THE HIGH COURT

Record No. 2023/874JR

BETWEEN

K&J TOWNMORE CONSTRUCTION LIMITED

APPLICANT

AND

DAMIEN KEOGH

RESPONDENT

AND

DESLEND (MECHANICAL) LIMITED T/A COBEC ENGINEERING GROUP

NOTICE PARTY

JUDGMENT OF Mr. Justice Twomey delivered on the 17th day of August, 2023

INTRODUCTION

1. '*The only people who can litigate in the High Court are paupers or millionaires*,'[1] according to the former president of the High Court. This begs the question of whether there is anything which the Oireachtas can do, to make access to justice affordable for individuals and small businesses? The Construction Contracts Act, 2013 ("**2013 Act**") was such an attempt by the Oireachtas to introduce an affordable alternative to litigation (known as 'adjudication'), since *'the legal costs incurred by the parties will be* ***much less*** *than those of conventional*

[1] Kelly P. in *The Bar Review*, February, 2018, Vol. 23(1) at p. 11.

litigation' (*per* Simons J. in *Aakon Construction Services Ltd. v. Pure Fitout Associated Ltd.* [2021] IEHC 562 at para. 7 (Emphasis added)).

2. The introduction of this Act has however now led to the question of whether the intention of the Oireachtas, to introduce a *cheaper* and *quicker* alternative to litigation, could be thwarted by one party to that dispute judicially reviewing the adjudicator's decision? This is because if an adjudicator's decision can be judicially reviewed, then while the High Court is conducting that judicial review, the adjudication process is delayed significantly, and it becomes subject to the very high costs of that judicial review in the High Court (since Ireland ranks '*among the highest-cost jurisdictions internationally*).[2]

3. That is the broader issue which lies behind the applicant's ("**Townmore**") claim that it is a '*matter of significant public importance to the construction industry'* that the High Court grant leave to bring a judicial review in this case. It states that:

> "It is becoming practice in adjudications to put in substantial delay/disruption, breach of contract and damages claims in circumstances where [Townmore] submits that the adjudication process was not intended to, and does not on the wording of the Act, provide for them".

Thus, Townmore wants to litigate, by way of judicial review, the issue of whether an adjudicator, appointed to deal with a '*payment dispute'* under a construction contract, has jurisdiction to adjudicate upon, not just a claim for work done, but also for what Townmore describes as, in effect, a 'damages claim'. Townmore claims that an adjudicator does not have jurisdiction to determine such claims.

4. While this case does indeed raise a '*matter of significant public importance'*, it seems to this Court that the issue of importance is the broader one mentioned, i.e. whether the Oireachtas can have its intention, of introducing an *alternative to litigation*, thwarted by one

[2] *Review of the Administration of Civil Justice in Ireland*, October 2020, at p. 267, chaired by Kelly P.

party to an adjudication subjecting the adjudication process to *litigation by the back door*, i.e. by judicially reviewing the adjudicator's decision?

5. Indeed, this question has the potential to be of public importance beyond the construction industry, to the extent, if any, that the Oireachtas seeks to introduce alternatives to litigation more generally, for individuals and small businesses, who are neither *'millionaires'* nor '*paupers',* and so who cannot afford conventional litigation in the High Court.

6. This issue was considered during the vacation sittings on 2nd and 3rd August, 2023 as it was an urgent application by Townmore to prevent the respondent in this case (the "**Adjudicator**") from delivering an adjudication on a dispute to which he was appointed and which he was due to deliver on 18th August, 2023 (which was later extended to the 25th August, 2023 by the agreement of both parties, after the conclusion of the hearing before this Court).

BACKGROUND

7. The backdrop to this case is that the Oireachtas introduced the 2013 Act in order to achieve a *quicker* and *cheaper* resolution of payment disputes by providing for the appointment of an adjudicator, who is expected to provide a decision on a payment dispute under a building contract, *within 28 days* of the referral of the dispute to her.

8. While this is a very short timeframe within which a dispute is to be resolved, it is important to note that the 2013 Act provides that a party (such as Townmore), who might be dissatisfied with the adjudicator's decision, can, in effect, challenge/appeal the decision of the adjudicator. The Act does so by providing that the adjudicator's decision *is not enforceable until* there is a decision of the High Court to enforce the adjudicator's decision. During these 'enforcement proceedings', the adjudicator's decision can be challenged in a *'narrow context'*, i.e. on the grounds that the adjudicator did not have jurisdiction to make her decision or on the

grounds that she breached natural justice in reaching her decision (see *Principal Construction Ltd. v. Beneavin Contractors Ltd* [2021] IEHC 578 at para. 17).

9. In this '*innovative'* way (see *Aakon* at para. 8), the Oireachtas sought to ensure that builders get paid money that is determined to be owed to them (by an independent adjudicator) in a much quicker and much cheaper way, than if they had to resolve their payment dispute by conventional litigation. In this way, a building contractor is paid:

- *within months rather than the years* which it can take for a final resolution of a payment dispute using conventional litigation in the High Court (plus any appeals to the Court of Appeal/Supreme Court),
- *at a fraction of the costs* of conventional High Court litigation and any appeal (because of the speed of adjudication, absence of expensive discovery and other litigation procedures, absence of right to recover legal costs from the other party, *etc.*).

