

**APPROVED**

**[2022] IEHC 3**



THE HIGH COURT

2021 No. 262 MCA

IN THE MATTER OF THE CONSTRUCTION CONTRACTS ACT 2013

BETWEEN

JOHN PAUL CONSTRUCTION LIMITED

APPLICANT

AND

TIPPERARY CO-OPERATIVE CREAMERY LIMITED

RESPONDENT

**JUDGMENT of Mr. Justice Garrett Simons delivered on 11 January 2022**

## **INTRODUCTION**

1. These proceedings take the form of an application for leave to enforce an adjudicator's decision pursuant to the Construction Contracts Act 2013. Section 6(11) of the Act provides that an adjudicator's decision can, with the leave of the court, be enforced in the same manner as a judgment or order of the High Court.
2. The paying party seeks to resist the application for leave to enforce on two broad grounds. First, it is said that the adjudicator failed to comply with the requirements of fair procedures and natural justice. Specifically, it is alleged

NO REDACTION REQUIRED

that the adjudicator “*ignored*” the substantive defence put forward by the paying party, and also allowed the claiming party to introduce a “*new claim*” during the course of the adjudication process. Secondly, it is said that the adjudicator purported to reopen an issue which he had already decided in an earlier adjudication between the parties.

### **PRINCIPLES GOVERNING APPLICATION FOR LEAVE TO ENFORCE**

3. 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 Rather, it is envisaged that an adjudicator’s decision may be superceded by a subsequent decision reached in arbitral or court proceedings. This is provided for under subsections 6(10) and (11) of the Act as follows:

“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.

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.”

4. The special feature of the legislation is that an adjudicator’s decision is binding in the interim, unless and until superceded by another decision. Even though the adjudicator’s decision is not final and conclusive, it nevertheless gives rise to an

immediate payment obligation. The successful party is entitled to enforce the adjudicator's decision forthwith, by invoking a summary procedure, notwithstanding that the adjudicator's decision is amenable to being overreached by a subsequent decision of an arbitrator or a court. This special dispute resolution mechanism is sometimes described by the shorthand "*pay now, argue later*".

5. The principles governing an application for leave to enforce have been considered in detail in *Principal Construction Ltd v. Beneavin Contractors Ltd* [2021] IEHC 578 and *Aakon Construction Services Ltd v. Pure Fitout Associated Ltd (No. 1)* [2021] IEHC 562. In the latter judgment, I summarised the position as follows (at paragraphs 31 to 34):

“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.

It should be reiterated that the only matter currently before this court is an application for leave to enforce. The role of the court on such an application is narrow, and is

circumscribed by the wording of the Construction Contracts Act 2013 which confers binding effect on a “*decision*” of an adjudicator, albeit on a provisional basis.

Importantly, however, the legislation envisages that a payment dispute may subsequently come before the court again in a different form, namely, in proceedings “*initiated in a court in relation to the adjudicator’s decision*” within the meaning of section 6(10) of the Act. The court would have jurisdiction in the context of proceedings of the latter type to embark upon a much fuller consideration of the payment dispute. The legislation thus envisages that the High Court might grant leave to enforce an adjudicator’s decision, only to rule in subsequent proceedings that the adjudicator’s decision was incorrect and that the paying party has an entitlement to recover any overpayment.

The legislation does not oust the High Court’s jurisdiction, rather it regulates the timing of the exercise of that jurisdiction. The successful party in an adjudication can seek to enforce the adjudicator’s decision immediately, by way of a summary procedure instituted by originating notice of motion. The unsuccessful party must await the outcome of plenary proceedings (or, more typically, arbitral proceedings) before it can recover any overpayment.”

6. There is a twofold rationale for the High Court having a limited role on an application to enforce. The first plank of the rationale is that an adjudicator’s

decision does not represent a final and conclusive determination of the rights of the parties. The adjudicator's decision is provisional only. The unsuccessful party is entitled to a full rehearing of the underlying payment dispute—in subsequent arbitral or court proceedings—and has a right to recoup any monies paid pursuant to the adjudicator's decision if successful. The legal effect of an adjudicator's decision is merely to impose an obligation to make a payment in the interim. All of this lessens the need for rigorous judicial intervention at the time of the enforcement application. Certainly, there is no call for the court, on such an application, to carry out a detailed review of the underlying merits of the adjudicator's decision.

