



LITIGATION AND DISPUTE RESOLUTION

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# Irish Construction Adjudication: Recent High Court Decision

by **Ian Lavelle, Jamie Ritchie**

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An analysis of three recent decisions of the High Court in relation to adjudication under the Construction Contracts Act 2013.

[\*Aakon Construction Services Limited v Pure Fitout Associated Limited\*](#) [2021] IEHC 562

The High Court granted leave to enforce the decision of an adjudicator in accordance with Section 6(11) of the Construction Contracts Act 2013 (2013 Act). This decision serves as a further endorsement of the “pay now, argue later” principle that has underpinned the adjudication process in the UK and is being supported by a growing body of case law relating to adjudication in Ireland.

## Background

Aakon Construction Services Limited (Aakon) was engaged by Pure Fitout Associated Limited (Pure Fitout) under a subcontract which qualified as a “construction contract” for the purposes of the 2013 Act. A payment dispute arose in relation to a Payment Claim Notice delivered to Pure Fitout on 25 November 2020. A “Notice of Intention to Refer” the payment dispute to adjudication under Section 6 of the 2013 Act was issued by Aakon on 14 January 2021. Aakon submitted that Pure Fitout had failed to issue a response to the Payment Claim Notice within 21 days of the payment claim date as required by Section 4(3) of the 2013 Act and that this entitled Aakon to full payment in respect of the amount claimed.

## Decision of the Adjudicator

The adjudicator issued the decision on 25 June 2021 and ruled that the failure of Pure Fitout to respond to the Payment Claim Notice and in particular, to serve a valid “pay less” notice triggered the requirement to pay the amount claimed by Aakon. The 2013 Act does not use the terminology “pay less notice”, but instead refers to a “response to the payment claim notice”. For the purposes of our analysis of this judgment they should be considered to have the same meaning. Following the adjudicator’s decision, Aakon applied for leave of the High Court to enforce this decision and Pure Fitout sought to resist the application on the basis that the decision was “invalid”, alleging that the adjudicator did not have requisite jurisdiction and that the adjudicator had breached the rules of fair procedures and constitutional justice.

### Limited Jurisdiction of the Court in Enforcement Applications

The Court noted that its role in an application for leave to enforce is limited and that the 2013 Act confers binding status on the decision of the adjudicator “in the interim”, such that any decision “gives rise to an immediate payment obligation” which should be treated as being capable of enforcement “forthwith” save in the narrowest of circumstances.

In this regard, Section 6(11) of the 2013 Act states the following:

*The decision of the adjudicator, if binding, shall be enforceable either by action or, by leave of the High Court, in the same manner as a judgment or order of that Court with the same effect*

*and, where leave is given, judgment may be entered in the terms of the decision.*

The Court held that the qualifying words contained within section 6(11) “if binding” were “merely intended to address the contingency of the adjudicator’s decision having been superseded by a subsequent decision of an arbitrator or court.” Furthermore, the Court noted that these words “are not intended to suggest that the binding status conferred on an adjudicator’s decision is qualified or uncertain. Nor are the words intended as an invitation to parties to question the binding nature of the adjudicator’s decision in enforcement proceedings.”

In exercising its statutory powers in granting leave to enforce, the Court held that it was only required to consider two main issues: whether the decision was within the jurisdiction of the adjudicator and whether the decision had been reached on a fair basis.

## **Adjudicator’s Jurisdiction Not Strictly Confined to Contents of Notice of Intention to Refer**

Pure Fitout contested the adjudicator’s jurisdiction on the basis that the Notice of Intention to Refer did not clearly set out whether there was an interim payment or termination payment being sought and had failed to establish the relief being sought.

Whilst the Court recognised that an adjudicator does not enjoy “inherent jurisdiction” and that the authority and jurisdiction of the adjudicator “must be conferred” by the parties, the Court held that the Notice of Intention to Refer was valid in accordance with both the subcontract and the 2013 Act. The Court noted that while the 2013 Act is silent on the relationship between a Notice of Intention to Refer and the subsequent Referral Notice, it was satisfied in this instance that the terms of the Notice of Intention to Refer were sufficiently comprehensive to provide the adjudicator with the requisite jurisdiction.

