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**Practical and Strategic Considerations in Adjudication; The Party
Representative Perspective**

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1 The Evolution of Adjudication

1.1 Construction contract adjudication, along with mandatory provisions for payment, introduced by the Construction Contracts Act 2013, have now transformed the landscape for construction contract claims in Ireland. This has broadly happened in three phases:-

- The relatively inactive phase from 2016 to perhaps 2019/2020.
- The Judicial exploration phase, where various legal theories were tested - and largely rejected - at enforcement stage in the High Court, perhaps well exemplified by the decision in Aakon Construction Services Ltd v Pure Fitout Associated Ltd [2021] IEHC 562. Practice Direction HC 105 from April 2021 has assisted in bringing enforcement issues speedily before a Judge.
- The now active phase, where adjudication is considered a primary means of resolving construction contract payment disputes.

1.2 I can illustrate the dramatic shift in approach to payment disputes with some examples:-

2010 Arbitration under 1954 Act over unpaid certified sum of circa €500k, counterclaim for value of defects in region of €2 million. Approximately 2 years, 19 procedural orders, 4 substantive awards, 2 week hearing...

2020 Adjudication under 2013 Act before adjudicator power examined by the High Court. Prolongation claim for approximately €4 million, LD counterclaim. Fully contested jurisdiction hearing with Senior Counsel representation by each party in oral hearing, written decision. Substantive phase for 6 months with oral hearing. c200 page decision.

2023-4 Series of 7 complex adjudications on one project for generally 7 or 8 figure sums between main contractor and sub-contractor. All dealt with by one adjudicator in succession over an 18 month period, generally no more than 42 days each. None of the awards were contested or required enforcement steps.

1.3 The Eight Annual Report of the Chairperson of the Construction Contracts Adjudication Panel, covering the period from 26 July 2023 to 25 July 2024 illustrates the extent to which adjudication is a central means to resolve payment disputes in construction contracts. Figure 1 reports the growth in applications for the appointment of an adjudicator from July 2019 to July 2024. It should be noted that this covers only applications for an appointment, and so the actual total number, including those where appointments are agreed, may well be materially higher.

Figure 1: Number of Applications and Adjudicator appointments made under section 6(4) of the Construction Contracts Act, 2013 since July 2019

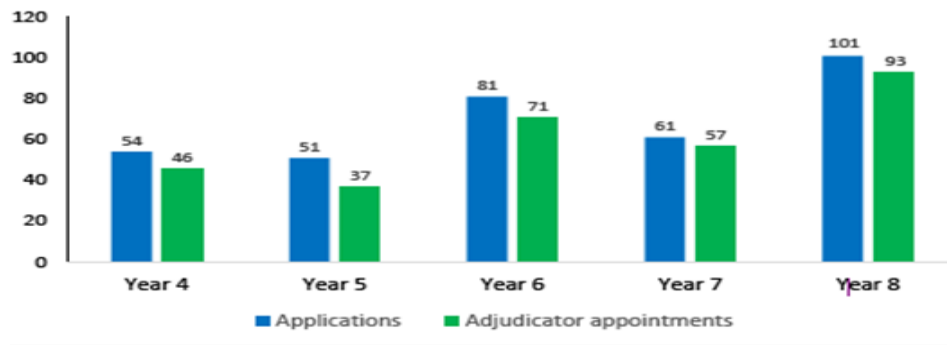
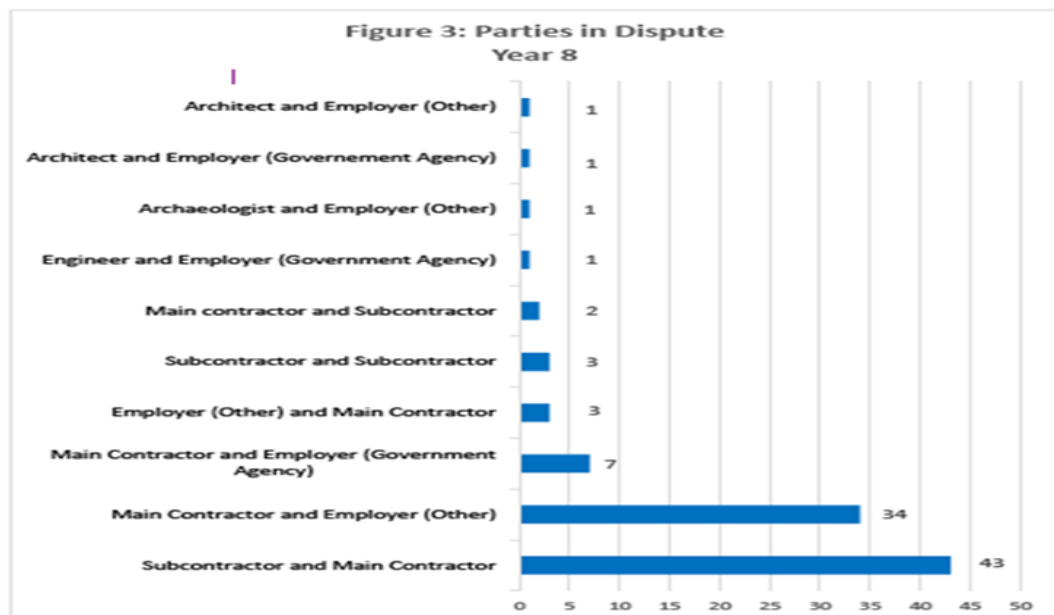
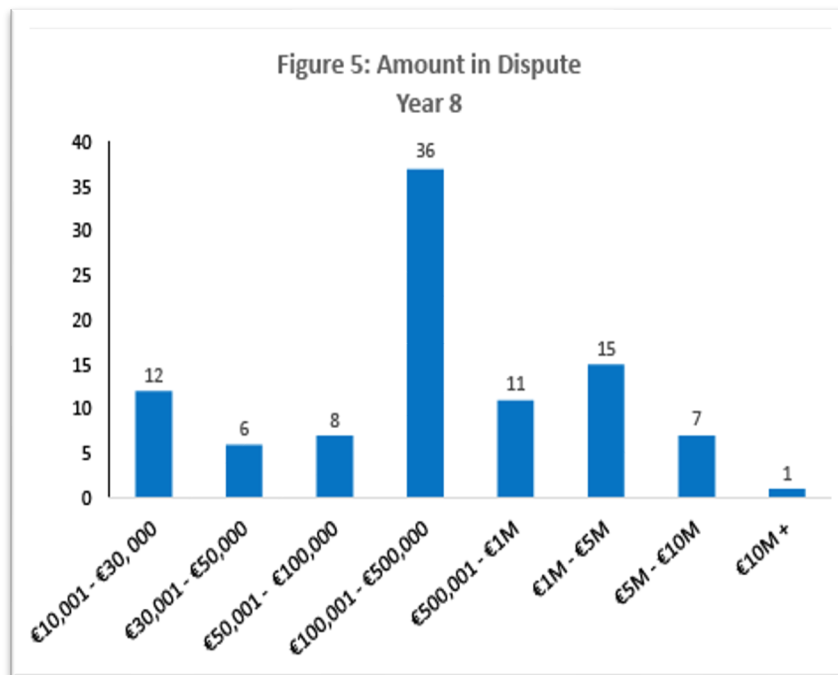