7. The second plank of the rationale reflects the legislative policy underlying the Construction Contracts Act 2013. As discussed in more detail in *Aakon Construction Services Ltd* (at paragraphs 5 to 10), statutory adjudication is designed to be far more expeditious than conventional arbitration or litigation. The default position is that the adjudicator shall reach a decision within 28 days beginning with the day on which the referral is made.
8. To achieve this expedition, the adjudication process will, of necessity, be less elaborate than conventional arbitration or litigation. This is not an accident: rather this is the precise purpose of the legislation. The Oireachtas have put in place a special dispute resolution mechanism, at first instance, for construction contracts which is intended to fulfil the need for prompt payments in the construction industry. This does not affect the right of either party to pursue arbitration or litigation thereafter. It would undermine the legislative policy of “*pay now, argue later*” were the court to refuse to enforce an adjudicator's

decision precisely because the adjudicative process failed to replicate that of conventional arbitration or litigation.

9. 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.
10. 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.
11. 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.

12. One inevitable consequence of the existence of this judicial discretion is that parties, in an attempt to evade enforcement, will seek to conjure up breaches of fair procedures where, in truth, there are none. At the risk of belabouring the point, the discretion to refuse to enforce is a narrow one. The High Court will only refuse to enforce an adjudicator's decision on the grounds of procedural unfairness where there has been a blatant or obvious breach such that it would be unjust to enforce the immediate payment obligation. The court will not be drawn into a detailed examination of the *underlying merits* of an adjudicator's decision under the guise of identifying a breach of fair procedures.
13. In the present case, the principal ground advanced for resisting enforcement involves an allegation that the adjudicator failed to consider the defence put forward to the claim by the paying party. Were this allegation to be made out on the facts, then it would justify the refusal of leave to enforce the adjudicator's decision. 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.

14. An allegation that there has been a failure to consider a defence may arise in two separate scenarios. The first is where it is apparent from their decision that an adjudicator has deliberately excluded a particular line of defence from consideration. An adjudicator might, for example, have ruled that a defence falls outside the terms of the adjudication. In such a scenario, the debate becomes whether the adjudicator erred in their ruling on jurisdiction. The second scenario is where a particular line of defence has not been expressly excluded, but the court is invited to infer from the adjudicator's decision that the defence has not been considered. The allegation in the present case involves a scenario of this second type.
15. The High Court will adopt a pragmatic approach in assessing an allegation that there has been a breach of fair procedures by dint of a failure properly to consider the defence made to a claim. The court will have regard to the adjudicator's decision in the round: the decision is not to be parsed line-by-line. Where a respondent has sought to raise a number of distinct defences—for example, by invoking contractual time-limits as well as advancing a defence on the merits—or has raised a counterclaim, then the decision should record the adjudicator's findings on each of these distinct defences. The position in respect of a single line of defence which comprises a number of interrelated issues is otherwise: the adjudicator will not necessarily be required to set out separate findings on each and every subtopic. It is sufficient that the substance of the defence have been addressed in the decision.
16. It is important to distinguish between (i) the rejection of a line of defence as inadmissible, and (ii) the failure to consider a line of defence. This distinction is illustrated by the facts of *Aakon Construction Services Ltd*. It had been alleged



there that the adjudicator had failed to consider an alternative line of defence advanced by the paying party, namely that the true value of the works was less than that sought under a payment claim notice. This court held that the adjudicator had not disregarded or ignored the defence, but had rather reached a reasoned decision as to why the paying party was not entitled to pursue that line of defence in the context of the specific adjudication.

17. Similarly, it is important to distinguish between (i) the dismissal of a defence on the merits, and (ii) the failure to consider a line of defence. Say, for example, that the respondent to a payment claim had sought to assert a right of set-off. Were the adjudicator to refuse to consider the set-off on jurisdictional grounds, i.e. on the mistaken assumption that it did not come within the scope of the payment dispute, then this might well be a ground for refusing to enforce the adjudicator's decision. If, conversely, the adjudicator had considered the asserted set-off on its merits, but had mistakenly concluded that it did not meet the criteria for a contractual set-off, then this would not justify the refusal of leave to enforce. If and insofar as the respondent contended that the finding was incorrect, the remedy would be to pursue the matter by way of separate arbitral or court proceedings.
18. The parties in the present proceedings have referred me to case law from the neighbouring jurisdictions of England and Wales, and Scotland, respectively, which address the approach to be taken to an alleged failure to consider a defence.
19. Both sides placed special emphasis on the following passage from the judgment in *Pilon Ltd v. Breyer Group plc* [2010] EWHC 837 (TCC); (2010) 130 ConLR 90 (at paragraph 22):

“22.1. The adjudicator must attempt to answer the question referred to him. The question may consist of a number of separate sub-issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question then, whether right or wrong, his decision is enforceable: see *Carillion v Devonport*.