Another advantage of adjudication over litigation is that there is less risk of a party to an adjudication being subject to the '*blackmail*' which can arise in conventional litigation because of the high costs involved. (This litigation '*blackmail'* was referenced by the Supreme Court in *Farrell v. The Governor and Company of the Bank of Ireland* [2013] 2 ILRM 183 at para. 4.12 and arises because litigation, particularly in the High Court, is so expensive, since Ireland '*ranks among the highest-cost jurisdictions internationally'.* This means that a party to a building contract, even though it has a very strong case, may end up having to *'buy off the case'* in order *'to avoid having to incur the costs'* in the tens/hundreds of thousands of euro, which are involved in litigating.)

10. In this case, Mr. Damien Keogh S.C., was duly appointed as an adjudicator under the 2013 Act. He was appointed to resolve a payment dispute between Townmore, the main contractor, and the notice party ("**Cobec**"), a sub-contractor, under a sub-contract dated 6th

January, 2021 ("**Sub-Contract**") for mechanical and electrical works at a development at Eblana Avenue, Dun Laoghaire, Co. Dublin.

11. The decision, which Townmore now seeks leave from this Court to judicially review, is the decision of the Adjudicator on 18th July, 2023, that *he will not resign as an adjudicator* despite Townmore's claims that he does not have jurisdiction to hear the payment dispute between Townmore and Cobec.

12. In Townmore's application for leave from this Court to take these judicial review proceedings, it claims that it should not be forced to participate in the adjudicative process which, it claims, lacks jurisdiction.

13. The key question for this Court is whether the High Court determination of the challenge to the Adjudicator's jurisdiction should take place *before* the adjudication process is complete, i.e. by means of a judicial review, or whether it should take place *after* the adjudication is complete, i.e. as part of the 'enforcement proceedings' envisaged by the 2013 Act and so before an adjudicator's decision becomes enforceable against the paying party to the building contract dispute.

The basis of Townmore's claim that the Adjudicator does not have jurisdiction

14. Cobec submitted a claim for payment in respect of the Sub-Contract on 26th October, 2022, which was rejected by Townmore on 24th November, 2022. On 29th March, 2023, Cobec submitted a Payment Claim Notice in the sum of €3,789,814.82. On 28th April, 2023, Townmore disputed this claim. On 15th June, 2023, Cobec commenced a referral to adjudication in accordance with the 2013 Act for the payment of this sum.

15. Townmore claims that the dispute referred by Cobec to adjudication is not in fact a 'payment dispute' within s. 6 (1) of the 2013 Act, which states:

> "A party to a construction contract has the right to refer for adjudication in accordance with this section **any dispute relating to payment arising under the construction contract** (in this Act referred to as a "payment dispute")." (Emphasis added)

Section 1 (1) of the 2013 Act states that:

> ""payment claim" means a **claim to be paid an amount under a construction contract**". (Emphasis added)

16. Townmore says that Cobec's claim is not a payment dispute as the payment claim was premature and invalid by reason of its timing, i.e. as it was not due on account of the fact that the Payment Claim Notice was made after the payment claim date and/or that it was issued before the date of practical completion. On this basis, Townmore claims that the Adjudicator does not have jurisdiction to deal with this dispute.

17. More significantly, Townmore also claims that the Adjudicator lacks jurisdiction to consider part of the claim by Cobec which relates to its alleged entitlement to payment in respect of delay and disruption allegedly caused by Townmore. On this basis, Townmore claims that the Adjudicator does not have jurisdiction to consider Cobec's claim for loss and expenses arising from such delay and disruption. In particular, Townmore claims that any claim which may ultimately result in an award of damages is a claim in damages and so is not a dispute relating to payment so as to be a 'payment claim' for the purposes of the Act (and so cannot form the basis of a 'payment dispute').

18. On this basis, by letter dated 14th July, 2023 to the Adjudicator, Townmore claimed that he lacked jurisdiction to deal with this matter and sought his resignation as adjudicator in the matter.

19. By email dated 18th July, 2023, the Adjudicator, while accepting that he could not issue a *binding* decision on his own jurisdiction, reached a non-binding conclusion that he had

jurisdiction to proceed with the adjudication and that he would not be resigning as adjudicator. He added that:

> "Ultimately, any challenge to my jurisdiction to decide the payment dispute referred in this adjudication, would be a **matter for a court to rule on** in any proceedings that may arise **following my decision** in this adjudication." (Emphasis added)

For the reasons outlined below, this Court refuses the leave sought to judicially review this decision of the Adjudicator.

ANALYSIS

20. In these proceedings, Townmore seeks, amongst other things, an order of *certiorari* quashing the Adjudicator's decision of 18th July, 2023, not to resign and his decision to continue as an adjudicator of the dispute.

Can Townmore judicially review the Adjudicator's decision not to resign?

21. The key question at issue between the parties is whether Townmore is entitled to judicially review the decision of the Adjudicator in this case. As acknowledged by counsel for Townmore, at the *'heart of the application*' is whether or not the most *'appropriate'* remedy (to quote *G v. DPP* [1994] 1 I.R. 374 at p. 378), which Townmore could obtain for its claim that the Adjudicator lacked jurisdiction, was an order by way of judicial review. Cobec claims that the most appropriate remedy is to raise this challenge to the Adjudicator's jurisdiction at the enforcement proceedings stage of the adjudicative process, as envisaged by the 2013 Act.

