

Adjudication court cases in Ireland and established jurisprudence.

List of cases

- *McGill Construction Limited and Blue Whisp Limited* [2024] IEHC 205.
- *K&J Townmore Construction Limited, Damien Keogh and Desland (Mechanical) Limited T/A Cobec Engineering Group* [2023] 874 JR.
- *DNCF Limited and Genus Homes Limited* [2023] IEHC 40.
- *McGurran Civils ROI Limited and K&J Townmore Construction Limited* [2023] IEHC 355.
- *Western Excavations and Ground Works Limited and Glenman Corporation Limited* [2022] 165 MCA.
- *John Paul Construction Limited and Tipperary Co-Operative Creamery Limited* [2022] 165 MCA.
- *Aakon Construction Services Limited and Pure Fitout Associated Limited* [2021] 161 MCA.
- *Kevin O'Donovan and The Cork County Committee of the Gaelic Athletic Association and Nael G. Bunni and James Bridgeman and OCS One Complete Solution Limited* [2021] IEHC 575.
- *Principal Construction Limited and Beneavin Contractors Limited* [2021] MCA 199.
- *Construgomes & Carlos Gomes SA and Dragados Ireland Limited, BAM Civil Engineering and Banco BPI SA* [2021] IEHC 79. (Adjudication discussed but was not the substantial issue).
- *Gravity Construction Limited and Total Highway Maintenance Limited* [2021] IEHC 19.

Additional relevant notes

- Practice Direction for Adjudication Enforcement Applications (HC 105) in effect from 26.04.2021.
- *Bowen Construction Limited and Ors and Kelly's of Fantane (Concrete) Limited* [2019] IEHC 861, Barniville J, 06.12.2019.

Addresses several grounds advanced by a Respondent to resist enforcement of a previous Adjudicator's decision being: 1. Binding decision on jurisdiction, 2. That the Notice of Intention to refer to Adjudication was invalid due to encompassing more than one Payment Claim Notice. 3. The Referral of the payment dispute was not made within the required seven-day period. 4. Referral deficient in not including all documents. 5. The Adjudicator was in breach of fair procedure in not considering defective works as set-off. 6. Inability of the Referrer to re-pay sums should it be later found that monies not owed.

1. Binding decision on jurisdiction.

The Respondent also advanced that the Adjudicator had exceeded authority in issuing a binding decision. The Respondent advanced that this was in contravention of the general principle that an Adjudicator does not have jurisdiction to make a binding determination in relation to their own jurisdiction. The Court confirmed that:

17. "This general principle is subject to the exception that the parties to a construction contract can, by agreement, confer jurisdiction upon the adjudicator to make a determination on jurisdiction which is binding upon them. The parties can agree to be bound by the adjudicator's decision on a jurisdictional objection."

The Adjudicator had asked both parties to advise whether they wished to confer jurisdiction to decide the issue, where both parties had confirmed their agreement. Having conferred jurisdiction on the adjudicator to determine the issue, it was then not possible for the Respondent to later seek to challenge the adjudicator's decision in enforcement proceedings. In judgment the Court also provided guidance upon the point when an adjudicator has jurisdiction by stating:

10. "It should be explained that the making of the appointment does not, in and of itself, confer jurisdiction upon the nominated adjudicator to embark upon adjudication of the payment dispute. Rather, a further procedural step is required. It is necessary for the referring party to formally refer the payment dispute to the nominated adjudicator. This must be done within seven days beginning on the day on which the appointment is made."

2. Invalidity due to encompassing more than one Payment Claim.

The Court found that it was not necessary to provide separate adjudication referrals for individual "Payment Claim Notices" deciding:

34. "There is no legislative requirement, therefore, that there be separate referrals in respect of individual "payment claim notices". The claim advanced in the present case is correctly characterised as a singular "payment dispute" and it was properly advanced in one notice of intention to refer."

3. Referral not made within the required seven-day period.

The Respondent asserted that the referral of the payment dispute was made outside the seven-day period as required at S6.-(5)(a) of the Act. The Referring party submitted an e-mail with the Referral at 23:59 on the date due where it arrived at 00:01 on the following day. The Court determined, in citing the Electronic Commerce Act 2000, that the time that e-mail communication entered the IT system was the relevant date and time and not the time it entered the adjudicator's inbox and was satisfied that the Referral had been made within the seven-day time requirement. The Court provided the following additional commentary:

52. *"It is not necessary, for the purposes of determining the present proceedings, for me to express a concluded view on whether a failure to make a referral within seven days is fatal to the validity of the adjudication process" and "A final decision on the effect of the provisions of the Construction Contracts Act 2013 will have to await a case where the resolution of this issue is critical to the outcome."*

4. Referral deficient in not including all documents.

The Respondent sought to claim that the referral was invalid due to a failure to provide the listed appendices within the seven-day period required under S6.-(5)(a) where the Court found that there was no invalidation, commenting:

51. *"For completeness, the supposed failure to furnish the appendices to the referral within seven days of the date of appointment would not, in any event, have invalidated the referral. It is a question of fact in any particular case as to whether the material, which has been furnished to an adjudicator within the seven-day time-limit, is sufficient to constitute the making of a referral. The principal determinant of the validity of a referral is whether the content of same (and such supporting documentation, if any, as accompanies it) describe the nature and extent of the payment dispute in sufficient detail to allow the adjudicator to understand same and to allow the other party a meaningful opportunity to respond to same."*

5. The Adjudicator was in breach of fair procedure.

The Respondent claimed that the adjudicator had failed to consider set-off or damages for allegedly defective work and monies owed. The same allegation had been made in two previous parallel adjudications. In this referral the adjudicator had timed, or staggered, the decision to ensure that the decisions in the two other decisions would be available before the latter decision payment deadline. The Court found that:

58. *"...there has been no breach of fair procedures. The Respondent has been afforded a full opportunity to ventilate its argument in relation to the allegedly defective works and a determination made in advance of its obligation to discharge the first adjudication award coming into force."*

The Court added:

60. *"The fact that this issue was left over for determination in the context of the parallel adjudications meant that the Respondent was, in effect, given an opportunity to make a better case in the two parallel adjudications."*

6. Inability of the Referrer to re-pay sums should it be later found that monies not owed.

The Respondent argued that the ability of the Referrer to repay monies arising from the adjudicator's decision of circa €1.25m, being later found to be improperly owed, was questionable.

The Court found as follows:

64. *"The Respondent has failed to discharge the evidential burden upon it of demonstrating a probable inability of the referring party to repay the award. In the current proceedings it was neither necessary nor appropriate to consider whether, given the "pay now, argue later" principle, it would ever be appropriate to refuse to*

enforce an adjudicator's award by reference to the applicant's financial position.

This decision is consistent with previous decisions of the High Court in continuing to support adjudication as a means for resolving construction disputes and the rejection of later arguments in seeking to challenge an adjudicator's decision.

**K&J Townmore Construction
and Damien Keogh and Desland
(Mechanical) Limited T/A Cobec
Engineering Group [2023]**

874 JR

Twomey J, 17.08.2023

In advancing its case the Referrer stated that the claim was “*matter of significant public importance to the construction industry that the High Court grant leave to bring a judicial review...*” In response the Court advised that the issue of importance was:

4. “...whether the Oireachtas can have its intention, of introducing an alternative to litigation, thwarted by one party to an adjudication subjecting the adjudication process to litigation by the back door, i.e. by judicially reviewing the adjudicator's decision?”

The question of adjudication in Ireland being subject to judicial review due to its statutory basis has been the subject of much past debate. The central issue in the case was whether a challenge to an adjudicator's decision should be determined by the Court before or after the adjudication has been completed. Or alternatively, should a question of jurisdiction be decided through judicial review prior to the issuance of the adjudicator's decision or be confined to later enforcement proceedings.

The applicant, being the Respondent in the adjudication, sought leave to judicially review the previously issued decision of the adjudicator on jurisdiction where a non-binding decision had been determined, advising that any challenge would be a matter for the Court to rule upon following the issue of the adjudication decision. Leave of Court was sought on the basis that the adjudicator had no jurisdiction to deal with the matter and that Respondent should not be forced to participate in the process. Following extensive discussion, reference to other authorities and the Act the Court determined that:

38. “...it seems clear to this Court that when a paying party has an issue in relation to whether a dispute is a ‘payment dispute’ for the purposes of the 2013 Act, or otherwise claims that an adjudicator does not have jurisdiction, as in this case, the appropriate forum in which this issue is resolved is not by way of judicial review, but by way of challenge to the adjudicator's decision as part of the enforcement proceedings.

In refusing to grant leave for a judicial review the Court detailed several reasons as follows:

47. “...the rationale for the 2013 Act is to ensure prompt payment of the sums, if any, due to parties to a construction contract, this rationale provides further support for the view that the more appropriate remedy in this case is not judicial review to determine in advance the Adjudicator's jurisdiction...”

51. “...threat of blackmail or of highwayman tactics, in conventional litigation, which arises as a result of the huge costs of High Court litigation, can arise for a plaintiff, who has to bring a claim, but is faced with an unmeritorious defence from a financially powerful defendant, or for a defendant, who is faced with an unmeritorious claim from a financially powerful plaintiff.