22.2. If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice: see *Ballast, Broadwell, and Thermal Energy*.

22.3. However, for that result to obtain, the adjudicator’s failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable: see *Bouygues* and *Amec v TWUL*.

22.4. It goes without saying that any such failure must also be material: see *Cantillon v Urvasco* and *CJP Builders Ltd v William Verry Ltd* [2008] EWHC 2025 (TCC), [2008] BLR 545. In other words, the error must be shown to have had a potentially significant effect on the overall result of the

adjudication: see *Keir Regional Ltd v City and General (Holborn) Ltd* [2006] EWHC 848 (TCC), [2006] BLR 315.

22.5. A factor which may be relevant to the court's consideration of this topic in any given case is whether or not the claiming party has brought about the adjudicator's error by a misguided attempt to seek a tactical advantage. That was plainly a factor which, in my view rightly, Judge Davies took into account in *Quartzelec* when finding against the claiming party."

20. At an earlier point in the same judgment, Coulson J. observes at paragraph 20 that it is wholly illegitimate for a defendant to comb through an adjudicator's decision to try and find some aspect of the dispute which the adjudicator did not expressly address, and then argue on jurisdictional or natural justice grounds that the decision should not be enforced.
21. These passages indicate that the Courts of England and Wales adopt a pragmatic approach when assessing whether there has been a material failure to consider all issues referred for adjudication. There has been some debate in the academic commentary, however, as to the significance, or otherwise, of an omission being deliberate or inadvertent: see, in particular, *Emden's Construction Law* (LexisNexis, Issue 210, December 2021) at §24.191 to §24.193.
22. The proper approach under the Construction Contracts Act 2013 has been discussed at paragraph 15 *et seq.* above. As appears, it is broadly similar, but not identical, to the approach adopted by the Courts of England and Wales.
23. The written submissions filed on behalf of the respondent cite an impressive number of other judgments from England and Wales. For the most part, these

judgments are directed to an issue which is not actually in controversy in the present proceedings. The judgments stand as authority for the unremarkable proposition that the claiming party in an intended adjudication cannot, by purporting to define the dispute in narrow terms at the time of the reference, circumscribe the type of defences which the responding party may raise. The principle is summarised as follows by Coulson J. in *Pilon Ltd v. Breyer Group plc* [2010] EWHC 837 (TCC); (2010) 130 ConLR 90 (at paragraphs 25 and 26):

“Adjudicators should be aware that the notice of adjudication will ordinarily be confined to the claim being advanced; it will rarely refer to the points that might be raised by way of a defence to that claim. But, subject to questions of withholding notices and the like, a responding party is entitled to defend himself against a claim for money due by reference to any legitimate available defence (including set-off), and thus such defences will ordinarily be encompassed within the notice of adjudication.

As a result, an adjudicator should think very carefully before ruling out a defence merely because there was no mention of it in the claiming party’s notice of adjudication. That is only common sense: it would be absurd if the claiming party could, through some devious bit of drafting, put beyond the scope of the adjudication the defending party’s otherwise legitimate defence to the claim.”

24. The same principle applies to a notice of intention to refer under the Construction Contracts Act 2013. This principle is not in controversy in the present

proceedings. This is not a case where a claimant contends that a particular point of defence, such as a right of set-off or a counterclaim, was properly *excluded* because it fell outside the adjudicator's jurisdiction. Rather, the position of the claimant in the present proceedings has always been that the points of defence were all legitimately brought before the adjudicator, and that same were properly considered and determined by him.