22. However, Townmore claims that the invalidation of the Adjudicator's decision to continue with the adjudication by means of *certiorari*, obtained as part of judicial review proceedings, is the most appropriate remedy. Otherwise, Townmore says it would be required to participate in an adjudicative process, in which it should not have to participate (if it is proved correct that the Adjudicator lacks jurisdiction). To put it another way, Townmore is claiming

that requiring a party to wait until the Adjudicator has delivered his adjudication and then find out afterwards that he did not have jurisdiction (if Townmore is correct), is an *inappropriate* remedy compared to *certiorari*/judicial review which will determine *in advance* whether the Adjudicator has jurisdiction. It is of course relevant to note that as part of this judicial review, if leave is granted, Townmore anticipates the High Court staying the adjudication process until the court decides if the Adjudicator has jurisdiction to proceed. In this way, Townmore anticipates that it would avoid ending up participating in an adjudication unnecessarily (if it is correct that the adjudicator does not have jurisdiction).

23. For its part, Cobec argues that leave to bring judicial review should not be granted because the 2013 Act provides an alternative (and appropriate) remedy to deal with Townmore's claim that the Adjudicator lacked jurisdiction, namely the enforcement proceedings, which are envisaged by the 2013 Act and provided for under Order 56B of the Rules of the Superior Court. These enforcement proceedings exist because the decision of an Adjudicator is not self-executing. Rather to be enforced, it is necessary for there to be a decision of the High Court to that effect. As noted by Simons J. at para. 8 of *Aakon*:

> "The Act seeks to ensure that an adjudicator's decision may be enforced promptly by making it **binding upon the parties on a provisional basis**. The **innovative feature** of the legislation is that it provides that an **adjudicator's decision shall be enforceable, by leave of the High Court**, in the same manner as a judgment or order of that court with the same effect. **Where leave is given**, judgment may be entered in the terms of the adjudicator's decision." (Emphasis added)

24. However, Townmore argued that these '*enforcement proceedings'* do not provide an effective or appropriate remedy since those proceedings arise *after* the decision of the Adjudicator. It claims that it is *more appropriate* that the jurisdictional issue be dealt with *before* the Adjudicator reaches his decision, and therefore by means of this judicial review

seeking a declaration that the decision of the Adjudicator to continue with the adjudication is unlawful.

25. Before deciding this key issue between the parties, as to whether the enforcement proceedings, pursuant to the 2013 Act, are an alternative and appropriate remedy to judicial review, it is crucial to understand the rationale for the 2013 Act in the first place, since this is an important factor in this Court's decision.

26. In *Principal* at para. 12, Meenan J. provided a useful summary of the Act, which summary was also adopted by Simon's J. in *Aakon* at para. 9:

> "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.** This **ensures that moneys are paid without having to await** the outcome of arbitration or litigation, which, more often than not, involves delay. The **necessary timelines for payment in the building and construction industry are very different** to the timelines in arbitration and litigation. 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." (Emphasis added)

27. It is important to note, as was done by Meenan J., that these unusual provisions which introduced the adjudication process are there to ensure that builders are paid quickly because of the 'timelines' that apply in that industry. This appears to be a reference to ensuring that

building contractors do not end up going out of business for cashflow reasons caused by an employer/main contractor not paying them promptly. One unusual provision is that the 2013 Act provides for a very rapid summary procedure to *decide if monies are owed* to builders, *even* if it subsequently transpires, for whatever reason, that the monies are not if fact owed to them. This is what is referred to as the '*pay now, argue later*' principle, which appears to apply in order to ensure cashflow for building contractors. In this regard, it is relevant to observe that one reason, why monies which are 'adjudicated' to be owing to a builder might subsequently transpire not to be owing, is, if the adjudicator did not, in fact, have jurisdiction to determine the payment dispute in question. This is clear from the observations of Meenan J. in the *Principal* case. Before referring to these observations, it is necessary to refer to ss. 6 (10) and (11) of the 2013 Act, which state:

> "(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.
>
> (11) **The decision of the adjudicator, if binding, shall be enforceable either by action or, by leave of the High Court**, in the same manner as a judgment or order of that Court with the same effect and, where leave is given, judgment may be entered in the terms of the decision." (Emphasis added)

28. At para. 17 of *Principal*, Meenan J. goes on to analyse these sections when he states that:

> "The words "if binding" in s. 6 (11) have to be read subject to the provisions of s. 6 (10) which states:

> "(10) the decision of the adjudicator shall be binding until the payment dispute is finally settled by the parties---"
>
> 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**." (Emphasis added)

Thus, while the grounds for challenging the adjudicator's decision are relatively confined, it is to be noted that they include a challenge based on jurisdiction. In addition, as noted by Meenan J., the 2013 Act expressly provides for a *'summary procedure to enforce the payment of moneys'* by a paying party, such as Townmore, even though it *'may ultimately transpire that such moneys are, in fact, not owed'* on the *'grounds of jurisdiction'* – yet this is the very complaint made by Townmore in this case, i.e. that it will have to undergo the adjudication process and be found liable provisionally for a certain sum, which subsequently may not be due because the Adjudicator lacked jurisdiction.

29. This is exactly the situation which will arise in this case, *if*, as part of the enforcement proceedings, the High Court determines that the Adjudicator did not have jurisdiction to deal with the payment dispute between the parties (as alleged by Townmore).

30. More generally, it is also relevant to note that at para. 20 of *Principal*, Meenan J. states that

> "This act confers on a party to a construction contract a **clear unfettered right to refer a payment dispute for adjudication."** (Emphasis added)

Thus, the intention of the legislature is clear, namely that every building contractor who is subject to the terms of the Act is entitled to use this quick and cheap dispute resolution

procedure to resolve any dispute regarding payments due under the building contract. It seems clear that the Oireachtas regarded it as being a matter of public interest that all builders should be able to benefit from a cheap and fast adjudication process, so that there is little delay in them being paid for work that they have done.