54. *"...not only did the Oireachtas not provide in the 2013 Act for judicial review of a decision of an adjudicator appointed under that Act, but it provided for enforcement proceedings for the adjudicator's decision to be enforced, at which stage the jurisdiction of the adjudicator could be challenged".*

62. *"...because every adjudicator's decision to agree to adjudicate on a payment dispute has the potential to be subjected to a claim that she does not have jurisdiction to hear the dispute in question and therefore every adjudication has the potential to be subjected to a High Court judicial review, before the adjudication process has been completed".*

64. *"...to ventilate the jurisdiction claims, at a judicial review hearing in the High Court (and possibly on appeal in the Court of Appeal/Supreme Court), rather than at the enforcement proceedings, would be 'inconsistent' with a speedy dispute resolution process for construction contract payment disputes and would incentivise employers/main contractors to judicially review adjudications in order to delay payments to building contractors for a year or more".*

65. *"...it is conceivable that the Adjudicator, once he has carefully considered all the arguments made by both parties, may reach a decision which is acceptable to both parties".*

68. *"...that the Adjudicator is prima facie carrying out his functions and making decisions in a regular and orderly way. This therefore is a further factor which weighs against the grant of leave to bring judicial review proceedings to challenge the jurisdiction of the Adjudicator, to prevent the Adjudicator exercising his statutory functions. Instead, the Adjudicator's decision should be challenged as envisaged by the statutory mechanism provided (the enforcement proceedings under Order 56B).*

72. *"...that the enforcement/appeal machinery provided by the Oireachtas is intended to provide 'particularly suitable' machinery in view of its 'innovative' approach to achieving speedy resolution of payment disputes in construction contracts.*

76. *"...what is at issue is very much a dispute between two commercial entities over sums due under a private contract and that it would be more appropriately dealt with by a private law remedy, which is provided by the challenge to the Adjudicator's decision pursuant to the Order 56B enforcement proceedings, rather than by the public law remedy of certiorari of the Adjudicator's decision.*

In concluding the Court stated that a challenge to an adjudicator's decision on jurisdiction cannot be brought forward in advance of the adjudication process and can only be heard as part of the enforcement proceedings after the issue of the decision. The Court further commented that *"...this appears to be a price, which the Oireachtas regards as worth paying for a cheaper and quicker alternative to litigation."*

It is noteworthy that whilst the judgment confirms that the Court will not permit judicial review of the adjudication at an early stage in the process,

the question as to whether judicial review could be sought after a decision on the substantive dispute remains open.

***DNCF Limited and Genus
Homes Limited [2023] IEHC 40***
Simons J. 11.08.2023

Challenge to adjudicator's decision on the grounds that it had been reached in breach of fair procedures having dismissed the Respondents claim for a set-off by reference to issues which had not been raised by the parties, together with failing to canvass the views of the parties on these issues. In considering the matter the Court stated that:

10. "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."

Adding that:

11. "...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."

Where:

11. "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 Respondent claimed that there had been an over-payment to the Referrer that should have been considered as set-off where the adjudicator had requested a copy of the payment certificate to evidence the over-payment. The Respondent provided a certificate in response but absent of any quantum calculation to justify the figure claimed. The adjudicator then decided that the Respondent had not established its entitlement to payment or sought after set-off as insufficient detail had been provided. In distilling the matter, the Court stated that:

15. "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."

In deciding upon the matter, the Court determined that:

33. "...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."

In further elaboration on this point, that the adjudicator's findings did:

36. "...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."

The Court in further guidance stated that:

40. "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."

In summarising on the matter, the Court stated that:

47. "...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."

The judgement makes it clear that the onus is upon the parties to make or set out their case with the relevant evidence to substantiate the case. Furthermore, where challenge to the enforcement of

a decision is sought the challenging party must demonstrate that there has been 'an obvious or blatant breach of fair procedure by the adjudicator' as the basis for the Court to intervene,

**McGurran Civils ROI Limited and
Townmore Construction Limited
[2023] IEHC 355**

Simons J, 23.06.2023

This case of seeking enforcement was unusual insofar as the respondent did not challenge the validity of what was two adjudicator decisions but instead sought minor reductions in the amounts claimed by the applicant, being principally the calculation of interest and the recovery of VAT. The Court advised that:

19. "The proper approach for the respondent to have adopted in the circumstances would have been either to discharge so much of the claim as it did not dispute or, alternatively, to consent to judgment in respect of so much of the claim it did not dispute."

Commenting further that:

19. "It is no answer to these claims to suggest that there is a dispute at the margins in respect of a sum of approximately €3,000."

The respondent also argued that the applicant had not sent a formal solicitor's letter prior to the taking of proceedings where the Court stated that *"...that in the context of the very tight timelines for adjudication..."* there:

21. "...is no obligation upon the party seeking to enforce an adjudicator's award to give repeated warnings to the defaulting side of an intention to issue proceedings."

The applicant was granted to leave to enforce both adjudicator's decisions without any reduction in the amounts sought. It is noteworthy that proceedings were initiated in May 2023 and concluded soon thereafter in June 2023, demonstrating the intent of the Courts to deal with adjudication enforcement expediently.

