible defence. Put otherwise, this line of defence failed on the merits rather than being dismissed out of hand: see the passages from *John Paul Construction Ltd v. Tipperary Co-Operative Creamery Ltd* [2022] IEHC 3 cited at paragraph 6 above.

46. The facts of the present case are to be distinguished from those of *Harrington Contractors Ltd v. Tyroddy Construction Ltd* [2011] EWHC 813 (TCC) (cited by the employer). In that case, the adjudicator had dismissed a line of defence on jurisdictional grounds, holding that issues raised by the responding party in respect of the final account were not properly part of the adjudication. The High Court of England and Wales found that the adjudicator had been asked, by the responding party, to decide the amount of the final account under the contract between the parties and to decide what, if any, retention was or remained due. Moreover, the claimant had not raised any jurisdictional objection in this regard. The High Court held that the adjudicator, by wrongly deciding that the final account was a matter outside his jurisdiction, had put himself in the position whereby he did not consider the final account evidence and argument in any

detail or at all. The High Court further held that the adjudicator had acted in breach of natural justice in failing to give the parties the opportunity to be heard on the jurisdictional issue which he himself had raised.

47. By contrast, in the present case, the adjudicator did address the merits of the defence raised by the employer and found that the revised valuation had not been substantiated by a detailed breakdown. Put otherwise, the adjudicator did consider the evidence which had been put before him and found it to be wanting. This is a very different matter from refusing to consider the evidence at all, on jurisdictional grounds related to how the claim and defence had been formulated by the parties.

CONCLUSION AND PROPOSED FORM OF ORDER

48. The onus is upon the party resisting an application for leave to enforce an adjudicator's decision 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.

49. Here, the respondent, who was the employer under the relevant construction contract, has failed to discharge this onus. The adjudication process was carried out fairly. The adjudicator was entitled to reject the defence, which was predicated on the February 2023 certificate, on the grounds that no detailed breakdown of the valuation had been provided to him. The adjudicator was not obliged to revert to the respondent seeking further and better particulars of its defence.

50. It is to be emphasised that, if and insofar as the respondent contends that the adjudicator's decisions are incorrect, it has a remedy open to it by way of arbitration or by way of further legal proceedings. In the interim, and in accordance with the principle of "*pay now, argue later*", the respondent is required to discharge the sums awarded by the adjudicator in his two decisions.

51. 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:

(a) The adjudicator's decision of 14 March 2023 directing the respondent to pay to the applicant the sum of €175,000 within 7 days of the date of the said decision.

(b) The adjudicator's decision of 2 April 2023 directing the respondent to pay to the applicant the sum of €42,531 plus VAT as applicable within 7 days of the date of the said decision.

(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 in the sum of €217,531 (plus VAT as applicable) against the respondent.

(3). In circumstances where the adjudicator did not direct that interest be paid on the award, 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 in default of agreement. The costs include the costs of the written legal submissions.

52. 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 within 14 days.

Appearances

Garvan Corkery SC and David O'Dwyer for the applicant instructed by RDJ LLP
John Trainor SC and James Burke for the respondent instructed by Hanley and Lynch