31. In *Aakon*, Simons J. gives some further background to some of the novel features of the 2013 Act. At para. 5 *et seq*., he states:

> "The Construction Contracts Act 2013 has put in place a statutory scheme of adjudication whereby payment disputes under construction contracts can be heard and determined in a **very short period of time**. The adjudication process is designed to be **far more expeditious than conventional litigation or arbitration**. The default position is that the adjudicator shall reach a decision within 28 days […]
>
> The fact that an adjudication will be heard and determined within a matter of weeks has **the consequence that the legal costs incurred by the parties will be much less than those of conventional litigation or arbitration.** [...]
>
> The Act seeks to ensure that an adjudicator's **decision may be enforced promptly** by making it **binding upon the parties on a provisional basis**. The **innovative feature** of the legislation is that it provides that an adjudicator's decision shall be **enforceable, by leave of the High Court**, in the same manner as a judgment or order of that court with the same effect. Where leave is given, judgment may be entered in the terms of the adjudicator's decision. […]
>
> The Construction Contracts Act 2013 **does not designate a decision of an adjudicator as final and conclusive**. Rather, it is envisaged that an adjudicator's decision may be **superseded by a subsequent decision** reached in arbitral or court proceedings. […]

The qualifying words "if binding", as used in section 6 (11) of the Act, are merely intended to address the contingency of the adjudicator's decision having been superseded by a subsequent decision of an arbitrator or a court. **A party will not be allowed to enforce an adjudicator's decision which has already been overtaken by events: such a decision will no longer be binding.**

In many other statutory schemes which provide for a second stage of decision-making, the decision at first instance is not normally enforceable pending the outcome of the second stage. Even in those statutory schemes where it is, in principle, open to rely on the decision of first instance, it is often possible to apply for a stay pending the outcome of the second stage. The factors to be taken into account in deciding whether to grant a stay will include, *inter alia*, the balance of justice and the relative strength of the parties' respective cases. **By contrast**, the Construction Contracts Act 2013 mandates that **the decision at first instance is to be binding unless and until superseded** by a subsequent decision of an arbitrator or a court." (Emphasis added)

32. While, as noted by Simons J., the 2013 Act mandates that an adjudicator's decision is binding, it is important to bear in mind that it is not enforceable until there has been a decision of the High Court to that effect. Indeed, at that stage it may become unenforceable (as noted by Meenan J. in *Principal*) on the '*grounds of jurisdiction or natural justice*'.

33. At para. 15 of *Aakon*, Simons J. states:

"The rationale underlying the legislation is that it is in the public interest that payment disputes under construction contracts be resolved expeditiously and that the decision of an adjudicator should be capable of being enforced immediately. This rationale is sometimes described by the shorthand "*pay now, argue later*". The paying party is entitled to pursue the matter further whether by way of arbitral or court

proceedings. In the event that it is successful, it will then be entitled to recover any overpayment from the other side." (Emphasis added)

34. Simons J. refers in his judgment to the case law in England & Wales, which is not directly applicable to the 2013 Act, as the English legislation is different in significant respects. However as noted by Simons J. at para. 18:

> "The [English & Welsh] case law is nevertheless of great assistance in addressing the question of principle as to whether and when a court should depart from the literal meaning of the legislation, which designates an adjudicator's decision as *"binding"*. In brief, the case law from England and Wales identifies two broad exceptions to the binding nature of an adjudicator's decision. The first concerns the adjudicator's jurisdiction. **It has been held that where an adjudicator exceeds the jurisdiction conferred upon him by the parties, the adjudicator's decision will be treated as invalid** (subject to the possibility of severance). The second exception concerns the requirement that an adjudicator comply with fair procedures. If it is demonstrated that fair procedures have not been properly observed and that this has had a material effect on the outcome of the adjudication process, then, again, the adjudicator's decision will not be regarded as valid. […]
>
> Moreover, when speaking of an adjudicator's jurisdiction, 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.
>
> 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. […]

For present purposes, what requires to be addressed is **the legal basis upon which the court would be entitled to refuse to enforce a decision which the legislation proclaims to be "*binding*"** until superseded by another decision.

The "binding" status is only conferred on an adjudication which meets the criteria prescribed under the Construction Contracts Act 2013. **A court, in exercising its discretion to grant leave to enforce, must be entitled to consider whether a purported adjudication meets the statutory criteria.** To take an obvious example, the provisions of the Construction Contracts Act 2013 only apply to construction contracts entered into after 25 July 2016. The court would need to be satisfied that this temporal criterion had been fulfilled before it would grant leave to enforce. See, by analogy, the judgment of the High Court (O'Moore J.) in *O'Donovan v. Bunni* [2021] IEHC 575.

On the same logic, it would seem to follow that the **court must also be satisfied that the adjudication has been made in respect of a "payment dispute"**. Unlike the position obtaining under the equivalent UK legislation, the statutory scheme of adjudication is confined to payment disputes and does not extend to other types of dispute which might arise in the context of a construction contract.

