# CONSTRUCTION LAW PERIODICAL

**Editorial Committee's Note**

*The Construction Law Periodical provides all members of the CBA with a regular summation of judgments and dispute resolution decisions drawn from Ireland and other common law and model law jurisdictions that touch upon and/or are relevant to matters of construction law and/or the resolution of construction disputes in this jurisdiction.*

*This edition additionally includes abstracts of the essays that were selected as finalists in the Sanfey Essay Prize competition.*

*The next edition of the Construction Law Periodical is due for release in March 2022. Please contact a member of the editorial team if you would like to submit a case note or article for consideration.*

***John McDonagh SC***
***Michael Judge BL***

**Aakon Construction Services Ltd v Pure Fitout Associated Ltd [2021] IEHC 562 (13 September 2021)**

*Adjudication - application for leave to enforce adjudicator's decision - first in-depth review of principles in this jurisdiction - judgement entered.*

This was an application for leave to enforce an adjudicator's decision. It is the first application of this nature in which the principles and issues involved have been comprehensively reviewed by the High Court and a lengthy and comprehensive judgment delivered. The judgement of Simons J runs to 43 pages.

**The Facts**

The payment dispute arose under a subcontract entered into between the applicant (as subcontractor) and the respondent (as main contractor). The applicant delivered a payment claim notice on 25 November 2020. The respondent did not issue a response to the payment claim notice within 21 days. The applicant submitted that this entitled it to be paid the full invoiced amount. In the alternative the applicant contended that the respondent was liable for all payments properly due for work executed and completed up to 10 November 2020. This amounted to €242,225.09.

The respondent submitted that the purported payment claim notice was invalid. It alleged a number of deficiencies in it and contended that if it did not comply with the subcontract provisions relating to such notices then no payment was due.

The adjudicator issued a detailed decision on 25 June 2021. He held that the payment claim notice was valid in accordance with the subcontract and the Construction Contracts Act 2013 ("**the CCA**").

Ultimately, citing *Grove Developments Ltd v S&T (UK) Ltd* [2018] EWCA, the adjudicator decided that the respondent's failure to respond to the payment claim notice and, in particular, to serve a valid pay less notice, had the draconian consequence that the respondent was obliged to pay the whole sum stated in the payment claim notice. Having so concluded he did not proceed to evaluate the sum "properly" payable up to 10 November 2020 for measured works, variations and dayworks.

**The Law**

In Part 1 of the judgement Simons J carries out an overview of the CCA.

At [8] he points out that 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 judgement or order of the court with the same effect. Where leave is given, judgement may be entered in the terms of the adjudicator's decision.

> The special feature of the legislation is that an adjudicator's decision is binding unless and until superseded by another decision reached by arbitration, litigation, or by agreement between the parties. While the adjudicator's decision is not final and conclusive, it does give rise to an immediate payment obligation [12]
>
> The qualifying words "*if binding*", as used in s 6(11), address the contingency of the adjudicator's decision having been superseded by a decision of an arbitrator or a court. They are not intended to suggest that the binding status conferred on an adjudicator's decision is qualified or uncertain. Nor are they intended as an invitation to parties to question the binding nature of the adjudicator's decision in enforcement proceedings. [13]
>
> 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. "*Pay now, argue later*" is the mantra. [15]

At [17] he states that the case law from England and Wales cannot be simply read across to the CCA. It differs in a number of respects from the equivalent UK legislation. [17]

The UK case law identifies two broad exceptions to the binding nature of an adjudicator's decision. The first concerns the adjudicator's jurisdiction, the second, the requirement that he must comply with fair procedures. [18]

At [20] he raises the issue of whether an error of law made in the course of the decision-making might itself be characterised as having been made outside jurisdiction, but does not address it. He also refers to it at [31]

On an application to enforce, the court is entitled 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, it must be conferred by the parties. [26]

The court should be careful to ensure that the adjudicator has not purported to decide issues in respect of which the responding party had not been on notice. [27]

At [28], in relation to fair procedures, he states that the court will not normally entertain an application for judicial review where there is an adequate alternative remedy available by way of statutory appeal. It will however intervene by way of judicial review if there has been a fundamental breach of fair procedures at the first stage.

Notwithstanding the very real differences between judicial review and leave to enforce, he states that it is consistent with the general supervisory jurisdiction of the High Court in respect of statutory decision-makers to say that a court should not enforce, even on a provisional basis, an adjudicator's decision which has clearly been reached in breach of fair procedures. [29]

At [33] he refers to s 6(10) of the CCA and states that the legislation 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.

**Order 56B**

Simons J briefly refers to and sets out the procedure to be followed on an application to enforce at [35].

At [36] he specifically points out that the respondent must file and serve its replying affidavit within 7 days.

At [37] he advises that the time limits prescribed in the Order are not merely aspirational. They must be complied with unless there is good and sufficient reason for not doing so. It is expected that the exchange of affidavits should have been completed prior to the first return date. This is to allow a hearing date to be fixed immediately for the application to enforce.

Practitioners should bear in mind that he is the judge in charge of the Adjudication List.

**Some differences between the UK and Irish legislation**

At [40] he points out that there are significant differences between the legislative approaches adopted in the two jurisdictions. There are also significant differences in the procedure governing the enforcement of an adjudicator's decision.

At [41] to[46] and at [99] he refers to a number of the differences, as follows:

1. First and foremost provision is made in the CCA for an adjudicator's decision to be enforced as if it were an order of court. The adjudicator's decision thus has an enhanced status under the CCA.

The normal procedure for enforcing an adjudicator's decision in the UK is to apply for summary judgement. Much of the case law is therefore concerned with whether the party resisting enforcement has been able to establish an arguable defence. In some instances the party resisting enforcement will bring a parallel application challenging the decision of the adjudicator, and seeking a final determination by way of declaration (a Part 8 CPR application).

It is important to appreciate the differences between the two procedural regimes [41].

2. The adjudication process in Ireland is statutory in origin. By contrast, the UK legislation gives effect to a right to adjudication by implying terms into construction contracts. One practical consequence of this is that an adjudicator's decision in this jurisdiction might, in principle, be amenable to judicial review. (This point has not as yet been decided in this jurisdiction) [42]

3. The provisions in respect of payment claim notices under the CCA are materially different to those in the UK. In particular, there is no express statutory provision under the Irish Act which stipulates what the consequences of a failure to respond to a payment claim notice are to be.[43]

4. The status of a notice of intention to refer to adjudication under the CCA is different to that of an adjudication notice under the UK legislation. [44]

5. The UK legislation provides that an adjudicator's decision is binding until the dispute is finally determined by legal proceedings, arbitration or by agreement. In contrast, the CCA might be taken as suggesting that it is necessary to challenge the decision head on and that some weight may have to be given to the decision. In the UK the decision is a neutral factor in subsequent litigation or arbitration [45/46]

6. S 6(9) of the CCA provides that an adjudicator may deal at the same time with several payment disputes arising under the same construction contract or related construction contracts. By contrast, under the UK legislation, the consent of all parties is required before an adjudicator can adjudicate at the same time on more than one dispute under the same contract. [99]

**Payment claims notices**

At [49] he points out that the CCA does not set out the consequences of a failure on the part of the paying party to deliver a response within the required time, and also does not state that in the absence of a response the amount claimed in the payment notice is payable by default. [49]

The adjudicator in this case had held, in effect, that the failure of the respondent to deliver a response to the payment claim notice had the consequence that it was required to discharge same. [50]

He points out at [51] that the court was not concerned on this application for leave to enforce with the question of whether that interpretation of the legal position was correct. It was only concerned with whether the alleged failure of the adjudicator to embark on a true valuation of the works represented a breach of fair procedures.