The Court further held that that the adjudicator’s jurisdiction should not be rigidly defined by the contents of a Notice of Intention to Refer as this would be inconsistent with Section 6(9) of the 2013 Act, which provides that an adjudicator may take initiative in ascertaining the facts and law in relation to the payment dispute in question. Furthermore, the Court noted that elaboration on the details of a Notice of Intention to Refer in a subsequent Referral Notice and / or “refinement of legal argument” in later submissions are matters which the adjudicator is entitled to consider within his jurisdiction.

## **Procedural Fairness**

Pure Fitout argued that just because a response to a Payment Claim Notice had not been given, this should not preclude them from the right to contest the “true” value of the payment. Moreover, Pure Fitout submitted that the adjudicator openly acknowledged that he did not consider a substantive defence on this particular point and that this was tantamount to procedural unfairness. In this regard, the adjudicator effectively held that the proper course for Pure Fitout would have been to comply with the Payment Claim Notice and make adjustments in subsequent responses to future Payment Claim Notices. In other words, Pure Fitout’s failure to issue an adequate response to the Payment Claim Notice meant that Aakon was entitled to a “default payment” and that the adjudicator did not need to consider the substantive defence on the alleged “true” value of the claim.

In reaching this conclusion, the Court noted that the adjudicator cited the English judgment of [Grove Developments Ltd v S & T \(UK\) Ltd](#) [2018] EWHC 123 (TCC) as the basis for finding that the line of defence put forward by Pure Fitout was “inadmissible” rather than “disregarded” or “ignored”. Accordingly, the Court found the approach of the adjudicator did “not disclose an egregious error such as would justify the refusal of leave to execute” and consequently Pure Fitout had failed to demonstrate that there had been any procedural unfairness.

## **Comment**

The rationale for this judgment is perhaps best summed up in the words of Mr Justice Simons where he stated that adjudication “will be of limited practical benefit if the outcome of the process, i.e., the adjudicator’s decision, cannot be enforced promptly.” The judgment clearly demonstrates judicial intent to

interpret the grounds for challenging enforcement of Irish adjudicator's decisions narrowly.

Although the Court did also acknowledge that more complex issues relating to enforcement (such as manifest error and related matters) will inevitably be developed as case law evolves. Whether this judgment will usher in an era of so-called "smash and grab" adjudications in Ireland remains to be seen. The judgment should serve as notice to the industry that the Irish Courts support the 2013 Act, particularly the requirements to issue responses to Payment Claim Notices within prescribed timelines, and to abide by adjudicators' decisions unless there are clear grounds to resist enforcement.

[Aakon Construction Services Limited v Pure Fitout Associated Limited](#) [2021] IEHC 619 (Aakon No. 2)

A further judgment of the High Court in respect of this matter was delivered on 6 October 2021. This judgment (the "**Second Judgment**") was primarily concerned with the issue of whether the debt which was the subject of the principal judgment should be adjusted by reference to the outcome of a second adjudication between the parties.

Pure Fitout submitted that the first adjudicator's decision was no longer binding, having been superseded by a decision made in a second adjudication between the same parties. Pure Fitout submitted that the second adjudicator valued the works in dispute at a figure less than that specified in the Payment Claim Notice referenced in the principal judgment. However, Pure Fitout did not adduce the second adjudicator's decision in evidence and at the time of the delivery of the Second Judgment, had not taken any steps to enforce the decision of the second adjudicator.

***"The interrelationship between a first and second adjudication is not clear cut"***

The Court noted that the interrelationship between a first and second adjudication is not clear cut and considered it "neither necessary nor appropriate" to embark on such a consideration in these proceedings, particularly in circumstances where the Court had not had sight of the second adjudicator's decision.

Furthermore, the Court pointed out that "a second and subsequent adjudication does not have the legal effect of setting aside or otherwise undoing the binding effect of an earlier decision" and that any such submission was based on incorrect interpretation of Section 6(10) of the 2013 Act which provides as follows:

*The decision of the adjudicator shall be binding until the payment dispute is finally settled by the parties or a different decision is reached on the reference of the payment dispute to arbitration or in proceedings initiated in a court in relation to the adjudicator's decision.*

The Court also noted that Pure Fitout had expressly relied upon the English judgment of [Grove Developments Ltd v S & T \(UK\) Ltd](#) [2018] EWHC 123 (TCC) which stands "as authority for the proposition that a paying party, having lost an earlier adjudication as a result of its failure to respond to a payment claim notice, may only enforce a decision in a subsequent adjudication on the true value of the works where that party has complied with the first adjudicator's decision" (emphasis added).