Figure 3, extracted below, gives the current profile of parties in dispute, predominantly sub-contractor to main contractor and main contractor to employer.



The profile of amounts in dispute can be seen in Figure 5, 62 references are for sums below €500k, and 73 for sums below €1 million.



2 The Approach of the Courts on Enforcement

It is unquestionably the case that the support of the High Court for adjudication at enforcement stage has been critical to the success of adjudication as a means to resolve construction contract payment claims.

If the intent of the Oireachtas in the Construction Contracts Act was to deliver a simple and quick means to resolving payment claims, then this has been reflected in a series of judgments since 2021.

If procedural arguments on availability of judicial review, the right to oral hearings, cross examination of witnesses, standard of application of law required by an adjudicator, and so on, had taken hold, then the enforcement process would have become complex, slow and unpredictable. By extension, the adjudication process itself would be quite different to that originally envisaged in the 2013 Act. A cautious, lengthy and expensive process such as that in my second example above may have been quite typical, rather than the speedy disposal of complex matters in my third example above.

I propose now to summarise the core features of key decisions since 2021 in order to highlight the practical aspects of the evolution of adjudication, and also to discuss the strategic

significance of the decisions from the perspective of the party representative. I will not examine the specific reasoning in each decision for present purposes, as this will be done by other panellists.

2.1 Gravity Construction Limited v Total Highway Maintenance Limited [2021] IEHC 19

This was the first Irish judgment to enforce an adjudicator's decision. The Applicant sought to enforce an award of €135,458.92 plus adjudicator's fees against the Respondent. The Court made an unless order and addressed costs allocation.

There were two issues for the Court to determine:

- (A) Whether a formal solicitor's undertaking to pay the monies will suffice instead of making an order against the Respondent?

Answer: No

The Respondent made a settlement offer, without prejudice to its right to pursue arbitration, to pay the sum due on the adjudicator's decision within two weeks. As a result, it argued that a judgment was unnecessary and proceedings should be adjourned, or in the alternative an unless order should suffice.

The Court agreed with the Applicant that the CCA 2013's intention was that "*the making of, and enforcement of, adjudications in construction disputes on an expedited basis ... are binding pending the resolution of the dispute between the parties by way of arbitration or legal proceedings*". The Applicant argued it was entitled to a judgment as a result and because it had waited 6 months for the hearing.

The Court found that the appropriate order was an order providing the Applicant leave to enforce the adjudicator's decision unless the sum was paid to its solicitors within seven days. This "*represents an appropriate compromise in that it respects the statutory entitlement of the applicant to relief, while affording the respondent a very short period of time within which to make payment without a judgment being formally entered against it*".

- (B) Benign outcome on costs for party making late and imprecise offer?

Answer: No

The Respondent's last minute offer, combined with grounds of opposition which were not pursued meant it was liable for the Applicant's costs. The default position under Legal Services Regulatory Act 2015 is the party which is "entirely successful" is entitled to costs, but the Court has discretion under section 169(1) to take any settlement offer into account. The Applicant raised the following issues with the settlement offer: (i) it was too uncertain to meet the criteria for a Calderbank letter, (ii) the letter was raised at the eleventh hour, and (iii) the Respondent raised grounds of opposition which it

ultimately dropped, thereby delaying proceedings. The Court ultimately granted the Applicant costs of the proceedings.

The 9 month period for the enforcement process in this case prompted Practice Direction HC 105; speedy access to Court is now at the heart of enforcement. Dilatory manoeuvres in Court are no longer an option.

2.2 Principal Construction Limited v Beneavin Contractors Limited [2021] IEHC 578

The High Court again enforced an adjudicator's decision awarding the Applicant €643,635.98. The Respondent argued against the enforcement on three grounds:

- (A) the wording of section 6 of the Act "if binding" makes the legislation in Ireland more flexible than the equal UK provision

17. "The UK authorities, notwithstanding the absence of such words in the corresponding section, have determined that the decision of an adjudicator may be unenforceable either on grounds of jurisdiction or natural justice. Therefore, ... the words "if binding" ought to be interpreted in that narrow context."

The Court emphasized the legislative intention for the enforcement process to be speedy and stated that:

"there is a statutory right to refer a payment dispute to adjudication. Secondly, the decision of the adjudicator is binding until the payment dispute is finally settled by the parties, or until a decision arises from arbitration or litigation. Thirdly, there is a summary procedure for enforcing a decision of the adjudicator."

In DG Williamson Ltd v Northern Ireland Prison Service [2009] NIQB 8, the Court noted the starting point for a court dealing with a request for enforcement of an adjudicator's award is to work on the assumption that the award ought to be enforced. The Irish Act expressly provided for Awards to be binding in Section 6(10) and so the contention based on Section 6(11) was misplaced.

Principle Established; the 'if binding' wording in Section 6(11) of the Act was not a gateway to relitigating the subject matter of the Award at the enforcement stage. The binding nature of the Award is expressly provided for in Section 6(10).

- (B) the final certificate was not disputed within the time provided and could not be referred to an adjudicator as a result

In summary the Court found that the provisions of the CCA 2013, which provides for adjudication, apply irrespective of the terms of the parties' contract. This is because the jurisdiction of the adjudicator derives from the legislation which confers "a clear unfettered right to refer a payment dispute for adjudication", not the contract. "When the payment dispute has been referred, the adjudicator, in determining the dispute,

may have regard to the terms of the construction contract itself. That is exactly what the Adjudicator did in this case.”

Principle Established: contractual language did not override the statutory right to adjudicate, or to have an Award enforced. The paying party can substantively dispute the matter later.