**Part III**

At Part III of the judgement he proceeds to deal with the issue as to whether the payment dispute had been validly referred to adjudication.

At [69] to [78] he deals with the role played by the notice of intention to refer a dispute to adjudication in the statutory scheme.

As regards the notice of intention to refer and jurisdiction, he states at [79] that it is unnecessary for the sake of the present proceedings to decide whether the precise parameters of the adjudicator's jurisdiction are forever fixed by the summary of the details of the payment dispute set out in the notice. The notice in this case was broad enough to confer jurisdiction to reach the decision he did.

It is at least arguable that the detail of the dispute in the notice of intention to refer can be further refined by the content of the subsequent referral. [81]

Ultimately the overarching principle is that an adjudication must comply with fair procedures. Provided that the notice of intention to refer identifies the gravamen of the payment dispute, and the matters referred to in paragraph 5 of the Code of Practice, the refinement of legal argument in the referral will normally be permissible. [83]

Also, fair procedures require that a notice of intention to refer not be interpreted narrowly so as to deprive a respondent of a potential legitimate defence. [84]

In this case, the adjudicator's decision corresponded precisely to the principal issue described in the notice of intention to refer, and there was no basis for saying that the adjudicator exceeded his jurisdiction. [89]

As with conventional litigation, a party referring a matter to adjudication is allowed to advance different legal arguments in the alternative. [92]

The litmus test in assessing the adequacy of a notice of intention to refer must be whether the alleged defects impinge upon the respondent's ability to defend the claim against it. [94]

Unlike the position in respect of an adjudication notice under the UK legislation, there is no express requirement under the statutory code of conduct that a notice of intention to refer must specify the relief sought. [95]

The notice of intention to refer adequately identified the issue upon which the applicant ultimately succeeded, namely that a right to a default payment had arisen in circumstances where the respondent omitted to issue either a payment certificate or a pay less notice. [97]

If and insofar as the respondent wished to challenge the correctness of the adjudicator's decision, it could only do so by referring the matter to arbitration or by instituting its own proceedings. It could not resist an application for leave to enforce on the basis that the adjudicator's decision on the default payment was incorrect. [97]

**Multiple disputes**

S 6(9) of the CCA expressly provides that an adjudicator may deal at the same time with several payment disputes arising under the same construction contract or related construction contracts.

By contrast, under the UK legislation, the consent of all the parties is required before an adjudicator can adjudicate at the same time on more than one dispute under the same contract. [99]

There is therefore no restriction under the CCA on a party referring more than one dispute to an adjudicator.[100]

The principal authority relied on by the respondent, Grove Developments v S&T, [2018] EWCA, does not address the jurisdictional objection raised by the respondent, that the applicant had improperly sought to combine (i) an entitlement claim (based on the right to a default payment on the basis that the respondent had not delivered a pay less notice) with (ii) a valuation claim. That objection was misconceived and ignored the difference in wording between the Irish and UK legislation. [103]

**Two applications for appointment of an adjudicator**

At [103] Simons J states that the respondent had sought to make much of the fact that there had been two attempts to apply to the Chairman of the Construction Contracts Adjudication Panel for the appointment of an adjudicator.

He points out at [105] that there are forms available on the Construction Contracts Adjudication Service website but that they do not have any particular legal status. [105]

In this case the second application superseded the first. The appointment of the adjudicator was made solely on the basis of the second application and was in order. [107]

**Alleged failure to consider defences raised**

Para 23 of the Code of Practice stipulates that an adjudicator shall observe the principles of procedural fairness and shall give each party a reasonable opportunity to put their case and to respond to the other party's case. [112]

At [116] to [119] Simons J refers to the adjudicator relying on Grove Developments v S&T and holding that the respondent's failure to respond to the payment claim notice had the consequence of triggering a default requirement to pay the amount claimed. It could however adjudicate the true value of the applicant's claim subsequently, having paid the adjudicator's award. The earlier finding is not conclusive as to the value of the work. The issue determined in the earlier finding i.e. whether a valid payment response or pay less notice had been served, is not the same issue as the true value of the payment claim.

For present purposes it was the holding of the Court of Appeal in Grove on the timing of any such true valuation that was most significant. The right to adjudicate or litigate the true value of the payment is contingent on the payment having been discharged. [120]

The adjudicator had made a reasoned decision that a valuation could not be commenced until the adjusted amount had been paid. This was a finding that the line of defence was inadmissible at that time, not a disregarding or ignoring of a defence. [122]

The approach of the adjudicator was tenable and did not disclose an egregious error such as would justify the refusal of leave to execute. [123]

At [124] he states that on this application for leave to enforce the court was only concerned with the allegation that there had been a breach of fair procedures, specifically, the right of defence. The judgement does not address the broader question as to whether the decision in Grove should be applied to the CCA. Any consideration of this broader question could only properly be carried out in substantive proceedings initiated in respect of the adjudicator's decision.

The approach adopted by the adjudicator did not entail any breach of fair procedures. [125]

Ultimately Simons J decided that the proofs for the application had been satisfied. The adjudicator's decision had been made in respect of a payment dispute properly referred to him under the Act. He had acted in accordance with fair procedures and natural justice and did not exceed his jurisdiction. Judgement was accordingly entered against the respondent for €257,165.09 9 (exclusive of VAT), being the amount found due by the adjudicator together with his fees.

**John McDonagh SC**

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**Greater Glasgow Health Board v Multiplex Construction Europe Limited et al [2021] CSOH 115 (5 November 2021)**

*Adjudication clauses - Construction contracts - Defects - Hospitals - Jurisdiction - Scotland - Sist*

A health board sought payment for losses sustained as a consequence of defects in the construction of a Glasgow hospital. The summons was served shortly before the expiry of the 5-year prescriptive period. The plaintiff's contracts with the first and fourth defendants provided that any dispute arising under or in connection with the contract be referred to and decided by an adjudicator. The contract further stated that "*no dispute may be referred to the Scottish Courts unless the dispute had first been decided by an adjudicator*."

None of the issues before the Outer House of the Court of Session in this case were referred to adjudication. The first, second and fourth defendants pleaded that the action is incompetent and should be dismissed. The plaintiff contended that the action should be allowed to proceed or, in any event, sited to allow an adjudication to take place. The applicant also sought a declaration that the summons in the action was a relevant claim for the purpose of the Prescription and Limitation (Scotland) Act 1973.

In their submissions, the first, second and fourth defendants submitted (§20) that the plaintiff was contractually barred from pursuing this dispute by way of court action, and moreover was in breach of contract by serving the summons and lodging it for calling. The first, second and fourth defendants submitted that the within action was, in the circumstances, incompetent.

On behalf of the plaintiff, it was argued (§21) that the contractual bar did not equate to incompetency and that the summons was not a fundamental nullity. Any entitlement of the defendants to have the dispute referred for adjudication could be waived. The plaintiff submitted that questions of competency were not fixed as at the moment when an action was raised; any incompetency at the time of raising could be cured by sist and referral for adjudication. The parties were highly likely to return to the court to pursue final resolution of their disputes, and could make use in the meantime of the court proceedings, for example to pursue document recovery.

