

Cathedral Risk

Adjudication: Latest Case Law, Grey Areas, and Unresolved Arguments

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Adjudication

- Statutory dispute-resolution procedure, introduced in the Construction Contracts Act 2013.
 - The purpose and aim of the Act of 2013 is to provide for a summary procedure to enforce the payment of moneys from one party to another in a building contract, notwithstanding that it may ultimately transpire that such moneys are, in fact, not owed. (*Principal v Beneavin*)
 - Default period of 28 days from referral to decision.
 - Decisions binding until overturned by a court or arbitrator.
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Established Principles

- Enforcement should be a very speedy process. There is little point in putting the adjudicator under the cosh to produce a decision within a matter of weeks only for there to be a delay of months, or even years, thereafter in the enforcement of that decision. (*Aakon Construction v Pure Fitout*)
 - Case law from England and Wales cannot simply be “read across” to the CCA 2013. An adjudicator’s decision has an enhanced status under Irish legislation as compared to the UK legislation. (*Aakon Construction v Pure Fitout, DNCF Ltd v Genus Homes*)
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Established Principles

- The High Court has a limited role in an application for leave to enforce an adjudicator's decision. The Court will not carry out a detailed review of the underlying merits of the adjudicator's decision. The Court can only declare a decision unenforceable on the grounds of a lack of jurisdiction or a [blatant or obvious] breach of natural justice. (*Principal v Beneavin, Aakon Construction v Pure Fitout, John Paul Construction v Tipperary Co-Op*)
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Established Principles

- Jurisdiction must be conferred on the adjudicator by the parties. The jurisdiction of the adjudicator is not necessarily fixed by the notice of intention. The notice must identify the substantial part of the payment dispute, but a referring party can develop and refine its claim in adjudication. The adjudicator's jurisdiction will encompass any legitimate available defence to the referring party's claim. There is no express requirement to specify the relief sought. (*Aakon Construction v Pure Fitout, John Paul Construction v Tipperary Co-Op*)
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Established Principles

- A failure by an adjudicator to consider the defence put forward by a responding party will justify the refusal of leave to enforce. If a responding party has raised a number of distinct defences, then the adjudicator should record her decision against each of them. A refusal to consider a defence on incorrect grounds might be grounds for refusing leave to enforce; a mistaken conclusion regarding the merits of a defence will not be. (*John Paul Construction v Tipperary Co-Op*)
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Established Principles

- An adjudicator going off on a frolic of her own and reaching 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 or considered relevant, would be a blatant or obvious breach of fair procedures. But she can bring specialist knowledge to bear. (*DNCF Ltd v Genus Homes*)
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Established Principles

- A referring party can refer more than one dispute to adjudication at the same time.
(Aakon Construction v Pure Fitout)
 - A responding party can plead a full defence in set-off, but cannot bring a counterclaim. *(Principal v Beneavin)*
 - It will be rare, if ever, that an adjudicator is required to convene an oral hearing.
(John Paul Construction v Tipperary Co-Op)
 - A party should give effect to those parts of an adjudicator's decision with which it does not take issue. *(McGurran Civils v K&J Townmore)*
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2024 Judgments - Ireland

McGill Construction Limited v Blue Whisp Limited [2024] IEHC 205 (19 April 2024)

- The responding party challenged the adjudicator's jurisdiction, pre-referral.
 - The adjudicator invited the parties to agree to give her jurisdiction to consider the issue of alleged invalidity, and both parties agreed to do so.
 - The Court found that, while an adjudicator cannot ordinarily decide upon her own jurisdiction, the parties here had given the adjudicator the requisite jurisdiction by agreement.
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2024 Judgments - Ireland

McGill Construction Limited v Blue Whisp Limited [2024] IEHC 205 (19 April 2024)

- Secondary issue about the referral having been made in time. The Court determined it had been made at 23:59 on the seventh day after the adjudicator's appointment and was therefore valid.
 - Statutory Interpretation Act 2005.
 - It is not definitely the case that a failure to refer a dispute to an adjudicator within seven days after their appointment will be fatal to the reference.
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2024 Judgments - Ireland

McGill Construction Limited v Blue Whisp Limited [2024] IEHC 205 (19 April 2024)

- Responding party alleged that there was a question mark over the referring party's ability to repay the adjudicator's award – but did not adduce any credible evidence to that effect.
 - Impecuniosity of the winning party in adjudication not ruled out as grounds for staying an adjudicator's decision.
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2024 Judgments – England and Wales

Abbey Healthcare (Mill Hill) Ltd v Augusta 2008 LLP (formerly Simply Construct (UK) LLP) [2024] UKSC 23

- A collateral warranty is not a contract for the carrying out of construction operations; it simply guarantees the performance of obligations owed to another party.
 - Could be a construction contract if it included obligations to perform construction operations that were separate and distinct from those in the underlying construction contract.
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Grey Areas / Unresolved Arguments

- Is an error of law enough to warrant the refusal of leave to enforce?