**Western Excavations and
Ground Works Limited and
Glenman Corporation Limited
[2022] 165 MCA**

Simons J, 08.2022

This decision is the first case to embrace a matter regarding adjudication fees. The terms and conditions previously issued by the Adjudicator included joint and several liability in respect of fees, as is common practice. The decision of the Adjudicator was in favour of the Referrer, including a direction to discharge the Adjudicator's fees. When the amount due was not paid, the Referrer brought enforcement proceedings. In addition to enforcing the substantive aspects of the decision. The Court, for the first time, also enforced the adjudicator's costs element in addition to the substantive aspects, of the adjudicator's decision.

The Courts of England & Wales have found that liability to pay an Adjudicator's fees is final and not subject to subsequent challenge, where it appears that the Courts in Ireland have moved in a similar direction although note entirely conclusive. It is not yet clear in Ireland whether this element of an adjudicator's decision is final or merely *"binding until ... a different decision is reached on the reference of the payment dispute to arbitration or in proceedings..."* as set out in S6.-(10) of the Act. In this case the Adjudicator was added to the enforcement action as a notice party. There appears to be no barrier for an Adjudicator whose fees have not been paid to instigate an enforcement action themselves.

**John Paul Construction Limited
and Tipperary Co-Operative
Creamery Limited
[2022] 165 MCA**

Simons J, 11.01.2022

The respondent Tipperary Co-Operative Creamery Ltd sought to resisting enforcement of an adjudicator's decision because the adjudicator had failed to comply with the requirements of fair procedures and natural justice. The respondent stated that the adjudicator had failed to consider the defence advanced in the adjudication, where the Court commented that:

13. "Making all due allowance for the provisional nature of an adjudicator's decision, and for the exigencies of the expedited procedure mandated under the legislation, fair procedures nevertheless demand that a party be afforded a right to be heard before a decision is reached requiring that party to make a payment under a construction contract. A right to be heard implies a right to have one's submissions considered by the decision-maker. The right to be heard does not necessarily, however, extend to a right to an oral hearing: having regard to the summary and expeditious nature of statutory adjudication, it will be rare, if ever, that an adjudicator is required to convene an oral hearing."

The Court further added that it:

15. "...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."

Within the judgment, the Court set out guidance as to its approach to complaints that in formulating the decision an adjudicator had expressly but wrongly decided not to consider a line of defence or had not considered a line of defence at all or had considered a line of defence but dismissed it on its merits. In assessing the matter, the Court held that:

42. "It is readily apparent from the adjudicator's decision that he fully understood the overall nature of the defence being put forward by the employer."

And that:

48. "There is no basis for saying that the adjudicator failed to consider the employer's defence, still less that he ignored the defence."

And furthermore that:

50. "In truth, the employer seeks to have this court embark upon a reconsideration of the underlying merits of the adjudicator's decision. In particular, the employer seeks to unpick the adjudicator's finding that part of the delay was...the responsibility of the employer" and "...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."

In closing the Court made some interesting observations on judicial view by stating that:

59. "The contractor had submitted that the employers' attempt to resist enforcement on the grounds of an alleged breach of fair procedures is, in essence, an attempt to judicially review the adjudicator's decision through the back door."

The Court stated that in the opposition to enforcement failed on the merits of its case "rather than as a result of any supposed failure to comply with the three-month time-limit" for judicial review proceedings. The Court commented that the Act expressly contemplates that proceedings may be "initiated in a court in relation to" an adjudicator's decision, it did not stipulate that such proceedings had to be by way of judicial review. The Act was also silent on whether judicial review lies to restrain an adjudicator from reaching a decision on a pending adjudication. The Court added:

61. "It is unnecessary for the purpose of resolving the present proceedings to address the difficult question of whether adjudication under the Construction Contracts Act 2013 is amenable to judicial review under Order 84."

The judgement re-affirms the principles of the Act, namely that: 1) 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 2) the adjudicator's decision gives rise to an immediate payment obligation and 3) leave to enforce does not preclude a party from pursuing the matter through arbitration or litigation.

**Aakon Construction Services
Limited and Pure Fitout
Associated Limited**
[2021] 161 MCA
Simons J, 13.09.2021

This case concerned a subcontractor seeking leave to enforce an adjudicator's decision to pay the amount set out in the payment claim notice. The enforcement was resisted by the respondent on the grounds that the adjudicator lacked jurisdiction because 1. The notice to refer the dispute to adjudication was invalid due to ambiguity, 2. That several claims were unlawfully advanced, 3. That two attempts were made to apply for the appointment of an adjudicator with notices of different wording and 4. The respondent claimed that there was a breach of fair procedures in the adjudicator's failure to consider all of their defences.