Lord Tyre stated that (§24) drew a distinction between, on the one hand, a curable incompetency and, on the other, incompetency which is incurable so that the action is fundamentally null.

Lord Tyre continued to state that (§27):

> "*[f]rom these authorities the following propositions may be distilled. Firstly, incompetency is different from fundamental nullity. The label "incompetent" when attached to a summons means that the action cannot proceed as matters stand, but does not determine whether the defect is curable. Secondly, just as incompetency may arise for a variety of reasons, so the means of curing the defect may vary. There is no single test such as whether the defect can be cured by amendment of the summons. The obstacle may be removable by other means. Thirdly, the fact that an action could proceed if a competency point were not taken by the defender is an indicator that it is not a nullity for the purposes of the interruption of the operation of prescription*."

Lord Tyre considered that (§28) the circumstances of the present case are indistinguishable from cases in which court proceedings were raised despite the agreement of parties to have their disputes resolved by arbitration. Lord Tyre continued to state that "*the effect on the jurisdiction of the court of an agreement to submit to arbitration is long established: jurisdiction is not wholly ousted although the court is for the time being deprived of jurisdiction to inquire into and decide the merits of the case.*

*Should the arbitration prove abortive, the full jurisdiction of the court revives: Hamlyn & Co v Talisker Distillery (1894) 21R (HL) 21, Lord Watson at 25*."

Critically, Lord Tyre determined (§31) that a term in the contract that specifically prohibits the referring of any dispute to the Scottish Courts unless that same dispute had first been decided by an adjudicator or in accordance with the contract "*adds nothing of substance*" to the separate obligation under the contract to refer any dispute to an adjudicator.

Additionally, Lord Tyre stated (§32) that it is "*not… accurate to describe reference to and determination by the adjudicator as a "condition precedent" of the bringing of a court action*." The Court considered the dicta of Lord Herschell LC in *Caledonian Insurance Co v Gilmour* (1892) 20R (HL) 13 and determined that (§32) the dispute in the present case falls within the first of Lord Herschell's categories, where reference to arbitration (or adjudication) for a determination does not create the obligation and is not therefore to be characterised as a condition precedent.

Accordingly, the Court concluded that the action is not incompetent, but by virtue of the terms of clause W2, and in the absence of a waiver by the defendants of the contractual requirement to refer any dispute to an adjudicator, the within case could not be entertained by the Court until the adjudication process has concluded.

**Michael Judge BL**

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**CC Construction Limited v Raffaele Mincione [2021] EWHC 2502 (TCC) (15 September 2021)**

*Adjudication - application to enforce adjudicator's decision - interpretation of contracts and documents - requirement for crystallised dispute - breach of natural justice - adjudicator declining to consider claim employer entitled to make - failure to exercise jurisdiction - severance possible.*

**Facts**

The respondent employer engaged the applicant contractor to design and build the shell and core of a new house in London SW1. The initial contract sum of £2.6 million was subsequently increased to £3.1 million. The employer declined to pay the sum of £500,000 which the contractor said was due following the service of a final statement and pursuant to an adjudication decision ("the decision") determining that the sum was payable. The employer's case was that the operation of the terms of the contract and in light of the parties' actions meant that the final statement was not conclusive; that there was a balance owing to the employer; and that the adjudicator's decision was not enforceable.

The contractor sought to enforce the adjudicator's decision, and the employer sought a declaration as to the effect of the contract, contending that the payment notice served by the contractor was served before the due date, and that the contractor was accordingly not entitled to rely on the final statement.

**Law**

Useful short extracts from the judgement as regards the interpretation of contracts and documents include "*the court is to seek to ascertain the intention of the parties by reference to the language used when seen in context*" [60]; "where a construction would produce an unfair result, the court will often require clear words to support the construction in question" [64]; and "*the test for interpretation of a letter is how it would have been understood in the particular circumstances by a reasonable recipient aware of the surrounding facts*". [91]

On his interpretation of the facts and the law the Judge declined to declare that the due date was that contended for by the contractor, and that a letter delivered by the employer was effective to prevent the final statement issued by the contractor becoming conclusive.

One of the issues canvassed by the employer was that the adjudicator lacked jurisdiction on the issue of the conclusivity of the final statement because there had not been a crystallised dispute before the start of the adjudication. It was common ground that an adjudicator does not have jurisdiction to determine an issue unless a dispute in relation to that issue has crystallised. The adjudicator decided there was a crystallised dispute and that he had jurisdiction.

In dealing with this issue the Judge referred to the judgement of Jackson J in *Amec Civil Engineering v Secretary of State for Transport* [2004] (TCC), and went on to state at [110] that in his judgement what he had to do was to look at the reality of

the parties' positions and consider whether in truth there was a dispute about the relevant matter before the adjudication. That required consideration of the substance of the parties' positions and was not to be constrained by an artificial or unduly narrow reading of correspondence. The language used will be of great significance but the important thing is the underlying subject matter.

He concluded that a realistic analysis of the exchanges showed that the parties were in dispute as regards the relevant issue, and that that dispute had crystallised in advance of the adjudication. [112]

The employer argued that there has been a material breach of the requirements of natural justice in the adjudicator's treatment of its liquidated damages argument, in that he had concluded that it was not part of the dispute he had been asked to decide and therefore could not be raised by way of set off in those circumstances. [47]

In dealing with this issue the Judge stated at [114] that in considering whether there has been such a breach the starting point was the summary of the applicable principles set out by Coulson J in *Pilon v Breyer* [2010] (TCC). At [116] he referred to *Global Switch v Sudlows* [2020] (TCC) (reported in the April 2021 edition of the CBA Periodical) in which O'Farrell J provided a further useful summary when giving further consideration to the question of when a matter falls outside the scope of a dispute which has been referred to adjudication, and when there is a defence which is capable of being raised and which the adjudicator needs to consider.

At [118] he states that where there is a claim for payment a defence of set off can be raised and will necessarily be part of the dispute which an adjudicator addressing such a claim has to determine.

At [127] he held that this was a case of a type identified by O'Farrell J at [50(v)] of Golden Switch where the employer was entitled to rely on all available defences. The adjudicator had declined to consider the liquidated damages claim and in the circumstances there was a failure of the adjudicator to exercise his jurisdiction which amounted to a material breach of the rules of natural justice.

At [133] as regards the possibility of severing the adjudicator's decision he offered his provisional view that the adjudicator's failure to consider the liquidated damages claim of €343,237 was a discrete matter not capable of tainting or affecting his decision as to amounts in excess of that sum. He was of the view that there was a core nucleus of the decision that could be safely enforced and accordingly was prepared to enforce the balance over that sum.

**John McDonagh SC**

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**Downs Road Development Ltd v Laxmanbhai Construction (UK) Ltd [2021] (TCC) (7 September 2021)**

*Adjudication - application to enforce adjudicator's decision - jurisdiction - breach of natural justice - deliberate decision not to address a defence the employer was entitled to advance - possibility of severance.*

**The Facts**
The claimant employer engaged the respondent contractor to undertake construction works in connection with the development of land in London. The works involved the demolition of the existing buildings on the land and the construction of four buildings containing residential units and associated works. The original contract sum was €27,390,000.

A dispute arose as to the operation of the payment regime for the works and this led to a reference to adjudication in respect of payment cycle 34. The adjudicator's decision ("the decision") determined the sum due in respect of the contractor's interim application 34.