It is only a small step, then, to say that the court should also consider whether **the adjudicator's decision is confined to the dispute which had been referred for adjudication**. It seems to me that, by analogy with the approach taken to arbitration proceedings, **the court is entitled, on an application for leave to enforce, to confirm that the adjudicator's decision does not exceed the scope of the referral to**

adjudication. An adjudicator does not enjoy an inherent jurisdiction, rather it must be conferred upon him or her by the parties. […]

In summary, and having regard to the very specific and limited grounds of objection advanced in this case, I am satisfied that the court – in the exercise of its statutory discretion to grant leave to enforce – **is required to consider, first, whether the adjudicator's decision comes within the terms of the payment dispute as referred**; and, secondly, whether fair procedures, and, in particular, the right of defence, has been respected. As the case law evolves, it will be necessary to address more difficult questions, such as whether errors of law are similarly capable of examination in the context of an application for leave to enforce." (Emphasis added)

35. Just as Meenan J. in *Principal* appears to have contemplated the type of jurisdictional challenge brought by Townmore in this case, it also seems to this Court that Simons J. contemplated those same issues in somewhat more detail. Indeed, the very issue which is the subject of this dispute, namely whether something is a 'payment dispute' or not under the 2013 Act, is expressly referenced by Simons J. as something about which the High Court, when dealing with enforcement proceedings, must be satisfied. (In this case, it is whether a loss and expense claim arising from a delay and disruption claim is a 'payment dispute'.)

36. It seems to this Court that his analysis in these paragraphs is exactly what should be done regarding Townmore's claim, namely that it is the job of the High Court in the course of the enforcement proceedings, to consider whether the adjudicator had jurisdiction to adjudicate on the dispute (whether an initial jurisdiction to make the decision, or that he acted outside his jurisdiction in the course of decision-making).

37. As noted by Simons J., the fact that these issues have not been dealt with to date by the High Court is simply because the 2013 Act is relatively new and these matters arise incrementally as cases come to court. Thus, in this case, it is clear that *if* the enforcement of

the Adjudicator's decision is subject to enforcement proceedings in the future (and clearly if there were a settlement between the parties after the Adjudicator's decision, enforcement proceedings would not be necessary), then the judge dealing with enforcement proceedings under Order 56B (currently Simons J.), will then have to consider the precise effect of a claim after an adjudication that an adjudicator did not have jurisdiction. In this incremental, way the law in this area will be clarified by the judge overseeing enforcement proceedings under the 2013 Act.

38. This Court agrees with the foregoing analysis by Meenan J. and Simons J. regarding the role of the High Court in dealing with jurisdictional challenges and in considering what encompasses a 'payment dispute'. On this basis, 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.

39. While this is the primary reason for this Court's refusal of leave, there are a number of other reasons (which will be considered next) why this Court believes that leave to judicially review the Adjudicator's decision should not be granted, but instead that a challenge to the Adjudicator's decision pursuant to Order 56B is the appropriate remedy in this case.

The speedy resolution of payment disputes in building contracts

40. As noted by Simons J., the statutory scheme of adjudication is clearly designed to provide payment for builders at an exceptionally fast pace - the default position is that the adjudicator shall reach a decision within 28 days. It seems clear that the speedy resolution of payment disputes in construction contracts is in the public interest. This is because many of these building contractors perform an important role in providing housing and critical infrastructure in the State and for some of them, the payment will be important for their

continued solvency and survival. It seems clear that the Oireachtas' rationale for introducing the 2013 Act was to provide for the rapid resolution of any payment dispute, so that a builder is not out of pocket for any longer than absolutely necessary whether from a main contractor or an employer.

41. With this in mind, it is relevant to note that Towmmore's key complaint (regarding the Adjudicator not having jurisdiction to deal with the 'damages claim') might be described, not as a claim that it will have to pay money it does not owe, but rather a more technical claim, i.e. that any determination of the sum due should be made by a court/arbitrator rather than an adjudicator.

42. However, it is important to note that if this Court denies Townmore leave to bring judicial review proceedings, and its challenge to jurisdiction takes place after the Adjudicator's decision, rather than before, Townmore is still not required to *pay* Cobec the sum found by the Adjudicator to be due to Cobec (if any). This is because it is only *after the enforcement proceedings* in the High Court have come to an end (and the jurisdiction issue is resolved) that any payment is required to be made by Townmore.

43. On the other hand, if leave is granted and there is a challenge to the Adjudicator's jurisdiction *before* his decision is handed down, the involvement of judicial review in the whole process means that there will be a significant impact on the time it will take to resolve the dispute (whether by the Adjudicator or by a court/arbitrator), and so a failure to achieve the aim of the 2013 Act that payment disputes be resolved expeditiously.

44. In this regard, uncontroverted submissions were made on behalf of Cobec that where an adjudication is subject to judicial review it is likely to take *circa* 11 months for a High Court judicial review to be completed and therefore, if Cobec is successful, 11 months before the adjudicator is allowed to resume the adjudication process (assuming that the adjudication is stayed pending the determination of the judicial review). Of course, this 11-month timeframe

will be increased by months, if not years, if there is an appeal, of the High Court's decision on the judicial review, to the Court of Appeal/Supreme Court.

45. In contrast, uncontroverted submissions were made on behalf of Cobec that enforcement proceedings under Order 56B are likely to be dealt with by the judge dealing with enforcement proceedings under the 2013 Act within 4 to 6 weeks of the issue of the notice of motion seeking the enforcement of the Adjudicator's decision.