25. For the reasons explained under the next heading below, I am satisfied that the adjudicator did, indeed, properly consider and determine the defences raised.
26. Finally, the respondent has also referred to a number of judgments from Scotland (including *NKT Cables A/S v. SP Power Systems Limited* [2017] CSOH 38 and *DC Community Partnerships Ltd v. Renfrewshire Council* [2017] CSOH 143). These judgments are relied upon in support of the proposition that the adjudicator failed to consider the defences raised. Reliance on these judgments does not, in truth, advance the respondent's position. The governing principle, namely, that an adjudicator must consider the substance of the defences raised, is not in doubt. However, the application of this principle to the circumstances of any given case will be highly fact-specific, with the result that the precedential value of the Scottish judgments is limited. It is also to be noted that the defences at issue in at least some of the Scottish judgments were characterised as "*freestanding*" substantive defences. That does not arise here for the reasons explained at paragraphs 29 *et seq.* below.

## **DETAILED DISCUSSION**

### **NOMENCLATURE**

27. For ease of exposition, the parties will be described, in the discussion which follows, by reference to their role under the construction contract the subject-matter of the adjudication. The claiming party, i.e. the applicant in these proceedings, will be described as “*the contractor*”; the paying party, i.e. the respondent in these proceedings, will be referred to as “*the employer*”.

### **GROUND FOR RESISTING APPLICATION TO ENFORCE**

28. Order 56B, rule 6 of the Rules of the Superior Courts obliges a respondent to set out precisely the grounds relied upon by it to resist an application for leave to enforce an adjudicator’s decision. The grounds of resistance in the present case have been distilled, from those initially set out on affidavit, to three as follows. These are identified as grounds A, B and C in the employer’s written legal submissions of 8 December 2021. (A fourth ground, comprising an allegation that the adjudicator had acted unfairly in not directing an oral hearing, was very sensibly withdrawn. 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).

#### **(A). ALLEGED FAILURE TO CONSIDER DEFENCE**

29. The principal ground relied upon by the employer in seeking to resist enforcement involves an allegation that the adjudicator failed to consider the defence put forward. The deponent on behalf of the employer goes so far as to

say that the adjudicator, in effect, *ignored* the contract entered into between the parties.

30. This allegation centres on a small segment of the written response to the claim (“*the employer’s response*”) delivered on behalf of the employer on 2 October 2020. The employer’s response (excluding appendices) runs to some 142 pages. It is alleged that the adjudicator “*ignored the relevant and pertinent material*” submitted at §3.01 to §3.03 of the response. These sections run to some 20 pages.

31. These sections are headed up as follows:

3.01 Overview of the Design, Procurement and the Claimant’s Tender Undertakings for the Respondent’s New Facility the subject of the Contract in this Reference

3.02 Review of Claimant’s Resourcing of Construction of the Works

3.03 Review of Claimant’s Programming of the Construction Works

32. It should be explained that Section 3 of the employer’s response runs for a further 38 pages, and addresses, sequentially, each of the ten delay events in detail. Each delay event has its own subsection, e.g. delay event 1 is addressed at §3.04, delay event 2 at §3.05 and so on through to delay event 10 at §3.13. In a number of instances, there is an express cross-reference to material appearing at §3.01 to §3.03.

33. It is readily apparent from a reading of the employer’s response as a whole that §3.01 to §3.03 comprise what can properly be regarded as introductory sections, which explain the background to the project, the tendering process, the changes to the contractor’s management team, and a narrative of meetings. The narrative

of meetings at §3.03 consists largely of summaries taken from the minutes of the respective meetings.

34. It is alleged that the “*wholesale changes*” made by the contractor to the project team, together with what is described as the “*aggressive, confrontational and claims-driven strategy*” adopted by the then contracts manager, had a significant negative impact on the programme and commercial viability of the project.
35. Criticism is also made of the fact that the combined works detailed contract programme issued by the contractor on 13 June 2018 had been based on tender issue drawings, and thus did not reflect updated drawings issued in May and June 2018. This programme is also criticised for specifying deadline dates, for the issuance of general and structural drawings, which had not been discussed or agreed with the architect.
36. One of the principal themes which emerges from §3.01 to §3.03 of the response is that the employer is aggrieved at what it perceives as a failure by the contractor to assign the senior management personnel, who had been identified in the tender process, to the construction of the works. It is stated that changes in senior management were presented as a *fait accompli*, and that the substituted personnel did not have the requisite experience in the delivery of similar facilities with significant process installations. It is alleged that the lack of experience and competence resulted in delays to the project. There is much criticism of the conduct of the individual who had initially occupied the role of contracts manager until his removal as a result of complaints by the employer.
37. Relevantly, this theme is one which runs like a thread through the entirety of the employer’s response. Having introduced this theme in general terms in these opening sections, the employer then elaborates upon the alleged incompetence