The employer commenced proceedings challenging the enforceability of the decision on the ground that it failed to address a line of defence asserted by the employer. The contractor sought a declaration that as to the invalidity of the employer's payment notices, and contended that the decision was enforceable.

On 26 February 2021 the contractor sent interim application 34 with supporting documents. This identified the sum due as £1.9m approx. The employer's payment notice 34a specified a net amount payable as £650k approx. which it paid. The contractor gave notice of adjudication seeking that the adjudicator adjudicate on the correct sum due under the current interim payment cycle i.e. the true value of the sum due pursuant to interim application 34. [20]

The employer challenged the amounts advanced by the contractor and asserted two contracharges, one relating to an alleged breach of contract on the part of the contractor in respect of a capping beam, as a result of which the employer would suffer a loss of £150k approx. [22]

The adjudicator decided that his task was limited exclusively to the proper valuation of payment application 34, and concluded that the net sum due was £ 771k approx. which, after a deduction as a consequence of the non-provision of warranties, left a sum of £103k approx. due to the contractor. [26]

The adjudicator addressed the capping beam contracharge but decided that he did not have jurisdiction to rule upon that claim, and accordingly took no account of it in determining the amount due.

The employer contended that the adjudicator's decision not to address its defence based on the contractor's alleged breach of contract in relation to the capping beam was a breach of the requirements of natural justice by reason of being a deliberate decision not to address a material part of the dispute before him. [52]

**The Law**
At [53] the judge stated that the test to be applied is that a deliberate failure to address a material issue which was before the adjudicator on a proper view of his jurisdiction will be a breach of natural justice. An issue will be material for these purposes if it is shown to have had the potential to make a significant impact on the overall outcome of the adjudication.

Where the adjudication is concerned with a party's entitlement to be paid money, then a defence which would, if successful, remove that entitlement or diminish the sum to be paid will potentially be an issue in the adjudication. [54] It is open to a respondent to an adjudication to raise any ground which would amount in law or in fact to a defence to the claim. [55]

The first question was whether the adjudicator was correct to conclude that he did not have jurisdiction to rule on the employer's claim in relation to the capping beam. The judge decided that in adopting that approach he had taken an unduly narrow view of his jurisdiction. The exercise in which he was engaged in his decision was to address the sum due in a particular payment cycle. The capping beam claim was put forward as a matter which the employer said reduced the amount which was due in that cycle. It was accordingly being raised as a defence in respect of which the adjudicator had jurisdiction. By deliberately deciding not to address that defence the adjudicator was declining to address a defence which the employer was entitled to advance and entitled to have considered by the adjudicator. [60]–[61]

It followed from that conclusion that the adjudicator had failed to that extent to answer the question before him [64], that failure was a material one [65], and the decision that the sum of £103k approx. remained outstanding in relation to interim application 34 was as a consequence of that breach unenforceable. [67]

The next issue was whether there was part of the decision which could be safely enforced.

The Judge at [74] to [89] helpfully reviewed the authorities in relation to severance and in particular referred to two recent cases of particular importance.

The first is *Willow Corp v MTD Construction* [2019] (TCC) in which the judge stated that the question was whether it was clear that there was something left in the adjudicator's decision which could be safely enforced once one disregarded that part of his reasoning that had been found to be obviously flawed so that the good could be severed from the bad.

The second was the Scottish case of *Dickie & Moore Ltd v McLeish* [2020] CSIH 38 in which it was stated that in relation to an adjudicator's award that is partially valid and partially invalid, the valid part should be enforced if that is reasonably practicable. The court should adopt a practical and flexible approach that seeks to enforce the valid parts unless they are significantly tainted by the adjudicator's reasoning in relation to the invalid parts.

In the precise circumstances of this case the Judge held that the employer having established that the decision was not enforceable there was no part of the adjudicator's decision left which could be severed and which was binding on the parties. [104]

**John McDonagh SC**

**Minister of Finance (Inc) v International Petroleum Investment Co [2021] EWHC2949(Comm) (4 November 2021)**

*Arbitration claims - Delay - Extensions of time - Serious irregularity*

**Background**
The Commercial Court granted permission to two Malaysian entities to challenge an LCIA arbitration award in connection with the well-known 1MDB scandal. The background to the case is the multi-billion-dollar fraud that was perpetuated on 1MDB, a Malaysian state-owned investment fund, and which led to allegations against, among others, the former Prime Minister of Malaysia, Mr Najib, who now faces criminal proceedings in Malaysia. 1MDB and its co-claimant, Minister of Finance (Inc), contended that approximately USD 3.5 billion was misappropriated from 1MDB with the involvement of, among others, two individuals who worked for International Petroleum Investment Company ("**IPIC**"), a sovereign investment corporation of Abu Dhabi, and Aabar PJS, a related company. The Claimants contended that Mr Najib wrongfully settled an arbitration that was brought against the Claimants by IPIC and Aabar in order to avoid the arbitration considering allegations regarding the fraud. The Court's judgment handed down by Baker J is the decision on the application for an extension of time. The Court granted permission for the claim under s. 68(2)(g) of the 1996 Act to proceed, but refused an extension of time for a claim under s. 67 of the 1996 Act.

**The Principles**
Both sides to the dispute invited the Court to consider the extension of time application by reference to the guidelines given by Colman J in *Aoot Kalmneft v Glencore International AG* [2002] 1 Lloyd's Rep 128 at [59].

Baker J stated (§124) that *Kalmneft* calls for a careful and balanced focus upon:

> (a) "*the length of the delay, as regards which the starting point is that the time limit for challenging an arbitration award is purposely very short, just 28 days: see on that, for example, Kalmneft itself at [51]-[54] and Terna Bahrain Holding Company WII v Al Shamsi et al [2012] EWHC 3283 (Comm) at [27] ("Any significant delay beyond 28 days is to be regarded as inimical to the policy of the 1996 Act"), reflecting which the current (10th) Edition of the Commercial Court Guide says at O9.2 that "it is important that any challenge to an award be pursued without delay and the Court will require cogent reasons for extending time";*
> (b) *whether the applicant acted reasonably in all the circumstances, both (i) in permitting the time limit to expire and (ii) in permitting any subsequent delay to occur, as to which I agree with Butcher J in STA v OFY [2021] EWHC 1574 (Comm) at [25] that it is not necessary for there to have been a deliberate decision not to comply with the time limit before an applicant may be held to have acted unreasonably;*
> (c) *whether the respondent to the application or the tribunal caused or contributed to the delay;*
> (d) *whether irremediable prejudice to the respondent to the application resulting from the delay, beyond the mere loss of time, will be suffered if the extension of time is granted, as regards which an absence of such prejudice is not reason to grant the extension, it is just an absence of what may be a strong positive reason against granting it: see on that, Nagusina Naviera v Allied Maritime Incorporated [2002] EWCA Civ 1147, per Mance LJ (as he was then) at [39], Daewoo Shipbuilding & Marine Engineering Co Ltd v Songa Offshore Equinox Ltd [2018] EWHC 538 (Comm) at [74];*
> (e) *whether the arbitration has continued during the period of delay and, if so, what might be the impact on progress or costs in the arbitration were the extension of time granted;*
> (f) *the apparent strength of the challenge to the award, assessed provisionally as best the court may be able to do on an application for an extension of time;*
> (g) *overall, but in particular in the light of (a) to (f) above, whether in broad terms it would be unfair to the applicant to be denied the chance to have its challenge to the award determined on its merits*."