46. Accordingly, from the perspective of the rationale of the 2013 Act, of providing *quicker* and *cheaper* payments to builders than conventional litigation, it is relevant to note that denying Townmore judicial review will *not lead to it being legally obliged to make a payment of a 'damages claim' to Cobec*, if the Adjudicator does not, as Townmore claims, have jurisdiction to deal with the claim. Rather it will lead to a determination of how much is owed to Cobec *being speedily dealt with* by the Adjudicator (followed by a *speedy* resolution by the High Court under enforcement proceedings of whether the Adjudicator had jurisdiction to deal with this claim and so a speedy resolution of whether Townmore is legally obliged to pay the money to Cobec).

47. Therefore, when one bears in mind that 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 (with all the costs and delays involved therewith). Rather the more appropriate remedy is enforcement proceedings under Order 56B. This is particularly so when one bears in mind that Townmore will *only be legally obliged to pay* sums to Cobec *after* the jurisdictional challenge is dealt with by the High Court, within a matter of weeks of the adjudication, which itself is due within 28 days of the referral to adjudication.

48. For this reason, while the argument that Townmore should not have to participate in an adjudication which turns out to be without jurisdiction is superficially appealing (as it would seem logical that a party should not have to undergo a process which has the potential to be invalid), account must be taken of the rationale of the 2013 Act and the public interest in ensuring speedy resolution of payment disputes in construction contracts.

Reducing the legal costs for building contractors in seeking payments allegedly due

49. Simons J. noted in *Aakon* that by enacting the 2013 Act, the legislature sought to ensure that the legal costs, which are incurred by parties to a construction contract, will be '*much less'* than the costs of conventional litigation (which in the High Court can, even in relatively minor cases, cost hundreds of thousands of euro). This is in part achieved by the fact that the adjudication has to be determined within a matter of weeks, without expensive discovery and other litigation procedures and the fact each party pays their own legal costs (so there is an incentive for all parties to reduce their legal costs – as they will not be paid by the losing side).

50. In addition, a building contractor (who might be a sole trader or small company) seeking payment from a financially powerful employer or main contractor is less likely to be subject to the risk of *'blackmail'* that is present in conventional litigation. This litigation *'blackmail'* was referenced by Clarke J. in the Supreme Court case of *Farrell v. The Governor and Company of the Bank of Ireland* [2013] 2 ILRM 183 at para. 4.12, i.e. the *'blackmail'* of having to *'buy off the case (even if it was wholly unmeritorious) so as to avoid having to incur the costs of defending'* it. A related point was made by by O'Donnell J. in the Supreme Court case of *Quinn Insurance Ltd (Under Administration) v. PricewaterhouseCoopers* [2021] IESC 15 at para. 12, in the context of a litigant who fears that she might not be able to recover the very significant costs from the other side even if she wins her case, i.e. he referred to the fact that such a litigant may well feel *'aggrieved'* at not having her day in court and so end up getting '*something less than […] justice'*:

"the pressure to compromise because of the risk of expenditure of costs which will be irrecoverable is **something less than the administration of justice** according to law and instead has uncomfortable echoes of the **practice and procedure of the highwayman**." (Emphasis added)

51. This 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.

52. However, this threat of litigation *'blackmail'* for a party to a construction contract does not exist at all, or to anything like the same degree, when the payment dispute is resolved by adjudication, rather than conventional litigation. This is because the costs of adjudication are so much less than conventional litigation. (It is important to note that there is no suggestion of any improper motivation on the part of Townmore in seeking to resolve its jurisdictional claim by means of conventional litigation/judicial review, rather than as part of the adjudication/enforcement proceedings.)

53. Yet this advantage of adjudication will disappear if this Court was to permit a judicial review of the Adjudicator's decision (and the incurring of hundreds of thousands of euro in the costs of a judicial review hearing in the High Court and any appeal to the Court of Appeal/Supreme Court). Accordingly, this is another factor in favour of this Court exercising its discretion not to grant leave to bring judicial review proceedings.

Oireachtas has provided enforcement mechanism *without* judicial review

54. It is noted by Clarke J. at para. 4.7 of *EMI (Records) Ireland Ltd. v. Data Protection Commissioner* [2013] IESC 34, quoting Hogan J. in *Koczan v. Financial Services Ombudsman* [2010] IEHC 407 at para. 20, that:

> "It is well established that the Oireachtas must be presumed to know the law and the **Oireachtas is, of course, well aware of the existence and parameters of the High Court's judicial review jurisdiction**." (Emphasis added)

In this case, 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.

55. It is also to be noted that, as the default rule is that an adjudicator's decision has to be given within 28 days of the referral to her, this means that if there is a judicial review of the adjudicator's jurisdiction to make her decision, it seems inevitable that a stay would be granted on the adjudicator completing the adjudication, until the judicial review, and any appeal, was completed.

56. Yet, there is no provision in the 2013 Act for the 28-day period to be extended, in the event of a challenge by way of judicial review of the adjudicative process. Section 6 (6) states:

> "The **adjudicator shall reach a decision within 28 days** beginning with the day on which the referral is made or such longer period as is agreed by the parties after the payment dispute has been referred." (Emphasis added)

57. Accordingly, it seems that if a stay on an adjudicator's decision were to be granted by a court, when granting leave to bring judicial review proceedings, the jurisdiction of the adjudicator to make his decision would *automatically cease* at the end of that 28-day period (in the absence of agreement between the parties), for the simple reason that the legislation does not contemplate an automatic extension of that 28 day period, in the event of a judicial review.