- (C) the Adjudicator’s refusal to allow the Respondent to prosecute its counterclaim was a material breach of natural justice

The Court considered whether the Respondent was entitled to raise a defence or crossclaim based on Applicant delays and decided, considering the substance of the counterclaim, it had acted within the bounds of natural justice. The Adjudicator concluded the Applicant delays were caused by the Respondent and held the Applicant was entitled to an award arising from the delay. The Court relied on a UK Supreme Court decision:

24. “... The set-off may be advanced by way of defence to the exclusion of the claim referred to adjudication, but not as an independent claim for a monetary award in favour of the respondent to the reference. ...”¹

Principle Established: set off available to extinguish a claim – operating as a true defence, but not as a separate cross-claim; that requires its own dispute

2.3 Aakon Construction Services Ltd v Pure Fitout Associated Ltd [2021] IEHC 562

The High Court enforced an adjudicator’s decision and set out key principles underpinning adjudication in Ireland.

This was a payment dispute between the Applicant (subcontractor) and the Respondent (main contractor). The Respondent invoked a clause of the subcontract which allowed termination without fault and served a notice of termination. The Applicant then delivered a payment claim notice. When the Respondent did not respond within 21 days, the Applicant argued it was entitled to be paid in full, or alternatively, the Respondent was liable under a sub-clause in the contract for all payments properly due for work executed and completed.

The paying party sought to resist the application raising three issues:

- (A) The Adjudicator lacked jurisdiction as the Notice of Intention to Refer was invalid due to (i) ambiguity, (ii) it advanced several claims and (iii) went beyond the terms of the dispute referred to him.

The Court rejected all of these contentions, noting the Act:

¹ Bresco Electrical Services Ltd (In Liquidation) v. Michael J. Lonsdale (Electrical) Ltd [2020] UKSC 25

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

The Court disagreed that it was ambiguous stating the issue in dispute was obvious. The judge confirmed the Court’s role for enforcing an adjudicator’s decision is limited to reviewing the integrity of the procedure and not the substantive findings. The question is *“whether the alleged defects impinged upon the Respondent party’s ability to defend the claim”*.

“Provided always that the Notice of Intention to Refer identifies the gravamen of the payment dispute and, in particular, the construction contract; the parties; the site address; the payment claim notice; the response to the payment claim notice; and the sum claimed, then the refinement of legal argument in the Referral will normally be permissible.”

The Court stated that S6(9) expressly provides that the adjudicator *“...may deal at the same time with several payment disputes arising under the same construction contract or related construction contracts.”* There is no restriction under Irish law to a party referring more than one dispute and *“...this objection is misconceived and ignores the difference in wording between the Irish and the UK legislation.”*

The judgment confirms that the Notice of Intention to Refer should set out clearly and comprehensively the claim being made and the basis for it. This detail may be further expanded upon in the Referral.

Principle established: the Court will not forensically police the framing of the dispute in a Notice to Refer. The approach adopted is consistent with similar decisions in arbitration and other dispute processes.

- (B) The Adjudicator breached rules of fair procedure and constitutional justice as he did not address a substantive defence raised by the Respondent

The Court did not accept this – “Rather, the adjudicator made a reasoned decision that a valuation could not be commenced until the adjusted amount had been paid. This is more properly characterised as a finding on the part of the adjudicator that the line of defence was inadmissible at this time, than as the adjudicator having disregarded or ignored the defence.”

Principle Established; the adjudicator is not required to detail reasoning on every issue in dispute as long as it is apparent that the issues have been accounted for and

evidently considered in the framing of the decision.

(C) A question of the impartiality of the Adjudicator was sensibly withdrawn

The Court indicated that an error of law made during an adjudication may result in the decision being outside of his jurisdiction but noted that section 4 does not set out the consequences for failure to respond within a required time are and cautioned practitioners to recognise the differences between Irish and UK legislation in this area as they are “*materially different*”.

“...provision is made under the Construction Contracts Act 2013 for an adjudicator’s decision to be enforced as if it were an order of court. An adjudicator’s decision thus has an enhanced status under the domestic legislation.” In contrast, *“...the normal procedure for enforcing an adjudicator’s decision under the UK legislation is to apply for summary judgment. Much of the case law is, therefore, concerned with whether the party resisting enforcement has been able to establish an arguable defence.”*

“The precise contours of the High Court’s discretion to refuse to enforce what is expressed under legislation to be a binding decision should be developed incrementally.”

2.4 *John Paul Construction Ltd v Tipperary Co-Operative Creamery Ltd* [2022] IEHC 3

This judgement brought clarity to the Court’s role in the enforcement of adjudication awards under the 2013 Act. The Respondent resisted the application on two grounds:

(A) The Adjudicator failed to comply with the requirements of fair procedures and natural justice by:

(1) Ignoring the substantive defence

The onus is on the party resisting the application for leave to demonstrate an obvious breach of fair procedures such that it would be unjust to enforce the adjudicator’s decision, even temporarily. There must be a material breach which had a potentially significant effect on the overall outcome.

“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.”

In terms of the Court considering a breach of fair procedures due to a failure to consider the defence 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.”*

“...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.”

An adjudicator’s decision should record its findings on the distinct defences raised by the party. Regarding a single defence comprising interrelated issues, an adjudicator will not be required to set out separate findings on each subtopic. It is sufficient that the substance of the defence has been addressed.

The Court held it was apparent from the Adjudicator’s decision that he fully understood the overall nature of the defence put forward by the employer. If and insofar as the employer is aggrieved, it had a right to refer the matter to arbitration and this justified the less rigorous role the court has in enforcing an adjudicator’s award - the Respondent had a right to a full re-hearing and to re-coup the monies paid if successful.

Principles Established:

- (i) An oral hearing will be an exceptional event. The adjudicator is responsible for determining the process to be adopted within the terms of the Act, the parties cannot insist on procedural requirements.
- (ii) A breach of fair procedures must be material to affect the enforcement process; ie must be such that it impacts on the outcome.

- (2) Allowing the claiming party to introduce a “new claim” during the adjudication

The Court held it was simply a better particularised version of the original claim.

- (B) The Adjudicator purported to reopen an issue which he had already decided in an earlier adjudication

The issue 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.

The decision touched on the question of the availability of judicial review but did not consider it any detail.