1. The notice to refer the dispute to adjudication was invalid due to ambiguity.

The Court provided extensive commentary on the requirements of a notice to refer noting that the Act:

75. "...is silent on the interrelationship between (i) a notice of intention to refer, and (ii) the subsequent referral of the payment dispute to the appointed adjudicator. The Act does, however, expressly envisage that the referral will be accompanied by extensive documentation and information, which suggests that the referring party is not confined to the information accompanying the notice of intention to refer."

Where the Court stated that whilst the notice of intention to refer must accompany the referral, neither the Act nor the accompanying Code of Practice state that the details of the dispute as set out in the referral are confined to those set out in previously issued notice. In comparing the notice under the Act to its equivalent in the UK the Court advised:

80. "It should be explained that the range of disputes which can be referred to adjudication under the UK legislation is far broader than under the Construction Contracts Act 2013, and the adjudication process is not confined to payment disputes. The detail required to identify a complex non-payment dispute will be greater than that for a payment dispute."

The court further stated that:

81. "In circumstances where the Construction Contracts Act 2013 is largely silent on the status of the notice, it is at least arguable that the detail of the dispute can be further refined by the content of the subsequent referral. To hold that the adjudicator's jurisdiction is rigidly defined by what will, of necessity, be a brief description set out in the notice of intention to refer would appear to be inconsistent with the statutory provision that the adjudicator may take the initiative in ascertaining the facts and the law in relation to the payment dispute..."

and that:

83. "Provided always that the notice of intention to refer identifies the gravamen of the payment dispute, and, in particular, identifies

the construction contract; the parties; the site address; the payment claim notice; the response, if any, made to the payment claim notice; and the sum claimed, then the refinement of legal argument in the referral will normally be permissible.”

And furthermore that:

94. “The litmus test in assessing the adequacy of a notice of intention to refer must be whether the alleged defects impinged upon the responding party’s ability to defend the claim against it.”

In summarising the Court stated that the decision of the adjudicator had fallen “...well within the ambit of the payment dispute as described in the notice of intention to refer.” The Court further commented that:

77. “...the code of practice contemplates that the referral will to a large extent be self-contained, and will itself identify the relevant details of the payment dispute. Although a copy of the notice of intention to refer is to accompany the referral, the statutory code of practice does not say that the details of the dispute are confined to those set out in the notice.

2. That several claims were unlawfully advanced.

It was claimed by the Respondent that because several claims were detailed in the notice of intention to refer that this was in contravention of the Act. The Court stated that this position was incorrect as the Act at S6.- (9) expressly provides that the adjudicator “...may deal at the same time with several payment disputes arising under the same construction contract or related construction contracts.”

The Court added that this is “By contrast, under the UK legislation, the consent of all the parties is required before an adjudicator can adjudicate at the same time on more than one dispute under the same contract.” The Court summarised by stating that:

100. “There is no restriction, therefore, under the domestic legislation on a party referring more than one dispute to an adjudicator” and that “This is because the concept of a “dispute” has been given a broad interpretation. A single “dispute” may legitimately encompass a number of individual issues.”

The Court summarised the point by stating that “...this objection is misconceived and ignores the difference in wording between the Irish and the UK legislation.” The judgment confirms that the Notice of Intention to Refer should set out clearly and comprehensively the claim being made and the basis for it. However, this detail may be further expanded upon in the Referral.

3. That two attempts were made to apply for the appointment of an adjudicator.

The respondent advanced that there was material difference between two applications made to the Construction Contracts Adjudication Service (CCAS) where the Court advised that “...any difference in the wording employed as between the first and second application form submitted to the Construction Contracts Adjudication Service is legally irrelevant. The first application had been superseded by the second” adding that “Insofar

as the wording of the second application form is not identical to that contained in the notice of intention to refer, this is also legally irrelevant."

4. Breach of fair procedures in the adjudicator's failure to consider all their defences.

The Respondent advanced that the *"...adjudicator acted improperly in failing to consider the "true" value of the works under the payment claim notice. It is said that this represents a failure to consider a substantive defence properly put forward by the respondent."* However, the adjudicator acknowledged that in respect of the respondent that:

116. "...notwithstanding that it had failed to serve a response to the payment claim notice, the respondent was nevertheless entitled to adjudicate the true value of the payment claim. The adjudicator held, however, that before the respondent would be able to commence such an adjudication, it must first comply with the adjudicator's decision in this adjudication.

In summarising the position, the Court found that *"...the approach adopted by the adjudicator did not entail any breach of fair procedures"* advising that it is incorrect:

122. "...to characterise the adjudicator as having acted in breach of fair procedures by failing to consider a line of defence advanced by the applicant. Rather, the adjudicator made a reasoned decision that a valuation could not be commenced until the adjusted amount had been paid. This is more properly characterised as a finding on the part of the adjudicator that the line of defence was inadmissible at this time, than as the adjudicator having disregarded or ignored the defence."