58. While not determinative, this is another factor in support of this Court's view that it should not grant leave to bring judicial review proceedings in this case. This is because, as noted in *EMI* by Clarke J. at para. 4.8, when relying on Hogan J.'s statement in *Koczan*:

> "it must be presumed that the Oireachtas, in establishing a form of statutory appeal, intended that such an appeal **was to be the means by which, ordinarily, those dissatisfied with an initial decision might be entitled to have the initial decision questioned**." (Emphasis added)

59. While in this case we are not dealing with a statutory appeal, but enforcement proceedings, and the defences that can be raised in the enforcement proceedings are more restrictive than on an appeal, this point is nonetheless applicable. This is because in both instances, there is an opportunity for the party disappointed with the adjudicator's decision to challenge that decision. Accordingly, it must be presumed, in this Court's view, that the Oireachtas intended that the opportunity for a disappointed party to an adjudication process to have the adjudicator's decision questioned, was through enforcement proceedings, rather than judicial review. Accordingly this is a further factor in favour of this Court exercising its discretion to refuse leave to bring judicial review proceedings.

Employers/main-contractors intentionally delaying payment of builders/sub-contractors

60. Counsel for Cobec submitted that if judicial review of a decision of an adjudicator was to be permitted, this would defeat the entire purpose of the 2013 Act, since a party could institute judicial review proceedings and seek a stay on the adjudicator's decision, pending the outcome of the judicial review, and thereby delay for months, if not years, the handing down of the decision.

61. He claimed that this would lead to the death knell of adjudications and so undermine completely the aim of the drafters of the 2013 Act in having a speedier and cheaper resolution of disputes regarding payments due under construction contracts.

62. While not determinative of this application, this Court regards this as a further factor in favour of a refusal of leave to bring judicial review proceedings. This is 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.

63. Support for this view is to be found in the judgment of O'Moore J. in *O'Donovan* (High Court, unreported, 7th October, 2021) at para. 5. In that case he was not dealing with a stay on an adjudication pending the outcome of a judicial review. Instead, O'Moore J. was dealing with an application for a stay on an adjudication pending an appeal to the Court of Appeal, of his decision that the referring party in that case was entitled to seek adjudication under the 2013 Act (there had previously been a stay on the adjudicator's decision, as unlike in this case, leave for the paying party to take judicial review proceedings of the adjudication had been sought and obtained *ex parte*). In dealing with the application for a stay in that case, O'Moore J. observed that:

> "In my view, the fact that an **adjudicative process designed to provide a speedy assessment of a contractor's claim** has been interrupted for nine months is a reason to refuse a stay rather than to grant one. As [the referring party] observes in its submissions, were a stay to be granted in these circumstances (after a full hearing and a reserved judgment in favour of the contractor) it **would incentivise employers to challenge a reference to adjudication; even if unsuccessful, the employer could secure a deferral of the adjudication for well over a year just by taking a claim**

and appealing any adverse decision. The situation would be **quite inconsistent with the intention of the legislature as described in my judgement.**

[…]

The adjudication can resume after any appeal (if the appeal does not succeed), and so might at that time be of some effect, but **this would be after what would necessarily be a very long gap between the reference to adjudication and its conclusion**. **This is not what the legislation is designed to achieve."** (Emphasis added)

64. Similarly, in this case, it seems to this Court that permitting Townmore 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. This is therefore another factor in support of the refusal of leave to bring judicial review proceedings in this case.

The adjudication process may result in an award acceptable to both parties

65. Another point made by O'Moore J. in *O'Donovan* at para. 6 (iv) is that:

"It is possible that the adjudication may result in an award acceptable to both parties, thereby bringing this whole dispute to an end. In my opinion, this is a fair (though not decisive) factor to take into account and I do so."

This factor is equally applicable in this case since, while it may seem unlikely at this juncture, 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. However, as in

O'Donovan, while this is certainly a further factor in favour of the refusal of leave to take judicial review proceedings, it is not determinative in this case.

Duly appointed Adjudicator is entitled to exercise powers lawfully conferred on him

66. A further factor in favour of refusing leave to bring judicial review proceedings, which is not determinative on its own, is the well settled principle that the courts should give some weight to the fact that when one is dealing with judicial review/public law, one is usually dealing, as in this case, with a challenge to a decision made by a person:

- who was appointed to a statutory role (of adjudicator),
- who was duly appointed (pursuant to s. 6(4) of the 2013 Act by the '*chair of the panel selected by the Minister under section 8 [of the 2013 Act]'* i.e. the Chairperson of the Construction Contracts Adjudication Panel), and
- so is a person who is exercising powers lawfully conferred upon him by the Oireachtas.

As noted by Clarke J. in *Okunade v. Minister for Justice* [2012] IESC 49 at para. 9.30:

> "It seems to me to follow that significant weight needs to be placed into the balance on the side of **permitting measures which are *prima facie* valid to be carried out in a regular and orderly way**." (Emphasis added)

67. While *Okunade* was not concerned with the grant of leave to bring judicial review proceedings, but the grant of an injunction pending the hearing of the application for leave to seek judicial review, this factor is equally relevant to the question before this Court, of whether leave should be granted to bring judicial review proceedings. This is because in both instances one is concerned with whether a decision, of a person duly appointed pursuant to statue operating with powers conferred by statute, should be halted by court order.

68. Accordingly, this Court needs to give some weight to the fact 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).