2.5 *K&J Townmore Construction Limited v Damien Keogh* [2023] IEHC 509

Townmore, the main contractor to Cobec, sought leave from the High Court to bring a judicial review to challenge the appointment of an adjudicator, Mr Keogh (the Adjudicator). The Adjudicator had considered that he had jurisdiction to adjudicate on a dispute between Townmore and Cobec under the Construction Contracts Act 2013. Mr Keogh declined an invitation to resign despite Townmore arguing that this was not a ‘payment dispute’ within

section 6(1) of the Act.

Townmore stated that it would be inequitable to wait until the end of the adjudication proceedings before challenging the Adjudicator's jurisdiction. They argued that the appropriate remedy is an order issued in advance of the adjudication. Cobec argued that leave to grant judicial review should not be granted as the Act provides an appropriate remedy through enforcement proceedings. In challenging this view, Townmore stated that the more appropriate remedy would be to decide the Adjudicator's jurisdiction in advance before participating in an expensive and potentially wasteful adjudication.

Mr Justice Twomey citing *Aakon Construction* and *Beneavin Contractors*, noted that the decision of an Adjudicator is binding but it is not enforceable until there has been a decision of the High Court to that effect, i.e. via enforcement proceedings as envisaged within section 6 of the Act. Therefore, he concluded that the appropriate forum to resolve this issue is at the enforcement proceedings stage.

Although not determinative in the decision, Mr Justice Twomey cited other factors for rejecting Townmore's application:

- (1) The underlying rationale for adjudication in the Act is to bring about speedy payment for builders. If leave for judicial review to challenge the whole process was granted, there would be a significant impact on the time it will take to resolve the dispute.
- (2) The Oireachtas introduced the Act to reduce legal costs which are incurred by parties to a construction contract. Mr Justice Twomey noted that the advantage of adjudication would disappear if the High Court permitted a judicial review.
- (3) The Oireachtas has already provided for enforcement proceedings for the Adjudicator's decision to be enforced within the Act. Therefore, an adjudicator's jurisdiction could be challenged at this stage.
- (4) Opening the Act to challenge by way of judicial review would be inconsistent with the speedy dispute resolution mechanism contained in the Act. It would also incentivise parties to a construction contract to judicially review adjudications to delay payments for a year or more.
- (5) The adjudication process may result in an outcome that is acceptable to both parties.
- (6) The adjudicator should not be prevented from exercising their statutory functions. Instead, the challenge of an adjudicator's decisions should be as envisaged by the Act.
- (7) The procedure put in place by the Oireachtas to resolve these disputes is particularly suitable for building contract disputes.

Principle Established: Judicial Review is not an available remedy at interlocutory stage of an adjudication. It is unlikely that the Courts will endorse it as a substantive remedy given the

approach here and observations in other judgments.

2.6 McGurran Civils ROI Limited v K&J Townmore Construction Limited [2023] IEHC 355

In this case, the Respondent unusually did not challenge the validity of two adjudicator's decisions involving the same parties. Instead, it sought minor reductions of the awarded amounts relying on the calculation of interest and the recovery of VAT.

The Court ultimately held that:

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

Furthermore, an overarching complaint was made regarding the fact that a formal solicitor's letter was not sent prior to the institution of proceedings.

In the context of the tight timelines for adjudication, the Court stated there *"...is no obligation upon the party seeking to enforce an adjudicator's award to give repeated warnings to the defaulting side of an intention to issue proceedings."*

Furthermore, the Court found this argument was not well founded because the Respondent did not argue that if a warning letter was sent, it would have promptly discharged the awards without the necessity of litigation. Such an argument would have cost implications.

It was noted by the Court that the initial amount claimed at the institution of proceedings was miscalculated by the Applicants. Although the Applicants revised its claim in an affidavit, the Court only awarded 90% of the legal costs to the Applicant to reflect the error.

2.7 DNCF LTD v Genus Homes LTD [2023] IEHC 490

This emphasises that clear shortcomings must be established to challenge an award for breach of fair procedures. This dispute involved a supposed overpayment by the Respondent who argued the Adjudicator breached fair procedures by dismissing the set-off claim and failing to canvass the views of the parties on this issue.

The Adjudicator requested a copy of the payment certificate to evidence the over-payment, but the certificate provided did not contain any quantum calculation to justify the figure claimed. In the absence of such breakdowns, the Adjudicator concluded the Respondent had failed to establish same.

The Respondent argued the Adjudicator breached fair procedures by not requesting a detailed breakdown, but the Court rejected this stating an adjudicator is not under an obligation to *"[cajole] the parties to elaborate or improve upon their cases"*, concluding that:

"The adjudicator was entitled, consistent with fair procedures, to reach a decision on the basis of the materials put before him by the parties. The adjudicator was not obliged to

enter into a dialogue with the employer nor to invite the employer to shore up its defence by adducing further evidence.”

“...if an adjudicator has genuinely gone off on a frolic of his own and has reached a decision by reference to a legal or factual point which had not been advanced by either side, and which the parties could not reasonably have anticipated might be considered relevant, then this would reach the threshold of a blatant or obvious breach of fair procedures.”

The Court highlighted that the legislative regime in Ireland provides an adjudicator’s decision with “an *enhanced status*” as compared to the UK legislation. Accordingly, case law from those jurisdictions should be approached with a “*degree of caution*”.

The judgment then explained the limited circumstances in which the Court may exercise its discretion in refusing to enforce an adjudicator’s decision:

“The High Court will only refuse leave to enforce an adjudicator’s decision on the grounds of procedural unfairness where there has been a blatant or obvious breach such that it would be unjust to enforce the immediate payment obligation.”

“...the adjudicator did consider the evidence which had been put before him and found it to be wanting. This is a very different matter from refusing to consider the evidence at all, on jurisdictional grounds related to how the claim and defence had been formulated by the parties.”

Principle Emphasised: breach of fair procedures must be ‘*blatant and obvious*’ to impinge on enforcement.

2.8 McGill Construction LTD v Blue Whisp LTD [2024] IEHC 205

The High Court enforced an adjudicator’s award of €1.25 million under the CCA 2013. The Respondent raised four main grounds of opposition, none of which the Court accepted:

(A) The Notice of Intention to Refer the matter to adjudication was invalid as it contained two payment claims;

The Court disagreed, finding there is no legislative requirement to have separate referrals in respect of individual payment claim notices.

(B) The formal referral of the payment dispute to the Adjudicator was not made within the seven day period under the 2013 Act;

The referral email arrived into the Adjudicator’s IT system at 23:59am on the seventh day after the Adjudicator’s appointment but only reached the inbox at 00:01am. The Respondent argued the email was received upon arriving into the recipient’s inbox which would have been the following day. The Court disagreed, finding that under

s.21(2) and (3) of the Electronic Commerce Act 2000 an email is received when it enters the recipient's information system. Accordingly, the referral was within the time-limit.