Baker J considered that *"[e]very case will turn on its own facts and circumstances, assessed by reference to that framework. Nigeria v Process and Industrial Development [2020] EWHC 2379 (Comm) is a precedent showing it to be possible for even an extremely lengthy extension to be justified by particular facts*."

As part of judging each case on its particular facts, Baker J considered that (§125):

> (a) "*when considering whether the applicant acted reasonably, it may be that a party should not be required to show that evidence of fraud could not with reasonable diligence have been obtained sooner: ibid at [183], and by analogy Takhar v Gracefield Developments Ltd [2020] AC 450. It will not be necessary to decide in the present case whether, as Sir Ross Cranston was prepared tocontemplate, this is a principle of law so that a finding*

*that an applicant has not been reasonable in allowing time to pass cannot be founded upon a finding that with diligence it could have evidenced sooner allegations of fraud it comes to make;*

*(b) on any view, again when considering the applicant's conduct, it should be borne well in mind that allegations of fraud are not to be made lightly or without cogent evidence: ibid at [257];*

*(c) the fact that to refuse the extension is to shut the door upon a full investigation at trial of allegations touching the integrity of the dispute resolution system for which the court has a supervisory jurisdiction may be important when assessing prejudice to the respondent or the broad fairness of the matter overall: ibid at [273]. Sir Ross Cranston there addressed in particular the situation where on the extension of time application there was judged to be a strong prima facie case of a relevant fraud, but it seems to me that the logic of his observation means it has scope to apply in any case where a properly arguable challenge under s.68(2)(g) is raised (see to similar effect, Chantiers De L'Atlantique S.A. v Gaztransport & Technigaz S.A.S. [2011] EWHC 3383 (Comm), per Flaux J (as he was then) at [66]).*"

Finally, with respect to the length of the delay, Baker J stressed (§127) that "*[t]here is no principle of law that any particular length of delay either cannot ever be unjustified, at one extreme, or will always be unjustified, at the other extreme*."

**Application of the Principles**

Baker J determined that (§183) stepping back this is a case in which:

*(a) "serious allegations are made that are properly arguable on their merits to the effect that the defendants were complicit in the dishonesty of Mr Najib, as alleged, in such a way as to have made it a fraud, or contrary to public policy, that the Consent Award was issued;*

*(b) it was inevitable that any challenge to the Consent Award raising that issue would not be brought within time, indeed would not be brought at all unless and until Mr Najib was removed from his position of control over 1MDB and MOFI;*

*(c) it was thus inevitable that, as events transpired, any claim such as this Claim, if brought, would only be brought at least a year out of time;*

*(d) considering what was required by the CPR, and my conclusion as to the reasonableness of the approach that was taken on behalf of the claimants to the consideration and preparation of this Claim, it was on any view reasonable (whether or not inevitable) that this Claim was not commenced any sooner in the event than 15-16 months after the Consent Award;*

*(e) assuming against the claimants that it is appropriate to treat such matters as criticisms in a case such as this, there was a failure to single this Claim out as having a special urgency, because of the long-expired statutory time period, which, coupled with some unreasonable specific delays in getting matters moving, resulted in the Claim being commenced closer to 18 months after the Consent Award;*

*(f) that culpable delay (if that is what it was, continuing the assumption) has caused no prejudice to the defendants, let alone irremediable prejudice;*

*(g) indeed, that delay has had no impact at all on the parties or on the administration of justice, and it pales into utter insignificance within what is now a period of 3½ years to get from Consent Award to case management directions for a trial of the Claim and what is likely to be a period of 5 years from Consent Award to determination of the Claim, unless there is an amicable resolution in the meantime or there is some significant streamlining possible as a matter of case management to allow any trial to occur sooner than Q2 2023*."

Accordingly, the Court determined (§184) that it has no real hesitation in those circumstances in concluding overall that it would be unfair to the claimants, and an injustice, to deny them the opportunity of advancing their s.68(2)(g) claim, and that the extension of time they require in order to do so should be granted.

Of particular note, the Defendants submitted (§186(a)) that granting an exceptional extension of 511 days would severely undermine the [28-day] statutory period and the finality of English arbitral awards, to the detriment of London's position as a leading centre for international arbitration. Baker J rejected this submission and stated that (§187) "*the principles on which the grant of an extension will be considered are well established and the Defendants provided no evidence that they had done any damage to London's relevant reputation. The statute does not include any strict upper bound upon the extensions that may be granted. A decision in this case that an extension of nearly 17 months is merited should be seen for what it is, an exceptional decision to meet the justice of an exceptional case*."

In fact, Baker J considered that (§188) "*it is far more likely to bring London into disrepute for it to be thought that a party might connive in the dishonesty of the principal of its counter-party, harming the counter-party and the integrity of the system, and then thwart the counter- party, when it has been later freed from the control of the dishonest principal, from raising that with the court as guardian of that integrity, by relying on the fact that the s.68 claim is only brought long after the award in question was dishonestly procured where that is substantially the consequence of the fact that the dishonest principal remained in control for a long time after the award*."

Accordingly, Baker J concluded (§193) that the proper course in this "*unusual and special case*" is to grant the extension of time required for the bringing of this claim, even though that means allowing a s.68 challenge to be brought some 511 days late against a statutory requirement (absent the grant of an extension) to make such claims within 28 days.

**Michael Judge BL**

CONSTRUCTION BAR ASSOCIATION OF IRELAND

# Sanfey Essay Prize Finalists

## Five years of construction adjudication in Ireland: will judicial review spoil the party?

### Introduction

In his virtual address to the Adjudication Society on 6 May 2021, Alexander Nissen QC, Head of Chambers at Keating Chambers, considered whether the silver jubilee of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA), which introduced construction adjudication in the UK, would be a milestone worth celebrating. In Ireland, we are also approaching a significant milestone for our equivalent legislation. On 25 July 2021, it will be five years since the Construction Contracts Act 2013 (CCA) came into force, which introduced statutory adjudication for construction payment disputes. Will this be viewed by the Irish construction industry as a milestone worth celebrating?

2021 has seen positive news for construction adjudication in Ireland which is worth celebrating. Firstly, on 26 January 2021, the High Court enforced an adjudicator's decision for the first time pursuant to CCA, s.6(11) in *Gravity Construction Ltd v Total Highway Maintenance Ltd*[1]. Secondly, the President of the High Court, Mary Irvine, issued Practice Direction HC 105[2] , which will enable adjudicator's decisions to be enforced in the High Court on the first available Wednesday which, it is hoped, will significantly quicken the enforcement of adjudicator decisions going forward. However, despite these positive developments, judicial review remains an unwelcome guest that threatens to spoil the adjudication party. In the recent case of *Kevin O'Donovan and the Cork County Committee of the GAA v Bunni and another and OCS One Complete Solution Ltd,* [3] the High Court considered OCS' application to lift a stay pending judicial review proceedings placed on a payment dispute it had referred to adjudication which was granted to O'Donovan by the High Court. The court in *O'Donovan* held that the stay should not be lifted, delaying the adjudication until the determination of judicial review proceedings.

There are three sections in this paper. The first section provides the necessary background: it outlines the key provisions of the CCA along with its current level of usage and sets out the facts of the payment dispute in *O'Donovan*.

The second section criticises the court's approach in determining that the stay on adjudication proceedings should remain until the conclusion of judicial review proceedings. Firstly, the court's decision effectively deprived OCS of its right to adjudication under the CCA. Secondly, the court's reasoning failed to consider a key aspect of adjudication, pursuant to s.6(2), which is that a party to a construction contract has the right to refer a dispute 'at any time'. Thirdly, it is contended that the High Court should have considered guidance from UK jurisprudence in reaching its decision.