and inexperience by reference to the specific delay events. For example, it is alleged in the context of delay event 1 that ambiguities in the contractor's programme raised "*serious questions as to the understanding of the planner*" who prepared the programme of the activities associated with the construction of the building substructure, and, indeed, the contracts manager and/or project manager who did not ensure that such an ambiguity was corrected prior to the formal issue of the programme. It is asserted that the contractor's programme was a matter entirely for the contractor.

38. By way of further example, the allegations that the contractor failed to provide a competent contracts manager and/or project manager with appropriate experience, and failed to provide a competent senior engineer, are repeated in the context of delay event 2. It is said that these failures were the primary cause of the delay to the completion of the zone 1 and zone 2 foundations. The same particulars of complaint are repeated, almost verbatim, in the context of delay event 7.
39. Put otherwise, having identified, in the introductory sections 3.01 to 3.03, the alleged shortcomings in the provision of competent and experienced management personnel, the employer's response then purports to specify the practical consequences of same by reference to the individual delay events.
40. Against this background, the suggestion that §3.01 to §3.03 represented a freestanding defence, separate and distinct from the balance of the 142 page response, is artificial and contrived. The chronology and narrative presented at §3.01 to §3.03 finds expression throughout the discussion of each of the ten individual delay events. In some instances, there is an express cross-reference to §3.01 to §3.03; in others, the detail of certain incidents is replicated in the

context of the relevant delay event. For example, the criticisms of the combined works detailed contract programme issued by the contractor on 13 June 2018 are repeated as part of the response to delay event 2.

41. The contractor, in its submissions to the adjudicator, had sought to attribute the cause of the various delay events to other factors. For example, it had been alleged, *inter alia*, that the contractor had been given possession of certain parts of the site late, and that access had been hindered (in one instance, by reference to the presence of a large crane on the site for several weeks); that the architect had been late releasing design information; that certain additional works had been done pursuant to an architect's instruction; that the direct process plant installation contractor, Den Hollander Engineering, had caused delays; and that the laying of the foundations had been delayed by a flooding incident and the existence of non-chartered foundations.
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. The adjudicator summarises it accurately as follows (at page 7 of his decision):

“In trenchant terms, the employer [Response 2 sections 3.01 to 3.03] says that the contractor did not understand its obligations under the contract, failed to properly programme and manage the works, failed to properly resource the works, failed to liaise with DHE\* and failed to react promptly and efficiently when changes were made to the works in the context of what always was a fast track project. The employer says that changes to the works after start on site were minor and that a competent contractor could have dealt

with them in a much better way that (*sic*) the claimant in this adjudication.”

\* Den Hollander Engineering

43. The approach which the adjudicator took to the claim was to analyse each of the ten delay events in sequence, and to make determinations in each instance as to which party is responsible for the delay and the length of that delay. This was an eminently sensible approach to adopt.
44. The adjudicator’s decision expressly references the general complaint made by the employer that delay was a consequence of the alleged failure to assign competent and experienced senior management personnel to the construction of the works, and there are specific invocations of this complaint in the context of the adjudicator’s analysis of individual delay events.
45. For example, in relation to delay event 2, the employer had asserted that the delay in the completion of the foundations in zone 1 and zone 2 was as a consequence of, *inter alia*, the contractor’s alleged failure properly to programme the construction of the building substructure on the basis of the information made available to it. It is further alleged that the contractor failed to provide a competent contracts manager and/or project manager with the appropriate experience to efficiently coordinate the construction of the building substructure, and failed to provide a competent senior engineer with the appropriate experience to supervise the construction of same. This is a repetition of points previously made at §3.01 to §3.03.
46. It is apparent from the adjudicator’s decision that he disagreed with this analysis. The adjudicator found, instead, that the delay was referable, in part, to process effluent from the plant flooding areas of the substructure works. More time had

been required to pump out the effluent, clean out excavations and prepare for concrete works. The adjudicator held that this was an act of default by the employer. The delay was also referable, in part, to an architect's instruction.

