

# White Paper Conference Construction Disputes 27 September 2022

## Enforcement of Adjudication Decisions

How are the latest - and most salient - adjudication enforcement decisions affecting practice and the main suites of contract?

Niav O'Higgins

Partner: Infrastructure, Infrastructure,  
Construction and Utilities

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## Trends in Adjudication and Adjudication Enforcement Decisions

- Number of adjudications increasing each year
- Since April 2021, Mr Justice Garrett Simons responsible for enforcement cases
- Small (and growing?) body of case law
  - 4 enforcement decisions
  - 2 other decisions of relevance
- Some questions have been answered (in whole or part)
- Other questions remain!

## Statutory Backdrop

- Statutory entitlement to refer disputes relating to payment to adjudication at any time
- Right to have an adjudicator's decision enforced, if binding

December 2020: O'Donovan v Cork County Committee of GAA, OCS One Complete Solutions and others (Mr Justice Brian O'Moore)

- ***Potential for judicial review of the adjudication procedure?***
- Most of works carried out under a letter of Intent which preceded the coming into effect of the CCA
  - This question of jurisdiction raised with the adjudicator who considered he had jurisdiction to proceed
  - GAA sought judicial review of procedure and granted leave along with a stay of the adjudication !
    - O'D already paid a significant amount
    - O'D criticised for delay in commencing adjudication
    - Parties could extend time for decision if needs be

## January 2021: Gravity Construction v Total Highway Maintenance (Mr Justice Garrett Simons)

- Application to enforce payment of an unpaid adjudicator's decision
  - Respondent argued matter should be referred to arbitration with stay on adjudicator's decision
  - A few weeks before hearing, solicitor's undertaking offered to pay decision – late and ambiguous!

Court considered if enforcement order should be made and costs awarded

- Respondent criticised for delays in dealing with enforcement proceedings
  - Undertaking very late and ambiguous. Unless Order issued allowing 2 weeks to pay
  - Costs of enforcement application awarded against Respondent

*Court considered the legislative backdrop, noting that it should have regard "to the legislative intent underlying the Construction Contracts Act 2013, ..., in particular, the need for expedition ... this legislation allows for the possibility of the making of and enforcement of adjudications in construction disputes on an expedited basis"*

## February 2021 : Construgomes & Carlos Gomes SA v Dragados Ireland Limited, BAM Civil Engineer and Banco BPI SA (Ms Justice Nuala Butler)

- JV (Dragados ad BAM) appointed Construgomes as subcontractor on New Ross By Pass
- 10% performance bond put in place by C
- Disputes referred to adjudication, JV raised CC, decision made in favour of C and decision paid.
- JV raised further issues and when not resolved satisfactorily, sought to make call on bond and C sought injunction to prevent payment out
- C argued issues already been dealt with in adjudication
  - Respondent does not have to raise all defences / CCs available to it in adjudication
  - Injunction refused

## July 2021: Principal Construction v Beneavin Contractors (Mr Justice Garrett Simons)

- May 2018: LOI (subject to RIAI yellow)
- November 2018 contract executed and completed soon after
- Following adjudication, Respondent challenged enforcement on grounds that (i) notice of adjudication issued more than 6 months after final certificate and (ii) adjudicator did not consider defence / counterclaim re entitlement to LADs
- Jurisdiction of adjudicator derives not from contract but the terms of the CCA
  - “at any time” effectively trumps the contract and “confers a clear unfettered right to refer a payment dispute for adjudication”
  - Adjudicator clearly had considered delays and respective position of parties (including LADs)

*The purpose and aim of the Act of 2013 is to provide for a summary procedure to enforce the payment of moneys ... notwithstanding that it may ultimately transpire that such moneys are, in fact, not owed. This ensures that moneys are paid without having to await the outcome of arbitration or litigation, which, more often than not, involves delay. The necessary timelines for payment in the building and construction industry are very different to the timelines in arbitration and litigation.*

# September 2021: Aakon Construction Services v Pure Fit Out Associated (Mr Justice Garrett Simons)

- A was sub-contracted by PFO: Sub-contract terminated and A then issued a payment claim notice to which no response was issued
- Adjudicator considered payment claim notice was valid and as no response, full amount claimed was due (and no separate valuation undertaken)
- PFO sought to resist enforcement (unsuccessfully) on 2 key grounds.
  - Outside jurisdiction: Notice of Intention to refer defined scope of dispute and here was ambiguous and argued Adjudicator had exceeded jurisdiction and extended beyond the payment dispute referred. Rejected by court: PFO was aware of claim and had been able to respond fully
  - Breach fair procedures: Adjudicator failed to consider all lines all lines of defence. Rejected by court: Court made clear not concerned with whether adjudicator had arrived at correct legal position
- Some other helpful findings:
  - “If binding” simply refers to jurisdiction or fair procedures / NJ
  - Reiterated point in Principal v Beavin and importance of supporting expedited procedure (including enforcement)
  - UK case law to be approached with caution – legislation here is different.
  - Adjudicator’s decision may be amendable to JR
  - Impact of errors of law remains to be decided

## December 2021 : John Paul Construction v Tipperary Co-Operative Creamery (Mr Justice Garrett Simons)

- TCC resisted enforcement on 3 grounds
  - Failure to follow fair procedures for not considering defence
    - Clear had been considered and decision did not have to recite every single argument – “The Court would 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*”.
  - Excess of jurisdiction as issues already determined in previous adjudication
    - Different points in issue here
    - Adjudicator allowed a new claim to be introduced (JPC had updated figures)
      - Claim had simply been better particularised
- Helpfully, clarified that a hearing will rarely be required
- Noted that whether adjudication under the CCA is amenable to JR still to be resolved.

# Impact on Practice and Main Suites of Contracts?

- Key lessons
  - Adjudication is a much more tactical form of dispute resolution than we have previously been used to
  - As a statutory process, has less impact on forms of contract or amendments of the same
  - A number of questions about the CCA have been answered
    - ❑ A hearing will be exception rather than the rule
    - ❑ Court's role in enforcement is limited and only concerned with breach of NJ / fair procedures and questions of jurisdiction
    - ❑ Be wary of relying too heavily on UK cases
  - A number of questions remain including:
    - ❑ Is adjudication susceptible to JR?
    - ❑ Will an erroneous decision be enforced?
    - ❑ Does absence of a 'response' have the same impact as absence of a payless notice?
  - Review of the CCA / Code of Practice?

ARTHUR COX

Q&A  
Thank you

Arthur Cox LLP  
[arthurcox.com](http://arthurcox.com)