In further commentary within the judgment the Court added that in respect of comparison with UK legislation that *"The Construction Contracts Act 2013 has many similarities to the Housing Grants, Construction and Regeneration Act 1996 in the United Kingdom. The latter legislation has given rise to an impressive body of case law in England and Wales"* and:

40. "There is an understandable temptation for practitioners and judges in this jurisdiction to borrow from this extensive learning when interpreting and applying the Construction Contracts Act 2013. The case law from England and Wales must, however, be approached with a degree of caution. This is because there are significant differences between the legislative approaches 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."

In particular, the Court noted a significant difference in the enforcement of an adjudicator's decision whereby *"...provision is made under the Construction Contracts Act 2013 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 the domestic legislation."* Whereas in contrast *"...the normal procedure for enforcing an adjudicator's decision under the UK legislation is to apply for summary judgment. Much of the case law is, therefore, concerned with whether the party resisting enforcement has*

been able to establish an arguable defence.” The Court noted a further difference insofar that:

43. “...the provisions in respect of payment claim notices under the Construction Contracts Act 2013 are materially different to those under the UK legislation. In particular, there is no express statutory provision under the Irish legislation which stipulates what the consequences of a failure to respond to a payment claim notice are to be.

Regarding an adjudicator’s jurisdiction the Court noted that:

20. “...one has to consider whether same is concerned only with the initial jurisdiction to enter upon a consideration of a payment dispute, or, alternatively, whether an error of law made in the course of the decision-making might itself be characterised as having been made outside jurisdiction.”

And additionally commenting:

21. “These are difficult issues, and given that, to date, there have only been a handful of written judgments delivered in respect of the Construction Contracts Act 2013, it is appropriate to proceed with caution. The precise contours of the High Court’s discretion to refuse to enforce what is expressed under legislation to be a binding decision should be developed incrementally.”

This is an important case as it reinforces that adjudication as an expeditious and cost-effective way to resolve construction disputes. The ‘pay now, argue later’ approach creates an immediate payment obligation, ensuring continued liquidity. The Court also emphasised the importance of the ability to enforce the decision promptly by binding the parties on a provisional basis. The Court further clarified that there is an entitlement to have a true value of the claim subsequently adjudicated. However, if the adjudicator finds that a default payment is triggered, the payment arising from the interim binding decision must be paid first and unless there is a clear breach of the rules of natural justice, enforcement of an adjudicator’s interim decision will be difficult to resist.

**Kevin O'Donovan and The
Cork County Committee of
the Gaelic Athletic Association
and Nael G. Bunni and James
Bridgeman and OCS One
Complete Solution Limited
[1020/872 JR]**

O'Moore J, 29.07.2021

The respondent applied to the Court for a judicial review and stay on continuance on an adjudicator’s decision on jurisdiction. The matter concerned a letter of intent (LOI) that had been signed on 10 June 2016 pre-dating the enactment of the CCA 2013 by just six weeks on 25 July 2016.

In considering the letter of intent the adjudicator concluded that he could not decide on his own jurisdiction but nonetheless had formed the view that the referrer was entitled to prosecute the adjudication pursuant to s. 6 of the Construction Contracts Act 2013. The Court noted, amongst other matters, that the conditions of contract were to “...supersede and replace any and all prior agreements or understandings, representations or communications (including any letter of intent) relating to the same subject matter.” The Court further noted that:

39. “...even after the LOI was signed and issued, there were still negotiations about certain aspects of the final Contract which would define the legal rights and obligations of the parties.

Secondly, and entirely consistent with the LOI itself, the LOI is seen as a temporary arrangement sufficient to allow the works to proceed, but only until the formal Contract was executed."

And further that "...the LOI is more than a statement of intent. However, the LOI itself contains (to use a phrase employed during the hearing) the seeds of its own destruction. It was always intended that it would be replaced by a subsequent contract." The Court further noted that "...the parties have agreed that a document dated the 12th of May 2017 applies to works which began almost a year earlier, and which had been ongoing over that period." The Court concluded that as the 2017 contract postdated the commencement of the 2013 Act, the referrer was entitled to seek adjudication under that legislation in respect of its claim and as a result the adjudicator had jurisdiction to proceed with the adjudication process. The judgment is informative in setting out the relative status of letters of intent and the subsequent contracts to which they relate.

**Principal Construction Limited
And Beneavin Contractors
Limited [2020] 199 MCA**
Meenan J, 16.07.2021

The applicant sought leave to enforce or enter judgment arising from an adjudicator's decision. The application was resisted by the respondent on three specific grounds. The Court in setting out the context of the case stated that:

12." The purpose and aim of the Act of 2013 is to provide for a summary procedure to enforce the payment of moneys from one party to another in a building contract, notwithstanding that it may ultimately transpire that such moneys are, in fact, not owed" and "It is clear that the provisions of the Act of 2013 enable a speedy payment of moneys. Firstly, as referred to above, s. 2 (5) (b) makes clear that the Act applies irrespective of the terms of the construction contract agreed between the parties. Thus, there is a statutory right to refer a payment dispute to adjudication. Secondly, the decision of the adjudicator is binding until the payment dispute is finally settled by the parties, or until a decision arises from arbitration or litigation. Thirdly, there is a summary procedure for enforcing a decision of the adjudicator."