In the final section, this paper will propose that *O'Donovan* ought to have placed greater weight to OCS' arguments in relation to provisions of the CCA along with the Code of Practice Governing the Conduct of Adjudicators and UK case law. Adopting this approach, it is submitted, will discourage judicial review being used as a weapon to target adjudicator jurisdiction, which will encourage the wider use of adjudication to resolve payment disputes in construction contracts.

### 1. Background

#### (a) The Construction Contracts Act 2013

The Construction Contracts Act 2013 (CCA) came into effect on 25 July 2016 and is described as:

> "An Act to regulate payments under construction contracts and to provide for related matters."[4]

The CCA applies to construction contracts where there is an agreement between an executing party and another party, where the executing party is engaged in 'construction operations', which is defined in CCA, s.1(1). Under CCA, s.6(1), a party to a construction contract has the right to refer for adjudication any dispute relating to payment arising under the construction contract. This right can be exercised 'at any time'.[5]

Once the right to adjudicate has been exercised, what follows is a fast process. Once appointed, the adjudicator must reach a decision within 28 days[6], which can be extended by a further 14 days[7] with the consent of the referring party.

The CCA makes provision for a challenge to the enforcement of an adjudicator's decision. Under CCA, s.6(10), an adjudicator's decision is binding until the payment dispute is finally settled between the parties through arbitration or litigation.

There is evidence that adjudication under the CCA is becoming more widely embraced by the Irish construction industry. In the year July 2019-July 2020, the Chairperson of the Ministerial Panel of Adjudicators, Dr Nael Bunni, reported that the Construction Contracts Adjudication Service received 54[8] applications for an

[1] [2021] IEHC 19

[2] High Court Practice Directions | The Courts Service of Ireland

[3] [2020] IEHC 623

[4] CCA, p3
[5] CCA, s.6(2)
[6] CCA, s.6(6)
[7] CCA, s.6(7)
[8] Fourth Annual Report of the Chairperson of the Construction Contracts Adjudication Panel,

adjudicator to be appointed, which is the highest number recorded in the four years of reporting.

**(b) Facts**

*O'Donovan* concerned a payment dispute, which arose under the construction contract involving the redevelopment of Páirc Uí Chaoimh and a centre of excellence at Monaghan Road in Ballintemple, Cork.[9] On 10 June 2016, a Letter of Intent was signed by both parties. Due to a delay in receiving formal EU clearance for government funding, it was not possible to enter into a formal contract at that stage[10]. That clearance was received on 26 June 2016 and the works commenced in August 2016. The parties, however, did not sign a formal contract until 12 May 2017. O'Donovan took possession of the redeveloped stadium on 19 July 2017.

On 29 September 2020, over three years after the works were completed, OCS referred to adjudication a payment dispute relating to just over €1m it alleged was owed to it by O'Donovan. On 20 October 2020, the Chairman of the Ministerial Panel appointed Mr James Bridgeman to act as the adjudicator. On 23 October 2020, O'Donovan submitted written objections contesting the jurisdiction of the adjudicator. OCS responded with written submission on the jurisdiction issue on 24 October 2020[11]. On 2 November 2020, the adjudicator issued his written 'Views of Adjudicator on Jurisdiction', which concluded that he did have jurisdiction with respect to the payment dispute referred. Following this conclusion, O'Donovan withdrew from the adjudication. They subsequently obtained leave from the High Court on 19 November 2020 to challenge the jurisdiction of Mr Bridgeman to adjudicate on the payment dispute[12]. O'Donovan's main contention was that the bulk of the works in respect of which the payment was claimed arose from the Letter of Intent dated 10 June 2016, which meant the construction contract fell outside the scope of the CCA that came into force the following month[13]. A stay was also granted on the adjudication pending the determination of the judicial review proceedings.[14]

*O'Donovan* considered an application by OCS to lift the stay placed on the payment dispute it had referred to adjudication. Mr Justice Barr held that the stay on adjudication proceedings should not be lifted until the determination of judicial review proceedings. Some of the reasoning that underpinned that decision will now be analysed.

**2. Three criticisms**

**(a) The decision deprived OCS of their right to adjudicate under the CCA**

Counsel's primary submission was that not lifting the stay would deprive OCS of their statutory right to seek adjudication of the payment dispute as the adjudicator would not be able to issue a determination on 6 December 2020. In response, O'Donovan submitted that OCS were not being deprived of their right to adjudication, it was 'merely being postponed'[15]. They added that the judicial review proceedings would be determined 'within a relatively short period of time'[16].

The court concluded that OCS' argument was not 'well founded'[17]. In reaching that conclusion, the court placed significance on a letter sent by O'Donovan on 20 November 2020 which offered to consent to the adjudication before Mr Bridgeman if they failed to succeed in the judicial review proceedings. Mr Justice Barr also decided against OCS on the basis that the CCA 'envisages adjudication continuing beyond the 42-day period'[18] and, therefore, it is possible for the parties to agree to a period that is long enough to allow for the determination of the judicial review proceedings, both in the High Court and, if necessary, on appeal.'[19]

It is respectfully submitted that both reasons relied on by the court to OCS' primary submission were not well founded. Regarding the first reason, the court's approach fails to consider the underlying principle of construction adjudication, which is speed. OCS' right to adjudicate can only be viewed as protected if the approach that the court permitted led to a fast and inexpensive determination of the dispute. By accepting the approach outlined in O'Donovan's letter dated 20 November 2020, it is respectfully submitted that the court did effectively deprive OCS of their right to have their payment dispute adjudicated upon in accordance with the timelines stipulated in the CCA. Supporting an adjudication delivered over a much longer timeframe to accommodate the judicial review proceedings, it is argued, is a significant dilution of this right.

Considering the second reason, the court was correct in its understanding of the CCA, however, an extension beyond the 42-day period must be 'agreed by the parties'[20]. However, OCS clearly did not agree to an extension beyond the 42-day period given that they were seeking an order lifting the stay on the adjudication.

The need for speed in construction adjudication is evident in several sections in the CCA. Firstly, pursuant to CCA, s.6(2), a party to a construction contract may exercise their right under CCA, s.6(1) 'at any time'. The referring party, therefore, does not need to wait for certain circumstances to arise before they can refer a payment dispute. Secondly, under s.6(3), the party have only five days beginning on the day on which the notice was served to appoint an adjudicator of their own choice. If they fail to do so in that timeframe, s.6(4) provides that the adjudicator is appointed by the Chairperson of the Ministerial Panel of Adjudicators. By way of s.6(4), the State has, therefore, removed any potential for excessive delay due the appointment of an adjudicator. Thirdly, s.6(6) requires the adjudicator to reach a decision within 28 days, which can be extended by up to a maximum 42 days. This is an extremely tight timeframe, mirroring that of the UK statutory adjudication regime[21]. This clearly demonstrates the Oireachtas' intention to have payment disputes arising under construction contracts speedily resolved through adjudication under the CCA.

Without this ability to resolve their payment dispute through adjudication in line with the CCA's timescales, OCS would effectively be deprived of their right to adjudicate under the CCA. It is therefore respectfully submitted that the High Court should have placed greater weight on the need to protect this right in reaching their decision regarding the stay.