The Court noted that a failure to refer a dispute to an adjudicator within seven days after their appointment does not automatically invalidate a referral.

- (C) The Adjudicator acted in breach of fair procedures in failing to consider the Respondent's defence;

The defence asserted that any monies payable should be reduced by way of set-off or damages for the Referring Party's allegedly defective works. The Adjudicator indicated that the award was to be staggered so it would not be paid before the Respondent's parallel referral. When the Adjudicator did not reduce the Referring Party's reward, the Respondent argued that their defence was not considered. The Court held that the Respondent had *"been afforded a full opportunity to ventilate its argument in relation to the allegedly defective works and a determination made in advance of its obligation to discharge the first adjudication award coming into force."*

- (D) There was a question mark over McGill's ability to repay the Adjudicator's award if the Adjudicator's decision was overturned by the Court.

The Respondent alleged there were doubts as to the Referring Party's ability to repay the Adjudicator's award if it transpired that those monies were not properly owing to it. The Court found that Blue Whip *"failed to discharge the evidential burden upon it of demonstrating a probable inability ... to repay the award"*. The Court concluded that the question of whether, having regard to the 'pay now, argue later' principle underpinning the 2013 Act, it would ever be appropriate to refuse to enforce an adjudicator's award based on a claimant's financial position was a matter for another day.

2.9 Finnegan Contracts Limited v Killycard Developments Limited [2024] IEHC 752

This application to enforce an adjudicator's award under the CCA 2013 was challenged by the Respondent claiming a breach of fair procedures. The Court noted its discretion set out in John Paul Construction Ltd v Tipperary Co-operative Creamery Ltd case [at 2.4] stating:

- The Court's discretion to refuse leave to enforce an adjudicator's decision notwithstanding the narrow interpretation of the legislation which appears to be an automatic right to enforce once formal proofs are met.
- The High Court will not lend its authority to enforce an adjudicator's decision, even on a temporary basis, where there has been an obvious breach of fair procedures.

- Judicial discretion is an important safeguard ensuring confidence in adjudication. Once the formal proofs under CCA 2013 and Order 56B of the RSC have been established, leave to enforce will generally be allowed. The unsuccessful party has a right to reargue the underlying merits in subsequent arbitral or court proceedings. The onus is on the party resisting the application for leave to demonstrate 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 i.e. must have had a significant effect on the overall outcome of the adjudication.

An issue regarding the approach taken in calculating interest was raised, however, the Court reiterated the position in Aakon noting that the statutory discretion of the court to direct the payment of interest does not apply under the CCA 2013 as it lies with the adjudicator alone unless substantive legal proceedings are taken subsequently. In the case at hand, the Court was limited to determining the validity of the decision.

The Court concluded here that the decision was carefully reasoned and nothing in the procedural history or substance of the decision prevented the Court from enforcing the decision.

The Applicant, being entirely successful, was entitled to costs.

2.10 Tenderbids LTD (t/a Bastion) v Electrical Waste Management Ltd [2025] IEHC 139

This application for enforcement concerned the Notice of Intention to Refer being served by email rather than registered post, contrary to what the parties had contractually agreed. As a result, the Court held that the entire adjudication process was a nullity on the point of procedure and refused to enforce the adjudicator's decision.

Section 10 of the 2013 Act allows the parties to agree on the manner in which a notice shall be delivered. It stipulates that where there is no such agreement, a notice may be delivered by post or any other effective means.

The parties agreed to deliver such a notice by registered post whereas a payment claim notice under section 4 could be delivered by email. The Applicant argued it was sufficient that they received delivery receipt and an "email opened" notification. Furthermore, a telephone conversation had occurred between the solicitors discussing the adjudication.

The Adjudicator found that the referring party had served a valid notice of intention to refer and directed payment of €1,531,830.85 within seven days. Proceedings seeking leave to enforce this decision were adjourned to allow the parties to file written submissions on the failure to comply with the delivery of notices requirement.

It noted that the proper approach to statutory interpretation had recently been restated in Heather Hill Management Company v ABP [2022] IESC 43 which stated that "it is necessary

to consider the context of the legislative provision, the pre-existing relevant legal framework, and the object of the legislation insofar as discernible". The Court noted that the onus is on the Applicant to prove the provision does not have the effect suggested by the plain meaning of the words chosen by the Legislature. Here, the Applicant did not identify any factor that justified a departure from the plain meaning.

The Applicant tried to argue that the failure was not fatal and service ought to be deemed good where the Respondent had not suffered any prejudice. Service by email was the preferable method of service and there is evidence of receipt of the notice. The Respondent ought to have 'reserved its right' to bring a jurisdictional challenge at the earliest opportunity. The Court held there is no such requirement. The entire adjudication process was a nullity due to the failure of the Applicant to deliver a Notice of Intention to Refer in the manner prescribed. The Respondent was not obliged to engage with a nullity.

The Court noted that, in other cases, provisions expressly allowed for a departure from the strict rules in respect of service, but this did not. The Rules of the Superior Courts are inapplicable as a Notice of Intention to Refer is not a pleading governed by the Rules. The use of day-to-day communications by email cannot constitute an implied waiver.

The Court also pointed to case law from England and Wales which have set the precedent that: where there is a failure to comply with the prescribed method of service, the adjudication process is invalidated and the adjudicator is deprived of any jurisdiction.²

Principle Established: contractually prescribed means of service a Notice to Refer must be observed.

3 What are the practical consequences of the enforcement decisions?

3.1 The appealing vista – if only from the lawyer's perspective – of protracted procedural engagement around the adjudication provisions of the Construction Contracts Act has proven chimerical.

3.2 The landscape for procedural intervention to stymie either the adjudication process itself, or the enforcement of Awards, has narrowed dramatically through the series of judgments outlined above.

3.3 The following principles are firmly established:-

- (i) Interlocutory procedural review is not available. Judicial Review is not available at this stage and the indications are that it will not be available substantively. On the latter point, substantive Judicial Review is unlikely to be an attractive remedy in comparison to dispute on the merits. The threshold of review in judicial review is relatively benign

² Primus Build Ltd v Pompey Centre Ltd [2009] EWHC 1487 (TCC)

and may well only result in the decision being quashed and remitted to the decision maker. The issue is likely to come up again in circumstances where payment must be made to an entity that is unlikely ever to repay.

