APPROVED **[2024] IEHC 752**

THE HIGH COURT

2024 550 MCA

IN THE MATTER OF THE CONSTRUCTION CONTRACTS ACT 2013

AND IN THE MATTER OF ORDER 56B OF THE RULES OF THE SUPERIOR COURTS

BETWEEN

FINNEGAN CONTRACTS LIMITED

APPLICANT

AND

KILLYCARD DEVELOPMENTS LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered *ex tempore* on 17 December 2024

1. This matter comes before the court by way of an application, pursuant to the Construction Contracts Act 2013, for the enforcement of an adjudicator's award.

NO REDACTION REQUIRED

2. The nature and extent of the court's discretion on such an application has been set out in *John Paul Construction Ltd v. Tipperary Co-operative Creamery Ltd* [2022] IEHC 3 as follows (at paragraphs 9 to 11):

> "Importantly, the High Court retains a discretion to refuse leave to enforce an adjudicator's decision. This is so notwithstanding that, on a narrow literal interpretation of section 6 of the Construction Contracts Act 2013, there might appear to be an automatic right to enforce once the formal proofs have been met.
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> The High Court will not lend its authority to the enforcement of an adjudicator's decision, even on a temporary basis, where there has been an obvious breach of fair procedures. This restraint is necessary to prevent an abuse of process and to uphold the integrity of the statutory scheme of adjudication. It would, for example, be inappropriate to enforce a decision in circumstances where an adjudicator had refused even to consider a right of set-off which had been legitimately asserted by the respondent. It would be unjust to enforce such a lopsided decision.
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> The existence of this judicial discretion represents an important safeguard which ensures confidence in the statutory scheme of adjudication. It should be reiterated, however, that once the formal proofs as prescribed under the Construction Contracts Act 2013 and Order 56B of the Rules of the Superior Courts have been established, then leave to enforce will generally be allowed. The default position remains that the successful party is entitled to enforce an adjudicator's decision *pro tem*, with the unsuccessful party having a right to reargue the underlying merits of the payment dispute in subsequent arbitral or court proceedings. The onus is upon the party resisting the application for leave to demonstrate that there has been an obvious breach of fair procedures such that it would be unjust to enforce the adjudicator's decision, even on a temporary basis. The breach must be material in the sense of having had a potentially significant effect on the overall outcome of the adjudication."

3. Applying that test to the facts of the present case, I am satisfied that there is nothing in the procedural history, nor in the substance of the adjudicator's decision, which would cause any concern on the part of the High Court. It is apparent to me from the terms of the correspondence pre-adjudication and from

the adjudicator's decision that the respondent had every opportunity to address the issues raised in the adjudication. There is no fundamental jurisdictional issue raised. It is not suggested, for example, that the contract was not subject to the Construction Contracts Act 2013. Nor is it suggested that some fundamental error of law, which might deprive the adjudicator of jurisdiction, had been made. The adjudicator's decision is carefully reasoned. I am satisfied that it is an appropriate case in which to direct enforcement.

4. One issue which did arise this morning is in relation to the approach to be taken in respect of interest. The precise issue has not yet been addressed by this court. Interest did form part of the argument in *Aakon Construction Services Ltd v. Pure Fitout Associated Ltd* [2021] IEHC 619. The issue there was slightly different in that a question arose as to whether, in the absence of the adjudicator having made any provision for the payment of interest, the successful party might rely on section 22 of the Courts Act 1981 to claim what is colloquially referred to as "*Courts Act interest*".

5. For the reasons set out in my written judgment in *Aakon Construction Services Ltd* (at paragraphs 24 to 26), I refused that application, indicating that the general power under section 22 of the Courts Act 1981 does not apply to the enforcement of an adjudicator's decision under the Construction Contracts Act 2013. Interest would run instead from the date of the judgment of the High Court in accordance with the provisions of the Debtors (Ireland) Act 1840.

> "I have concluded that the general power under section 22 of the Courts Act 1981 does not apply to the enforcement of an adjudicator's decision under the Construction Contracts Act 2013. This is because the statutory discretion to direct the payment of interest is not freestanding, but is contingent on the court having jurisdiction to adjudicate on the entitlement of the party to payment of the debt.

> The distinguishing feature of the Construction Contracts Act 2013 is that the jurisdiction to determine the payment dispute resides, initially, with the adjudicator alone. It is only in the event that substantive legal proceedings are taken subsequently that the court would have jurisdiction to address the merits of the payment claim. Insofar as an application for leave to enforce is concerned, the court's jurisdiction is much more limited; and as explained in more detail in the principal judgment, is confined largely to a consideration of the *validity* of the adjudicator's decision. The court does not have jurisdiction, in an application under section 6(11) of the Construction Contracts Act 2013, to engage in the type of in-depth consideration of the underlying relationship between the parties which would be necessary to make an informed decision on whether to order the payment of interest. It would be inconsistent with the summary nature of an application for leave to enforce, and, more generally, inconsistent with the policy of the Construction Contracts Act 2013, to expect the court to do so.
>
> The proper interpretation of the legislation is that it is a matter for the adjudicator to decide whether interest should be payable from the date upon which the obligation to discharge the payment claim notice fell due. This decision falls to be made as an aspect of the adjudicator's overall resolution of a payment claim dispute."

6. The position here is slightly different. Here, interest has been expressly addressed by the adjudicator's decision. He has fixed a rate of €38.10 for each continuing calendar day. It seems to me that the court should give effect to that rate of interest post-judgment. I say that for two reasons. The first reason is that this best reflects the underlying rationale and objective of the Construction Contracts Act 2013, which is to give full effect to the adjudication process and to treat an adjudication award as if it were enforceable *pro tem* as a judgment or order of the High Court. It seems to me that the court should respect the finding made by the adjudicator in relation to the rate of interest.

7. The second reason follows by analogy with contract law in general. In the case of a commercial dispute, or even a dispute in relation to the debt payable under

a residential mortgage, the ordinary approach would be that, having identified the principal sum, the court order would then recite that interest would continue to accrue at the *contractual rate*. It seems to me that, in this context, the adjudicator's award of interest is analogous to the rate of interest fixed under a contract. In circumstances where there is no suggestion that the adjudicator did not have jurisdiction to impose the interest rate, nor that the rate is penal or otherwise disproportionate, it seems to me that the rate should continue post-judgment.

Having heard submissions on costs, the court ruled as follows:

8. In relation to the costs of the proceedings, the default position under section 169 of the Legal Services Regulation Act 2015 is that costs follow the event and that the successful party is entitled to recover its costs against the unsuccessful party. Here, the applicant has been entirely successful in obtaining the reliefs sought in the originating notice of motion. Therefore, the default position pertains, i.e. the applicant is entitled to its costs. I will make an order directing that the costs are to be adjudicated under Part 10 of the Legal Services Regulation Act 2015 in default of agreement between the parties.

Appearances

Conor Duff for the applicant instructed by Byrne Wallace Shields LLP
David O'Brien for the respondent instructed by Comiskey Solicitors

Approved
Garrett Simons