**(b) The court failed to consider a key aspect of adjudication: the right to adjudicate can be exercised 'at any time'**

since the commencement of the Construction Contracts Act, 2013, para 5.2

[9] *O'Donovan* (n3), [1]

[10] *O'Donovan* (n3), [5]

[11] ibid

[12] *O'Donovan* (n3) [2]

[13] *O'Donovan* (n3) [3]

[14] *O'Donovan* (n3) [2]

[15] *O'Donovan* (n3) [22]

[16] ibid

[17] *O'Donovan* (n3) [39]

[18] *O'Donovan* (n3) [41]

[19] ibid

[20] CCA, S.6(6)

[21] HGCRA, s.108(2)(c)

The court determined that OCS had 'delayed for an inordinate period' [22] in referring the payment dispute to adjudication, noting that the works were completed in August 2017 with the referral not made until September 2020, some three years later. Whilst it was acknowledged that adjudication was a 'fast track method of resolving payment disputes'[23], the court viewed OCS as a party that had not acted swiftly in instigating the process. The court held that this was a factor that it had have regard to.[24] The court also took account of the fact that arbitration proceedings were scheduled to conclude in September 2021, nearly a year later.

It is respectfully submitted that this reasoning does not appreciate one of the key aspects of adjudication which is that the right to refer a dispute to adjudication can be made 'at any time' pursuant to CCA, s.6(2). A referring party's right is not restricted or qualified in any way in the CCA. In no section of the CCA's provisions is there scope for the referring party's right to adjudicate to be restricted or suspended.

For guidance on what is meant by the phrase 'at any time', the court should have reviewed the UK courts' interpretation of the equivalent and near-identical provision in the HGCRA 1996, s,108(2). In *Connex South Eastern Ltd v M.J. Building Services Group Plc*[25], Dyson LJ stated that the words 'at any time' should be given their literal and ordinary meaning. [26] Adopting this UK interpretation to s.6(2), it is submitted that OCS' decision to refer a dispute three years after the completion of the works and when arbitration proceedings were underway was still at 'at any time'. It is therefore respectfully submitted that the court should have given more weight to this key aspect of construction adjudication in determining whether the stay on the adjudication process should be lifted.

**(c) The court did not consider guidance from UK jurisprudence in coming to their decision**

*Bresco*

In determining whether to lift the stay on adjudication, it is respectfully submitted that the court should have considered guidance provided by the UK courts. It is considered appropriate to adopt this approach given the similarities between the CCA and the UK's HGCRA. This was acknowledged by Mr Justice Simons in *Gravity* when he stated the following:

> "It also required consideration of the legislative policy underlying the Construction Contracts Act 2013 which was based, as I understand from reading the written submissions, on equivalent but not identical legislation in the United Kingdom."[27]

Counsel for OCS referred to the UK Supreme Court decision in *Bresco Electrical Services Limited (in Liquidation) v Michael J Lonsdale (Electrical) Ltd*[28] in their submissions. It is submitted that this is currently the leading case in construction adjudication in the UK. *Bresco* is not just a case which considered an insolvent company's right to pursue an adjudication, it provided an opportunity for some of the UK's most senior judges to review over 20 years of construction adjudication jurisprudence.

In *O'Donovan*, Counsel referred to the leading judgement, with which all other Supreme Court justices agreed, which was delivered by Lord Briggs. With respect to a court's refusal to grant an injunction restraining the adjudication pending the determination of legal proceedings concerning jurisdiction of the adjudicator, Lord Briggs stated the following:

> "In my view, consideration of costs and of burdens on the court militate against, rather than in favour, of admitting applications for injunctions to restrain adjudications before they have run their course. The tight time limits and document based investigatory nature of construction adjudication means that, if left to proceed, it would probably be completed before any opposed injunction application could be determined by the court, and at a fraction of the likely cost. The outcome of the adjudication may mean that no risks of the respondent losing the benefit of insolvency set-off arise, for example if the respondent is successful. Opposition to such attempts to enforce as there may be can then, if necessary, be dealt with on their merits, when the outcome of the adjudication is known, rather than having to be guessed at."[29]

Had the court carried out a detailed analysis of the circumstances OCS found itself in using the approach outlined in *Bresco*, it is submitted that this would have provided further strong arguments in favour of lifting the stay. Firstly, in line with Lord Briggs' reasoning, O'Donovan's application to the High Court on 19 November 2020 seeking leave to challenge the jurisdiction of the adjudicator placed a burden with associated costs on the Irish court system. A further burden with associated costs was also be placed on the court system by the judicial review proceedings, which were scheduled for February 2021. Had the High Court allowed the adjudication to continue in line with the CCA, this burden would have been avoided. Secondly, like the UK, adjudication in Ireland must adhere to a tight timeframe. Had the adjudication been allowed to continue, Mr Bridgeman could have reached his decision on 6 December 2020, which was well before the outcome of the judicial review proceedings. This approach would have incurred the modest cost of the adjudicator's fee and small legal costs relative to those of judicial review proceedings before the High Court. Finally, the adjudication could have been determined in O'Donovan's favour. If unsuccessful, O'Donovan had the right to challenge the adjudicator's decision through either arbitration or litigation pursuant to CCA, s.6(10). In summary, a careful application of the reasoning in *Bresco* to the circumstances in *O'Donovan,* it is submitted that there were strong arguments in favour of lifting the stay and allowing the adjudication to proceed.

*UK jurisprudence on adjudicator jurisdiction*

In *O'Donovan*, the court also held that having challenged the jurisdiction of the adjudicator, O'Donovan could not participate further in the adjudication process as this would leave them open to the charge, that by doing so, they were estopped from alleging that the adjudicator had no jurisdiction[30].

The UK's Technology and Construction Court (TCC) held in *GPS Marine Contractors Ltd v Ringway Infrastructure*

[22] *O'Donovan* (n3) [38]
[23] *O'Donovan* (n3) [24]
[24] *O'Donovan* (n3) [38]
[25] [2005] EWCA Civ 193
[26] ibid [40]
[27] *Gravity* (n1) [32]
[28] [2020] UKSC 25
[29] ibid [70]
[30] *O'Donovan* (n3) [46]

*Services Ltd*[31] that if a party does not raise any objections to the adjudicator's jurisdiction and continues to participate in the adjudication, the party creates an adhoc jurisdiction for the Adjudicator and will lose the right to challenge a decision on jurisdictional grounds[32]. However, in *GPS* it was also held that a general jurisdictional reservation enables a party to participate in the adjudication without waiving their right to object on jurisdictional grounds[33]. What is of critical importance is that at the time of the appointment of the adjudicator, a clear qualification is provided[34]. In *O'Donovan*, following the appointment of Mr Bridgeman on 20 October 2020, O'Donovan submitted written objections on 23 October 2020. It is therefore submitted, following the approach provided by *GPS*, having submitted their objections within three days of the adjudicator appointment, O'Donovan could have continued to participate in the adjudication and would have retained their right to challenge the adjudicator's jurisdiction during enforcement proceedings pursuant to CCA, s.6(10).

**3. Conclusion**

The analysis above has criticised the High Court's approach in deciding not to lift the stay on the adjudication process until the judicial review is determined. The court's approach effectively deprived OCS of their right to adjudicate their dispute; it failed to consider a key aspect of adjudication which is that a payment dispute can be referred 'at any time'; and the decision did not fully take into account jurisprudence from the UK, which robustly supports the adjudication process.