47. The adjudicator ultimately attributed responsibility for most, but not all, of the delay events to the employer. These findings are ones made within jurisdiction. If and insofar as the employer is aggrieved with these findings, then it had a right to refer the matter to arbitration. The matter would be considered *de novo* by the arbitrator, and the adjudicator's decision would not have had any status before the arbitrator.
48. There is no basis for saying that the adjudicator failed to consider the employer's defence, still less that he ignored the defence. It is apparent from the vast volume of papers which have been exhibited before this court, that the parties had each put forward detailed submissions as to what the cause of the delay was in respect of each delay event. A variety of different causes were asserted, ranging from alleged incompetence on the part of the personnel engaged by the contractor, on one side, to allegations of delay on the part of the architect and Den Hollander Engineering, on the other. The fact that the adjudicator resolved the rival submissions, in many instances, in favour of the contractor does not mean that he failed to consider one aspect of the defence, i.e. the alleged failure to assign competent and experienced senior management personnel. Rather, the adjudicator, very properly, descended to the detail of each individual delay event. The greater includes the lesser, and this approach ensured that the claim was examined in context rather than in the abstract.
49. With respect, it is difficult to understand what more the employer says the adjudicator should have done. Tellingly, none of the reliefs and declarations

sought by the employer at the conclusion of its response (§5.01) seek any specific relief in respect of the management personnel issue. If and insofar as it is now being implied that the alleged failure to assign the personnel referred to during the tender process amounts to a misrepresentation which vitiates the construction contract, no relief to that effect had been sought during the adjudication. Indeed, given that the adjudicator's jurisdiction is confined under the Construction Contracts Act 2013 to the determination of payment disputes, it must be doubtful as to whether he would have had jurisdiction to rule on the validity of the underlying construction contract.

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 attributable to Den Hollander Engineering, and was thus the responsibility of the employer. The employer seeks to criticise the adjudicator for not acknowledging that the "*subsequent alleged acts or defaults*" of Den Hollander Engineering occurred as a direct consequence of the failure of the contractor to fulfil its obligations in the first instance. This is a blatant attempt to reagitate the arguments made to—and rejected by—the adjudicator. As explained at paragraphs 11 to 17 above, 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.
51. In summary, for the reasons outlined above, I am satisfied that the adjudicator properly considered and determined the substance of the defence put forward by the employer.

**(B). ALLOWING “NEW” CLAIM TO BE MADE**

52. The employer complains that the adjudicator permitted a “*new*” claim to be made during the course of the adjudication process, and that this represented a breach of fair procedures.

53. With respect, this complaint is premised on a misunderstanding on the part of the employer. The supposed new claim is, in fact, simply a better particularised version of the original claim. The amount being claimed by the contractor in respect of additional preliminaries had been refined during the course of the adjudication as follows:

11 September 2020 (Referral)	€1,045,180.00
9 October 2020 (Reply)	€1,035,500.00
2 November 2020 (Particulars)	€752,847.20

54. The adjudicator refers to these iterations of the claim for additional preliminaries as Claim A (€1,045,180.00), Claim B (€1,035,500) and Claim C (€752,847). These are not intended as references to separate and distinct claims, but rather to the refinement and better particularisation of the claim in respect of additional preliminaries.

55. The revised figure of €752,847.20 had been produced in response to a request made by the employer for further and better particulars. These particulars were furnished on 2 November 2020. The employer had then been allowed a period of nine days to respond, i.e. by 11 November 2020. I am satisfied that this period was reasonable in the context of a statutory adjudication, having regard to the need for expedition. As discussed in more detail in *Aakon Construction Services Ltd* (at paragraphs 5 to 10), statutory adjudication is designed to be far more expeditious than conventional arbitration or litigation. To achieve this, all sides

and the adjudicator must comply with strict time-limits. The parties have the right thereafter to engage in arbitration which will allow for a more leisurely pace.