The respondent submitted that the inclusion of the words "if binding" in S6.-(11) of the Act has the effect of making it easier to resist enforcement in Ireland than in the UK, as these words are not contained in the corresponding provision in the UK legislation. In addition, the respondent advanced that since the final certificate was not disputed within the time provided within clause 35 of the RIAI Contract it could not subsequently be referred to an adjudicator. Finally, the respondent argued that the adjudicator's refusal to allow the respondent to prosecute its counterclaim was made in material breach of natural justice.

Regarding the words 'if binding' the Court found that S6.-(11) must be read in conjunction with S6.-(10) where the latter states:

S6.-10 "The decision of the adjudicator shall be binding until the payment dispute is finally settled by the parties or a different decision is reached on the reference of the payment dispute to arbitration or in proceedings initiated in a court in relation to the adjudicator's decision."

Adding that:

17. "The UK authorities, notwithstanding the absence of such words in the corresponding section, have determined that the decision of

an adjudicator may be unenforceable either on grounds of jurisdiction or natural justice. Therefore, it seems to me that the words "if binding" ought to be interpreted in that narrow context."

In seeking to limit recourse to adjudication through clause 35 of the RIAI Contract the court stated that:

20. "The jurisdiction of the adjudicator derives, not from the contract, but rather from the terms of the Act of 2013, which I have set out above. This Act confers on a party to a construction contract a clear unfettered right to refer a payment dispute for adjudication. When the payment dispute has been referred, the adjudicator, in determining the dispute, may have regard to the terms of the construction contract itself. That is exactly what the adjudicator did in this case..."

In summary the court found that the provisions of the Construction Contracts Act 2013, which provides for adjudication, apply irrespective of the terms of the contract between the parties.

Regarding the submission that the adjudicator's refusal to allow the Respondent to prosecute its counterclaim was a material breach of the rules of natural justice, the Court found that since the adjudicator had considered the substance of the counterclaim, he had therefore acted within the bounds of natural justice. In reaching the decision the adjudicator stated that the respondent *"is entitled to plead a full defence in the Response to Referral including abatement, set-off etc., it cannot amount a counterclaim which in law is a separate action. I therefore have no jurisdiction to consider BCL's counterclaim."* The Court referred to the decision of the UK Supreme Court in *Bresco Electrical Services Ltd (In Liquidation) v. Michael J. Lonsdale (Electrical) Ltd* [2020] UKSC 25 where Lord Briggs in giving the judgment of the Court stated:

24. "... The set-off may be advanced by way of defence to the exclusion of the claim referred to adjudication, but not as an independent claim for a monetary award in favour of the respondent to the reference. ..."

The Court in agreeing with the UK Bresco case seems to have given a strong indication that counterclaims giving rise to an adjudicator's decision resulting in a positive award to a respondent will not be permitted, being considered a separate action.

**Construgomes & Carlos
Gomes SA and Dragados
Ireland Limited, BAM Civil
Engineering and Banco
BPI SA [2021] IEHC 79**

Butler J, 04.02.2021

This case centres around a sub-contractor seeking to restrain payment to a main contractor arising from an on-demand bond. The sub-contractor claimed that the matters to which the bond related had already been dealt with in an earlier adjudication and as a result the further demand for payment through the bond was fraudulent. The Sub-Contractor disputed any liability for defects, stating that the issue had been previously and finally addressed during the earlier adjudication and thus the main contractor could not now make a further separate claim. The Sub-Contractor described the demand for payment as a collateral attack on the adjudicator's decision and contended that to do so was fraudulent. The Court did not agree with the proposition that the responding party is compelled to make the entire of any potential claim during the adjudication process or lose the right to make the claim entirely. The Construction Contracts Act 2013 states that an adjudicator's decision is binding until the payment dispute is finally settled by the parties or a different decision is reached in arbitration or court proceedings. The case

confirms that a contractor cannot unilaterally set off against an adjudicator's award and that it remains open to the parties to seek to enforce their contractual rights separately, outside the adjudication process.

**Gravity Construction Limited
and Total Highway
Maintenance Limited**
[2021] IEHC 19,
Simons J, 26.01.2021

This was the first judgment from the High Court in Ireland to enforce an Adjudicator's decision. The Respondent did not pay in accordance with the decision of the Adjudicator whereupon the Referrer applied to the Court to have the decision enforced. The Respondent in seeking to refer the matter to arbitration sought to have the payment stayed.