The author has suggested instead that the court should have, firstly, taken cognisance of the Oireachtas' intention for a quick and inexpensive dispute resolution process, which is clear from the drafting of the legislative provisions of the CCA. Secondly, the court should also have placed emphasis on the key principle that a payment dispute can be referred at any time, no matter the circumstances. And finally, the author suggests that the High Court should have been more willing to rely on the UK's jurisprudence with respect to adjudication. The court had the benefit of the recent UK Supreme Court case in *Bresco*, and it is submitted that had they have followed the reasoning of Lord Briggs, the analysis would have revealed very persuasive arguments in favour of lifting the stay.

In summary, construction adjudication in Ireland is on an upward trend, with greater numbers of referrals and more industry awareness. The enforcement of an adjudicator's award in *Gravity* and the announcement of Practice Direction HC 105 are significant milestones towards the wider adoption of adjudication. However, the Irish Courts must not let judicial review become established as a method for responding parties to avoid the adjudication process. Construction adjudication has the potential to be a significant dispute resolution method in the future and if the courts give greater weight to the CCA along with supporting jurisprudence from the UK, construction adjudication in Ireland can flourish. Adopting that approach could see Ireland, like the UK, celebrating a silver jubilee for the CCA in 2041. If that does not happen, however, judicial review will be an unwelcome guest at the adjudication party, and it is likely to spoil that party for potentially the next five years.

**Gavin Wilson (1st Place Awardee)**

[31] [2010] EWHC 283 (TCC)
[32] ibid [37]
[33] Nicholas Dennys QC and Robert Clay, *Hudson's Building and Engineering Contracts* (14th edn, Sweet & Maxwell 2020) 11-037
[34] ibid 11-037

## Time-Bar Provisions Concerning Extension of Time Claims in the Public Works Contract – Technicality Over Substance?

Standard forms of construction contract often contain an express provision, whereby, a notice must be issued prior to a contractual right coming into existence. Such a provision is referred to as a condition precedent. If the notice is not issued, a party may lose rights that it would otherwise have. Such provisions operate as limitation clauses. An obvious example is an extension of time claim by a Contractor. Normally, the entitlement to the extension of time is predicated upon the Contractor issuing a notice to the Employer indicating that an event has occurred, which is likely to delay the project. The Public Works Contract ('**PWC**') contains such a provision.

Courts are sometimes reluctant to construe the notice provision too strictly, and are unlikely to treat it as a condition precedent to making a claim, absent clear and unequivocal language. Therefore, if the effect of non-compliance with a condition precedent is to deprive a party of a right that it would otherwise have, the condition precedent clause may be interpreted strictly against the party relying on it. However, when the required notice provision is clear, the courts are likely to require strict compliance with it and construe the notice provision as operating as a condition precedent.

My Sanfey Essay Prize submission argues that, although the relevant provisions in the PWC are drafted to operate as a condition precedent, in the context of an extension of time claim the provisions are ambiguous and should not be construed strictly as a condition precedent. The arguments advanced are first, that sub-clause 9.3.1 and sub-clause 10.3.1 set different time limits by which the notice must be given for extension of time claims and therefore are ambiguous. When sub-clauses 9.3.1 and 10.3.1 are read together, a Contractor cannot state with any degree of commercial certainty, the last date upon which a claim notice must be issued. Under sub-clause 9.3.1 the Contractor can wait until a delay has actually started and notify as soon as practicable thereafter; whereas, under sub-clause 10.3.1 the Contractor cannot wait until the delay has started and must notify upon awareness of something that could give rise to an entitlement. Therefore, circumstances could arise whereby the Contractor is within the time limit to comply with sub-clause 9.3.1 but outside the time limit to comply with sub-clause 10.3.1. Second, under sub-clause 10.5.2 the Employer's Representative of its own initiative has a reserved power to determine the Contractor's claim even when the required notice is not given. Therefore, a lack of clarity exists, as notice is required under sub-clause 10.3.1, while sub-clause 10.5.2 permits entitlement to the Contractor in the absence of such notice.

As sub-clause 10.3.1 operates for the benefit of the Employer and deprives the Contractor of rights that it would otherwise enjoy, then considering the ambiguities, there is a convincing argument that sub-clause 10.3.1 should not operate as a condition precedent or be interpreted strictly. To do otherwise would be a triumph of technicality over substance.

**Paul Hughes Solicitor, FRICS, FSCSI, MCIOB, PhD.**

**(2nd Place Awardee)**

## Constitutionality of Section 11(2)(a) of the Statute of Limitations Act 1957:

**Implications for Latent Damage Tort Actions**

My Sanfey Essay Prize submission considers the constitutionality of section 11(2)(a) of the Statute of Limitation Act 1957 which creates a limitation period of six for tort actions from the date on which the cause of action accrued. This issue is particularly topical for construction law practitioners in light of the recent Mica crisis and the likelihood of victims seeking to bring claims in tort for latent damage after the limitation period has expired.

Part I traces how the case-law in Ireland has developed concerning section 11(2)(a) of the 1957 Act. It describes how a discoverability test was originally read into the sub-section in *Morgan v Park Developments* [1983] ILRM 156 and how this was ultimately rejected in *Hegarty v O'Loughran* [1990] IR 148 (SC). It notes how the Supreme Court in *Tuohy v Courtney* [1994] 3 IR 1 (SC) declined to declare the sub-section unconstitutional. It is suggested that the recent cases of *Brandley v Deane* [2018] 2 IR 741 and *Cantrell v AIB* [2020] IESC 71 could indicate that the Supreme Court could be more receptive to a constitutional challenge to the sub-section today.

Part II argues in assessing the constitutionality of section 11(2)(a) the 'rationality test' is not the appropriate standard of review to apply on the grounds the sub-section does not engage in a balancing of constitutional rights. It challenges Finlay CJ's contention in *Tuohy* that the defendant's alleged constitutional rights to be protected against unjust and burdensome claims and the public's common interest in being protected against stale claims were in fact engaged by the provision. It critiques this view in that both rights/interests identified do not have a firm mooring in the Constitution, the importance of which was emphasised in the recent case of *Friends of the Irish Environment v Government* [2020] IESC 49.

Part III submits that if the 'proportionality test' was applied in assessing the constitutionality of section 11(2)(a) it would be held to be unconstitutional. It posits the sub-section would likely fail the minimum impairment limb of the proportionality test. It suggests it can be derived from frequent judicial criticism of the sub-section and the fact that the judiciary has referred to alternative legislative schema which strike the balance better between the goods of ensuring the right to litigate and finality in litigation, that the sub-section could fail the minimum impairment limb. It also argues the sub-section could fail the balancing limb of the proportionality test due to the absolute nature of the limitation period and draws an analogy with some of the recent constitutional concerns expressed in the reform of damages for personal injuries.

Part IV considers a separate standard of review to analyse the constitutionality of the sub-section which could be extrapolated from previous cases which discussed the constitutionality of limitation periods. If the limitation period can be supported by "just and reasonable policy decisions" it will pass constitutional muster. A way of determining this is by comparing the impugned sub-section with similar types of legislation which create limitation periods. If the limitation periods governing similar torts differ for no ostensible reason this suggests the limitation period cannot be supported by "just and reasonable policy decisions". The fact the law prescribes a "date of knowledge" as the beginning of the limitation period for defective products actions, but fails to do this in limitation periods for latent damage construction tort actions is evidence the latter limitation period cannot be supported by "just and reasonable policy decisions".

**Séan Hurley**

**(Highly Commended)**