Existing machinery is particularly suitable for building contract disputes

69. In *State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381 at p. 393, O'Higgins C.J. observed, regarding judicial reviews of administrative decisions, that

> "there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where **administrative legislation provides adequate appeal machinery which is particularly suitable for dealing** with errors in the application of the code in question." (Emphasis added)

70. While O'Higgins C.J. was referring to an '*appeal machinery'*, it seems to this Court that the point he made is equally applicable to the adjudicative process and the 'enforcement machinery' which is provided by the 2013 Act and Order 56B, which, as noted, encompasses the ability of the court to consider whether the Adjudicator had jurisdiction to make the award, before it will enforce it.

71. In this regard, the enforcement proceedings work like an appeal process, *albeit* that as noted by Meenan J. it is more limited in nature. However, in this case, it must be borne in mind that Townmore is not claiming that it *does not have a remedy* under the enforcement proceedings. This is because it accepts that it *will be able to* challenge the jurisdiction of the Adjudicator during the enforcement proceedings, in the same way as if this was an appeal process, as envisaged by O'Higgins C.J.. Rather its key complaint is that it should not have to undergo an adjudication in the first place, when it *believes* that when it comes to the

enforcement proceedings stage, it will be able to establish that the Adjudicator did not have jurisdiction.

72. Yet it does seem to this Court 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. As noted by Simons J. at para. 6 of *Aakon*, in order to comply with the tight timeframe proposed by the 2013 Act for resolving payment disputes in building contracts:

> "the legislation **allows an adjudicator to take the initiative** in ascertaining the facts and the law in relation to the payment dispute." (Emphasis added)

73. This inquisitorial role in the resolution of payment disputes in building contracts contrasts with the normal adversarial approach to dispute resolution in arbitration/litigation and highlights the specialist nature of the machinery put in place by the Oireachtas to resolve these disputes. While not determinative, this is a further factor in favour of this Court exercising its discretion against granting leave for judicial review, and instead leaving this specialist machinery deal with the jurisdictional dispute in this case.

Public law remedy for private entities' dispute over private contract payments?

74. The Supreme Court decision in *Buckley v. Kirby* [2000] 3 I.R 431 at p. 433 clarifies that a court has a discretion not to grant judicial review, where there is an alternative remedy available to the applicant. This is because Geoghegan J. made it clear that judicial review ought not be granted where the alternative remedy to judicial review is '*more appropriate'*.

75. In this case it is important to remember that this is a dispute between two private contractors over a sum due under a private contract, *albeit* that the Adjudicator was appointed pursuant to a statutory scheme and exercises his powers pursuant to statue. In essence therefore,

the dispute which is at issue is very much a private dispute. As noted by Geoghegan J. at p. 436 of *Buckley*:

> "it is within the discretion of the court granting leave to refuse leave where […] perhaps it should more appropriately be dealt with by a private law rather than a public law remedy."

76. While not the determinative factor, and also not the strongest factor in this case, it nonetheless is of some relevance that 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.

CONCLUSION

77. For the foregoing reasons, this Court refuses to grant leave to bring the judicial review proceedings in this case.

78. Townmore may well feel hard done by, because it has to engage in the Adjudication process, *if* it turns out that it is successful, at the enforcement proceedings stage, at establishing that the Adjudicator *did not have jurisdiction* in the first place.

79. However, the High Court has made it clear that jurisdictional disputes regarding an adjudicator appointed under the 2013 Act are dealt with at the enforcement proceedings stage of the adjudicative process. For this reason, it seems to this Court that this is the '*appropriate*' and '*alternative*' remedy that exists for jurisdictional challenges, rather than a standalone judicial review of the adjudicative process.

80. In addition, it seems to this Court that the intention of the 2013 Act is to provide for a speedy and relatively cheap way of resolving construction disputes (*relative*, that is, to the very significant cost of High Court litigation). If this means that judicial review is not available to Townmore to challenge the Adjudicator's jurisdiction *in advance*, but that it must challenge that jurisdiction as part of the enforcement proceedings *after* the adjudicator's decision, this appears to be a price, which the Oireachtas regards as worth paying for a cheaper and quicker alternative to litigation. It seems to this Court that Townmore is in a similar position to all other parties wishing to challenge an adjudicator's decision, which is provisionally binding, but can be rendered invalid at the enforcement proceedings stage – *albeit* that it relates to jurisdiction, rather than how the Adjudicator reached his decision.

81. It also seems to this Court that, by structuring the adjudicative process in this way, the Oireachtas balanced the competing interests of the various parties to a construction contract dispute and determined that the public interest favoured a *'pay now, argue later'* system in place for the resolution of such disputes. However, permitting a party to a construction contract dispute to impose expensive and slow litigation, in the form of judicial review, on this process would run completely contrary to the intention of the Oireachtas, as well as providing an incentive for employers/main contractors to delay payments to building contractors by judicially reviewing the adjudication process.

82. To put it another way, it seems to this Court that Townmore's claim that it should be entitled to judicially review the Adjudicator's decision, if successful, would amount to a reversal of the *'pay now, argue later'* principle into an *'argue now, pay later'* principle, the exact reverse of the intention of the Oireachtas in enacting the 2013 Act.

83. For all these reasons, this Court refuses Townmore leave to bring judicial review proceedings in this case. In these circumstances, this Court orders the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the

need for further court time, with the terms of any draft court order to be provided to the Registrar. In case it is necessary for this Court to deal with final orders, this case will be provisionally put in for mention on Thursday 5th October at 10.30 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).