The Court was advised that the Respondent had made an offer of settlement, without prejudice to its right to pursue arbitration, to pay the sum due on the adjudicator's decision within two weeks. The Court confirmed that adjudication decisions are binding in accordance with S6-(10) of the Construction Contracts Act 2013 (the Act) stating:

1. "...this legislation allows for the possibility of the making of, and enforcement of, adjudications in construction disputes on an expedited basis. Such adjudications are binding pending the resolution of the dispute between the parties by way of arbitration or legal proceedings."

The Court decided to hand down an order, giving the applicant leave to enforce the Adjudicator's decision in the same manner as a judgment or order of the High Court. Simons J in judgment that:

11. "The framing of the order as an "unless" order represents an appropriate compromise in that it respects the statutory entitlement of the applicant to relief, while affording the respondent a very short period of time within which to make payment without a judgment being formally entered against it..."

The order made pursuant to section 6(11) of the Act, fully supports the statutory entitlement of the Referrer to receive prompt payment, where the Court confirmed:

37. "An order that the applicant has leave to enforce the adjudicator's decision in the same manner as a judgment or order of the High Court, and that judgment is to be entered against the respondent in favour of the applicant".

The decision acts as a deterrent to those who seek to employ delaying tactics to deny a contractor of entitlement due on foot of an adjudicator's decision. In this case the Courts for the first time provided full support to the Act by enforcing an adjudicator's decision under S.6-(11) of the Act. The decision is significant as absent of finding for enforcement it would have the effect of a wholesale undermining adjudication as set out in the Act, thus rendering it and its provisions ineffective.

Although the Court enforced the adjudicator's decision issued 28 April 2020 it took a period of nine months to 26 January 2021 to obtain the enforcement order. To ensure expediency of payment, as a central tenet of the Act, the High Court later issued Practice Direction HC 105 to ensure that the process could be made quicker.

Additional relevant notes

**Practice Direction for
Adjudication Enforcement
Applications**

(HC 105) in effect from 26.04.2021.

The new Practice Direction (HC 105) allow for applications to enforce or enter judgment in respect of a decision of an Adjudicator. The presiding Judge for Adjudication matters will give such directions to ensure that an application will be heard and determined with all due expedition. In practice the Direction requires all applications for enforcement shall be made returnable at 10.30am before the High Court on the first available Wednesday with the proviso that that papers are filed on the preceding Friday.

***Bowen Construction Limited
and Ors and Kelly's of Fantane
(Concrete) Limited***
[2019] IEHC 861.

Barniville J, 06.12.2019.

Any party considering serving notice of intent to adjudicate upon another party should also be aware of the nine guiding principles for construction as set out by Barniville J, albeit in the context of a reference to a case in arbitration, as follows:

148. "(1) The words in the notice should not be construed as if they were contained in a statute. The words should not be analysed in an overly legalistic manner.

(2) The relevant point in time for the purposes of ascertaining the scope of the dispute referred is the time of the reference to arbitration itself.

(3) In determining whether a particular dispute of claim has been referred, it is necessary to look objectively at what has passed between the parties to the reference up to the date of the reference. The words used must be given their natural meaning in their context applying an objective test. The court can and should have regard to the factual background or matrix leading up to the reference to arbitration.

(4) The focus should be on the essential claim which has been made and the fact that it has been challenged as opposed to the precise grounds on which the claim has been rejected or not accepted.

(5) The disputed claim or assertion is not necessarily defined or limited by the evidence or arguments submitted by either side to each other before the reference to arbitration.

(6) It is not necessary to set out in a reference to arbitration all of the grounds or points of defence or response which the respondent may wish to rely upon in resisting the claim. It is open to a respondent to raise any point or argument by way of defence to the claim being made in the arbitration notwithstanding that the point is not referred to in the reference to arbitration. this is a matter of procedural fairness for a respondent.

(7) Procedural fairness works both ways. If it is open to a respondent to raise any defence to the claim notwithstanding that it is not referred to in the reference to arbitration as a matter of procedural fairness, so too should it be open to the claimant to respond to any such defence sought to be relied upon by the respondent. That too is matter of procedural fairness for the claimant. Provided such response directly arises from the defence raised and concerns an issue which falls within the scope of the arbitration agreement.

(8) A particular dispute may comprise one or several issues. Or there may be several disputes between the parties. A dispute or disputes may attract more issues and become more nuanced as time goes on. In order to identify the dispute or disputes and the issue or issues arising, it is appropriate to consider the exchanges between the parties prior to and up to the point of the notice to refer. It is not necessary for the words used in the notice to refer to be ambiguous before the arbitrator or court can consider these exceptions.

(9) The court will also have to consider whether the terms of contract between the parties on its proper construction disapplies any principles or propositions."