- (ii) The adjudicator has latitude to determine his or her jurisdiction and then to proceed substantively.
- (iii) Fine arguments on the scope of a notice to refer, number of disputed items and evolution of claims in the actual referral have gained no traction if substantively the payment claim is rationally framed and a dispute can be shown to exist.
- (iv) Any breach of the requirements of fair procedure must be '*blatant and obvious*' and be directly material to the outcome – this is an exacting threshold.
- (v) There is no right to an oral hearing, any oral hearing will be an exception and generally within the provenance of the adjudicator. We do not now see oral hearings as a feature of adjudication. By extension, cross-examination of witnesses plays no role. Formal rules of evidence are very much in the background.
- (vi) Express contractual requirements or substantive legal arguments will generally not forestall enforcement of a validly made Award; those issues have their moment in further substantive treatment of the dispute. This is not a rigid position – it can be seen in *Tenderbids* that contractually specified service requirements for a Notice of Intention to Refer must be complied with.
- (vii) Set-off can play a role as a defence, but a counterclaim which is in substance a true cross-claim is typically not captured by the claimant's notice to refer.
- (viii) A party is not entitled to expect individually reasoned treatment of its arguments / defences in an Award, or to challenge the Award by their absence, if in substance it can be seen in the Award that the issues were taken into account.
- (ix) The enforcement process will not involve substantive merit review. Arguments that an adjudicator has made a substantive error on a merit issue will generally be irrelevant to the enforcement question.
- (x) The enforcement process is quick.
- (xi) Caderbank offers in enforcement proceedings will typically have little relevance.

3.4 With the emergence of a clear pathway to prosecute and enforce payment claims by way of adjudication, what tactical or strategic options present themselves to parties to a payment dispute?

3.5 Possibly few within the confines of an active adjudication, but this depends on which party's interests are considered. A claiming party with a genuine payment claim can avail of a clear

pathway to prosecute its claim and enforce a positive Award. This is at its most clear in respect of certified and unpaid sums (which can also be pursued directly in debt).

3.6 The responding party does not have significant room for manoeuvre in response to an unpaid certified sum claim, or a claim approximating this scenario but falling short of certification – say one where the QS has made a recommendation, or even in respect of claims for the value of work done but not recommended or certified. This should not come as a surprise as it encompasses the classic circumstances envisaged by the Act, and avoids those presented by the first scenario I have outlined above.

3.7 However, significant issues do emerge and need to be considered once payment claims are of the less straightforward variety – as they often are. Most dispute issues under construction contracts are, or can readily be turned into, payment claims or disputes. The below is a summary of key practical considerations that arise from the enforcement disposition of the Courts indicated by the decisions above:-

(i) **Contract Terms**

Contract terms will not necessarily determine an issue in a party's favour in adjudication, they still require careful attention. Helpful contract terms not availing the paying party can be seen in *Principal Construction Limited v Beneavin Contractors Limited* – conclusive final certificate provisions did not pervert the referring party making recovery. The contrary however can be seen in *Tenderbids LTD (t/a Bastion) v Electrical Waste Management Ltd* where failure to adhere to the contractually prescribed means of service for adjudication was fatal to the enforcement effort.

The absence of provisions which can be included is definitely not going to assist the responding party.

The 2013 Act leaves ample room to the parties to define what is meant by payment being “due”. The terms of the Act in this aspect are in addition to those required by the Act. The payment provisions of standard forms of contract generally comply with the Act.

It is possible to include objectively rational pre-conditions to payment falling due, centred on contractor submittals, required standards of performance, programming updates, resource details and so on. Pay when paid clauses are not permitted.

(ii) **Counterpart Creditworthiness**

This needs to be actively assessed. Bonds or guarantees are the typical answer. An adjudication award can readily be enforced by a party who may not be able to repay the sum at a later date if the award is successfully overturned. Raising this point on an enforcement application is immaterial to the outcome.

(iii) **Execute the Contract**

The practice of not executing construction contracts, or even better, commencing work with two competing drafts of the contract in being, is almost a hallowed ritual in the construction industry.

Not compiling the schedules to a contract in a single executed instrument is inviting trouble. Leaving the question of what contract terms apply to be determined by an adjudicator indicates a robust risk appetite by the parties to the venture. I have seen this issue required to be addressed in adjudications under contracts for €50 million and also €200 million.

Do not do this.

(iv) **Implement the Terms of the Agreement**

Having drafted appropriate terms, and gone to the trouble of compiling and executing a contract, the most favoured practice in the construction industry is to completely ignore the contract terms until a dispute arises.

It is all very well having well drafted terms defining what is meant by payment being due, but ignoring them for certificates 1 to 10 and then finding a new enthusiasm for exact compliance at certificate 11 is generally not going to play well with an adjudicator.

Resource and programme updated requirements are generally ignored by both employers and contractors, but can be a powerful defence tool at later stages of a contract, or conversely a persuasive source of evidence for a contractor in pursuing prolongation entitlements.

(v) **Pay special attention to claims / claim notices, and particularly set-off or withholding notices**

Generally, the opposite is the case. There are more likely to be no proper notices, especially re set-off / withholding, accompanied by denunciations of the claim once a notice to refer is received, with little sympathy from an adjudicator.

(vi) **Pay what is actually due**

Given the approach of the Courts to questions of enforcement, a paying party should give careful consideration to the merits of belatedly disputing sums due under a construction contract, especially certified money, and especially on dubious grounds. Neither an adjudication nor a Court process will afford succour to such a party.

(vii) **Draft the Referral before the Notice of Intention to Refer**

This is often best practice as it will ensure the claim is accurately captured in the Notice of Intention to Refer.

(viii) **Carefully frame the relief sought**

What is asked of the adjudicator needs to be considered and carefully expressed. This ultimately frames the Award. Lack of clarity here can cause confusion later and can result in an Award that does not fully reflect the referring party's intention even if substantially successful.

(ix) **Prolongation and disruption claims require significant preparation**

The moving party has the advantage of choosing its time to issue a notice to refer. Generally, the emergence of such a claim does not come as a surprise to the responding party, gathering material and reinforcing assessments in preparation to respond is usually feasible. These claims do not materialise out of thin air and are often accompanied by a liquidated damages assessment.