There is no express statutory provision under the Irish legislation which stipulates what the consequences of a failure to respond to a payment claim notice are to be. (*Aakon Construction v Pure Fitout*)

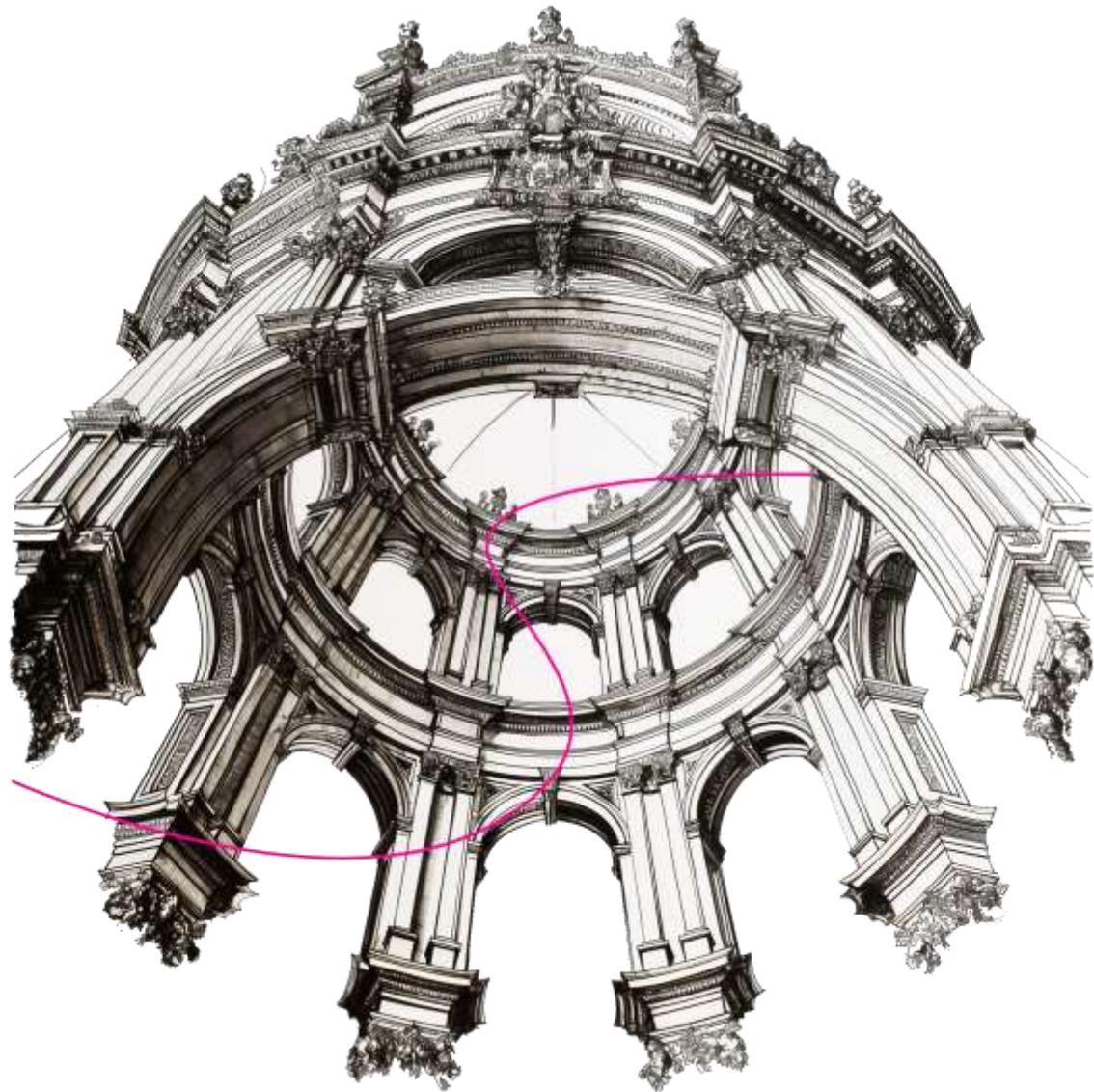
An error of law may amount to an over-stepping of jurisdiction, and may prevent enforcement. (*Aakon Construction v Pure Fitout*)

- Claims for damages versus payment claims.
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Grey Areas / Unresolved Arguments

- Can the referring party withdraw the dispute from the adjudicator?
- Is judicial review available at all?

Judicial review of an adjudicator's decision is not appropriate before the adjudication process has been completed. (*K&J Townmore v Keogh*)



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