**(C). MATTERS DETERMINED BY FIRST ADJUDICATION**

56. The employer contends that the adjudicator exceeded his jurisdiction in purporting to determine issues which were already the subject of an earlier binding adjudication decision. (As it happens, the earlier adjudication decision was made by the same adjudicator). These issues concern the claim in respect of delay event 6 which relates to delays to the completion of the RC tower lifts.
57. The objection that these issues had already been determined by the first adjudication is expressly addressed by the adjudicator in his second decision. The adjudicator accepted, by reference to the submission made by the contractor, that the claims made in the first adjudication had not been extension of time claims in respect of which prolongation costs were sought. The adjudicator thus draws a distinction between the valuation of the variation, and any delay costs.
58. An adjudicator's finding in respect of a jurisdictional issue is not binding on the parties unless they have agreed to be so bound. It is necessary for the court to examine the question of jurisdiction itself. On the basis of the materials and arguments put before the court, I am satisfied that the adjudicator's decision did not trespass upon issues which had been the subject of a binding determination in the first adjudication. It is apparent that the issue addressed in the first adjudication is not the same as that arising on the adjudication the subject of this application. The first adjudication did not involve a claim for an extension of time nor were prolongation costs sought.

**JUDICIAL REVIEW AND THE CONSTRUCTION CONTRACTS ACT 2013**

59. The contractor had submitted that the employer's 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. It is further submitted that this is impermissible in circumstances where the three month time-limit for judicial review under Order 84 of the Rules of the Superior Courts has long since expired: the adjudicator's decision is dated 23 November 2020.
60. Whereas the Act expressly contemplates that proceedings may be "*initiated in a court in relation to*" an adjudicator's decision (section 6), it does not stipulate that such proceedings must be by way of judicial review. The Act is also silent on whether judicial review lies to restrain an adjudicator from reaching a decision on a pending adjudication. (It appears to have been accepted by the parties without argument in *O'Donovan v. Bunni* [2020] IEHC 623 that judicial review is available in such circumstances).
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 reason that the opposition to the application for leave to enforce the adjudicator's decision has failed in the present proceedings is because the employer has not demonstrated that the adjudicator breached fair procedures nor exceeded his jurisdiction. Put otherwise, the opposition failed on the merits, rather than as the result of any supposed failure to comply with the three month time-limit.



## CONCLUSION AND FORM OF ORDER

62. Section 6(11) of the Construction Contracts Act 2013 provides that an adjudicator's decision can, with the leave of the court, be enforced in the same manner as a judgment or order of the High Court. Even though the adjudicator's decision is not final and conclusive, it nevertheless gives rise to an immediate payment obligation. The successful party is entitled to enforce the adjudicator's decision forthwith, by invoking a summary procedure, notwithstanding that the adjudicator's decision is amenable to being overreached by a subsequent decision of an arbitrator or a court. The grant of leave to enforce does not preclude the paying party from pursuing the matter further, whether by way of arbitral or court proceedings. In the event that it is successful, the paying party will then be entitled to recover any overpayment from the other side.
63. For the reasons set out in detail in this judgment, I have concluded that leave to enforce should be granted in this case. The "*proofs*" for the application, as identified in the Act and Order 56B of the Rules of the Superior Courts, have all been satisfied. In particular, the adjudicator's decision has been made in respect of a payment dispute properly referred to him under the Act. The adjudicator acted in accordance with fair procedures and natural justice and did not exceed his jurisdiction. The adjudicator's decision continues to be binding on the parties as it has not been superceded by a subsequent decision of an arbitrator or a court.
64. Accordingly, the applicant is hereby granted leave, pursuant to section 6(11) of the Construction Contracts Act 2013 and Order 56B of the Rules of the Superior Courts, to enforce the adjudicator's decision of 23 November 2020. Judgment will be entered against the respondent in the sum of €918,460.16 (inclusive of

VAT). In accordance with the Debtors (Ireland) Act 1840, interest will accrue from the date that the order of this court is perfected.

65. As to the costs of the application for leave to enforce, my *provisional* view is that the applicant, having been entirely successful in its application, is entitled to the costs of these proceedings. This reflects the default position under Part 11 of the Legal Services Regulation Act 2015.
66. If either party contends for a different form of order than that proposed, they may make oral submissions on 18 January 2022 at 10.30 AM.

*Appearances*

Stephen Dowling, SC and Alan Philip Brady for the applicant/contractor instructed by A & L Goodbody LLP  
James Burke for the respondent/employer instructed by Flynn O'Driscoll

Approved  
Gareth S. Mans