(x) **Adjudication is an available option – should you take it?**

Serious consideration needs to be given to this question for large complex claims. Large construction claims are usually multi-faceted, involve numerous legal, fact and technical issues, often with great complexity. Adjudication may well not be suitable and can involve a significant level of unpredictability, this is especially so in multi-party situations which may involve consideration of issues under the Civil Liability Act 1961.

(xi) **Dividing large disputes into manageable elements**

This approach can work well, particularly for final account disputes consisting of disparate elements such as measured works, variations, delay, disruption etc, especially with a QS adjudicator. This involves a sequential approach by the claiming party, or co-operative engagement between the parties. Overall, this approach can be significantly quicker and more cost effective than court or arbitration and have the material advantage of resolving issues incrementally as opposed to waiting for the blockbuster excitement of an arbitral award or a judgment.

(xii) **Pathfinder claims**

Often key contractual issues may determine the treatment of significant sums depending on how various circumstances or terms are treated. There may be merit in addressing individual issues for clarity in adjudication with strong and persuasive fact sets. This requires careful consideration as an adverse outcome creates the opposite to the intended situation.

From a contractor perspective, a large amount of money in respect of work actually performed, but which is resisted on contractual grounds by the employer, is can provide a strong claim narrative. Resisting payment for work which the employer has the benefit of on contractual grounds (eg late notice or lack of complete substantiation) can be an

unappealing proposition for an adjudicator.

(xiii) **Evidence**

Formal rules of evidence generally will not be applied, but this does not obviate the need for convincing proof. Direct contemporaneous records are, as in any forum, typically the most convincing evidence. Independent expert evidence is often a requirement for large claim complex technical issues. For smaller claims, the technical opinions of professionals connected with the project are common – but maintaining entrenched views is a feature which lessens the impact.

Factual witness statements can be of use on limited questions where no other evidence is available, but it often does not take long for this to descend into an exchange of salvos of rhetoric or recrimination which usually deprives it of any utility.

4 **The Appointment Process: Limits of a Tactical Approach**

There is a “*non-interventionalist*” policy adopted by the courts regarding adjudication but “*parties are not able to influence the appointment of a judge by simply withdrawing a claim and resubmitting until they get one to their liking, so why should they be able to do so with the appointment of an adjudicator*”³.

“**Adjudicator shopping**” – a referring party tries to (i) get a favoured adjudicator appointed or (ii) avoid one who is perceived as being potentially unsympathetic to *the* case.

(A) *Lanes Group plc v Galliford Try Infrastructure Limited* [2011] EWCA Civ 1617

The Respondent dropped a referral after an adjudicator with whom they had previous unsatisfactory dealings was appointed. They issued a fresh notice of adjudication for a new appointment. The Applicant did not serve a response by the Adjudicator’s deadline and the Adjudicator submitted its “Preliminary Views and Findings of Fact” to the parties. Following this, both parties made submissions and comments. The Adjudicator then made an award in the Respondent’s favour.

The Technology and Construction Court found that (i) the second adjudication was valid, but (ii) the decision was a nullity due to apparent bias as it appeared the Adjudicator had made up his mind in the Preliminary Views before receiving the parties’ submissions.

The Court of Appeal agreed that the second Adjudicator had jurisdiction as the concept of repudiation did not apply to adjudications. It also commented that “forum shopping” was undesirable but permissible under the contract and the second Adjudicator had jurisdiction. Applying the test for apparent bias, the Court of Appeal stated: “*the fair*

³ Adjudication: How far can your tactics go? Steven Carey, 19 January 2015

mindful observer in this case would have characterised the Preliminary View as a provisional view and not as a final determination". It therefore enforced the award of the second Adjudicator.

(B) Makers v Camden [2008] EWHC 1836

The Respondent participated in the adjudication without prejudice to its view that the Adjudicator had no jurisdiction as he was not validly appointed. At enforcement stage, the Respondent argued there was an implied term in the contract that neither party would seek to influence the identity of the Adjudicator by making representations. They argued that a breach of this implied term made the Adjudicator's appointment null and void. Furthermore, the Respondent argued the Adjudicator was biased due to the contact it had with the Applicant pre-appointment.

However, it was held that there was no implied term preventing a referring party from making unilateral representations to the nominating body regarding the identity of the Adjudicator. It is not uncommon for parties to suggest an individual and the nominating body is not bound by such suggestions. Additionally, the Court held there was no apparent bias as there was nothing to prevent a party making contact to check availability or conflicts. The Court commented that if a nominating body allows representations regarding the Adjudicator's identity, they should consider whether a copy of such representations should be given to the other side.

(C) Eurocom Limited v Siemens PLC [2014] EWHC 3710 (TCC) (07 November 2014)

In the initial adjudication, the Adjudicator found in favour of Siemens. Eurocom, over a year later, applied to RICS for the appointment of an adjudicator for round two, and stated on the application form that the first adjudicator had a "conflict of interest" which was not true. The second decision was made in Eurocom's favour and Siemens argued the jurisdiction of the Adjudicator was invalid due to fraudulent misrepresentations. They also argued that failure to send Siemens a copy of the form was unfair and a breach of natural justice where the RICS practice was to do so for alleged conflicts of interest. Furthermore, Eurocom breached an implied term not to act dishonestly by subverting the system of nomination.

The Court held that "*the evidence gives rise to a very strong prima facie case that Mr Giles deliberately or recklessly answered the question as to whether there were conflicts of interest so as to exclude adjudicators who he did not want to be appointed.*" These were fraudulent misrepresentations to the RICS and rendered the Adjudicator's appointment a nullity by invalidating the process of appointment. The Court did not consider the failure to notify Siemens of the information a breach of natural justice as they merely had statements of good practice and were not required for natural justice.

On the implied term argument, the Court followed *Makers v Camden* stating that “parties enter into contracts on the basis that the other party to the contract will act honestly ... a party applying for a nomination of an adjudicator ... should not act dishonestly” as this would be in breach of that implied term. This was sufficient to mean that the Adjudicator did not have jurisdiction.

(D) *Cofely Ltd v Anthony Bingham & Knowles Ltd* [2016] EWHC 240

In this case, the English High Court ordered the removal of an arbitrator for apparent bias due to the frequency with which he had acted for the party. The Respondent had requested the particular arbitrator due to his experience in quantity surveying and delay analysis. The Applicant disagreed that this experience was necessary, but the Chartered Institute of Arbitrators appointed the named person anyway.

Subsequently, the judgment in *Eurocom* was delivered which found that the Respondent Knowles Ltd had represented Eurocom where it had falsely claimed conflicts of interest in respect of another adjudicator so that an adjudicator (being the same arbitrator in this case) would be appointed. After seeing this judgment, the Applicant wrote to the Respondent and the Arbitrator requesting information of the dealings, but the Arbitrator rejected the request due to irrelevance and ruled the tribunal was properly constituted and lacked a conflict of interest.

The Applicant then applied under the Arbitration Act 1996 to remove the Arbitrator due to doubted impartiality. The Court again outlined the test for apparent bias as “*whether the fair-minded and informed observer, having all the facts, would conclude that there was a real possibility that the tribunal was biased*” and found his removal to be justified as:

1. He had acted as arbitrator or adjudicator 25 times for disputes involving the Respondent in the previous three years,
2. This accounted for 25% of his total income and 18% of his total appointments, and
3. In all cases, the Respondent had requested someone with experience as a quantity surveyor and barrister which significantly reduced the pool of candidates.

The Court agreed it was reasonable for the Applicant to enquire about the dealings between the Respondent and the Arbitrator in light of the decision in *Eurocom*. The meeting to address the Applicant’s concerns became a hostile hearing where the arbitrator held there was no apparent bias. The Arbitrator’s lack of understanding of the relevance of the information requested further heightened concerns of unconscious bias.

(E) *Aiteo Eastern E&P Company Limited v Shell Western Supply and Trading Limited &*

Ors [2024] EWHC 1993 (Comm)

This case also concerned apparent bias in relation to an arbitrator's disclosure obligations. Aiteo was involved in two arbitrations regarding the same project against the lenders for the project. Prior to them being consolidated, the same arbitrator was appointed for both and Aiteo was concerned that having the same arbitrator would compromise impartiality. The Applicant also raised an issue with the Arbitrator's connections to one of the Respondents and it transpired that the first arbitrator failed to disclose she had provided expert advice to the Respondent on separate matters prior to and during her appointment. Following consolidation, a formal challenge was brought by Aiteo to the appointment, the ICC Court removed the Arbitrator without providing reasons. However, the initial arbitrator had already made four partial awards prior to a new arbitrator being appointed. Aiteo applied to the court to set aside these awards.

The Court found the lack of disclosure was indicative that the informed observer would consider there was a real possibility of unconscious bias. The Court then found that the serious irregularity stemming from the apparent bias caused a substantial injustice to Aiteo. Interestingly, the Court found that substantial injustice only existed for one of the four awards. Three awards involved arguments which were no longer reasonably arguable, but the fourth award gave rise to substantial injustice as it involved reasonably arguable points on both sides and the Applicant was entitled to have its arguments considered by an impartial tribunal.

5 Privilege: Awareness and Caution

I will limit my comments on what is a potentially complex topic to a number of specific points applicable to adjudication which simply serve to underline the need to give active consideration to the question of privilege in an adjudication context.

5.1 Legal Advice Privilege

(A) UK

In Walter Lilly & Co. Ltd v Mackay [2012] EWHC 1773 (TCC) construction claim consultants assisted with bringing a claim by providing advice on programming, some of which was disclosed during court proceedings, some of which were not and over which legal advice privilege was claimed. The Court concluded legal advice privilege did not apply as the terms of business expressly stated that the advice was not legal advice. It was also not clear whether the advisors were lawyers, and the terms and conditions mandated the consultants to source external legal advice if required.

"It does not hold itself out as a firm of solicitors or group of barristers, albeit that it

employs some lawyers. It was retained to provide ‘contractual and adjudication advice’. It is notable that it was not retained to provide legal advice as such.”

Thus, if lawyers are not involved in consultant advices, legal advice privilege will not apply and will be disclosable in court.

(B) Ireland

In Ireland, for legal advice privilege to apply, the communication must be between a lawyer and client. In McMahon v Irish Aviation Authority [2016] IEHC 221 a “lawyer” was held to include solicitors, barristers, salaried in-house legal advisers and foreign lawyers.

UK Supreme Court decision of R (Prudential Plc and another) v Special Commissioner of Income Tax [2013] UKSC 1 confirmed that only members of the legal profession are entitled to rely on legal advice privilege. This case was referenced by the Irish Supreme Court in Emmett Corcoran and Oncor Ventures Limited t/a the Democrat v Commissioner of An Garda Síochána and the DPP [2023] ILRM 237⁴:

“In any event, legal professional privilege presents few, if any, of the definitional challenges that journalistic privilege does. It applies only in defined circumstances and within defined relationships. The actors are readily identifiable. It applies only to legal practitioners (and not to other professionals, even if they give legal advice) and their clients.”

5.2 Litigation Privilege

(A) Australia

Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd [2011] VSC 477 found that documents created for the purpose of adjudication proceedings would benefit from litigation privilege.

“Despite the fact that the adjudication may not ultimately determine the parties’ rights if, in a subsequent court proceeding, the parties’ entitlements are litigated, the adjudication result is enforceable at law and is binding upon the parties unless and until a subsequent court order changes the outcome. I think that the nature of adjudications is such that preserving the confidentiality of communications, made for the dominant purpose of enabling the provision of legal services to participants in the adjudication, would promote the object of fairness for and between those participants.”

(B) UK

However, Three Rivers v Bank of England [2001] UKHL 16 reiterated the principle in Re

⁴ para 95.

L[1997] A.C. 16 that privilege is “*essentially a creature of adversarial proceedings*”. The question is then, do adjudications amount to adversarial or non-adversarial proceedings? There are two conflicting UK authorities on same – Straume⁵ held that adjudication was a quasi-legal proceeding akin to arbitration, but Austin Hall⁶ noted that adjudication is not a legal proceeding, it is instead a process designed to avoid the need for legal proceedings.

5.3 Relying on Without Prejudice Material

This issue was considered in Volker Stevin Ltd v Holystone Contracts Ltd [2010] EWHC 2344 (TCC) and Ellis Building Contractors Ltd v Vincent Goldstein [2011] EWHC 269 (TCC), specifically the question of whether the Adjudicator’s knowledge of a without prejudice letter or offer made the decision biased. The Court held that a fair-minded observer would not reach a conclusion of bias regarding knowledge of a without prejudice document or letter. There was no legitimate fear of lack of impartiality.

Rory Kirrane SC

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⁵ A Straume (UK) Ltd v Bradlor Developments Ltd [2000] BCC 333, Times, June 29, 1999 (Ch D)

⁶ Austin Hall Building Ltd v Buckland Securities Ltd [2001] BLR 272 (QBD (TCC))