The Court ruled that Aakon was entitled to judgment in the full amount of the first adjudicator's decision.

## Comment

As noted by the Court, "careful consideration of the legislative intention underlying the Construction Contracts Act 2013" would be necessary to establish the true legal status of a decision made in a subsequent adjudication. While the circumstances of this hearing meant that it would be inappropriate to conduct such an analysis (at this stage), the Court did acknowledge that the existence of a second contrary adjudicator's decision may be a factor in its discretion to grant leave to enforce in a future scenario. In any case, this judgment clearly demonstrates that the Irish Courts are in favour of a responding party complying with the decision of a first adjudicator before they will consider whether such a decision should be set aside as a result of a second decision of another adjudicator.

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# Adjudication Process Applied Due to Terms of Construction Contract

[O'Donovan v Bunni](#) [2021] IEHC 575

The High Court ruled that an electrical contractor may seek adjudication under the Construction Contracts Act 2013 (the 2013 Act) on foot of a contract entered into in May 2017, notwithstanding that the majority of the works to which the payment dispute related were carried out pursuant to a Letter of Intent which predated the entry into force of the 2013 Act.

The Letter of Intent was dated 10 June 2016. The 2013 Act came into force on 25 July 2016.

## Background

OCS One Complete Solution Limited (OCS) was engaged by Kevin O'Donovan and the Cork County Committee of the GAA (together, Cork GAA) to carry out electrical works at Páirc Ui Chaoimh, the GAA stadium in Cork. A dispute arose between the parties in respect of the final account presented by OCS. OCS ultimately referred the matter to adjudication under the 2013 Act.

An adjudicator was appointed to deal with the dispute by the Chairperson of the Panel of Adjudicators.

Cork GAA contended that the adjudicator had no jurisdiction to hear the dispute. It argued that the relevant construction contract, a Letter of Intent dated 10 June 2016, had been entered into before the 2013 Act came into force, so procedures under the 2013 Act are not applicable.

Cork GAA obtained leave to apply for judicial review of this matter and sought a stay on the adjudication pending the determination of the judicial review process. According to Cork GAA, the majority of the works that were the subject of the payment dispute were carried out pursuant to the Letter of Intent. On 19 November 2020 Cork GAA obtained the leave of the High Court to have the matter reviewed and were granted the stay they sought on the adjudication.

OCS subsequently sought an order lifting the stay. In his judgment delivered on 2 December 2020, Barr J found that the interests of justice would be best served by the stay on the adjudication continuing until the determination of the judicial review proceedings. Judgment was delivered by O' Moore J on 29 July 2021.

### 2017 Contract Superseded the Letter of Intent

The Court noted that the Letter of Intent contained wording which stated that it would be deemed satisfactory to allow OCS to proceed with the works, "pending signing of the Contract". Appended to the Letter of Intent was a form of contract, Clause 42 of which stated that the contract superseded all previous agreements, including the Letter of Intent. This clause was retained in the 2017 Contract. The Court held that the clear meaning of this clause was that the 2017 Contract would supersede and replace any prior agreement (including the Letter of Intent).

The Court also noted that whilst the 2017 Contract contained a number of changes to the form of contract appended to the Letter of Intent, these changes were not "earth-shaking". Significantly, the Court pointed out that the 2017 Contract in its terms expressly covered all the works carried out by OCS at Pairc Ui Chaoimh, including the works carried out pursuant to the Letter of Intent and the parties had clearly intended for this to be the case.

## Comment

The use of letters of intent (and similar agreements such as pre-construction services agreements) is common in the Irish construction industry. It is often for convenience, to enable preliminary works to begin on projects, pending the final conclusion of a formal building contract. Employers and contractors should give careful consideration to the terms of letters of intent and whether it is intended that a subsequent contract will supersede any initial terms.

Finally, the Court did note that if the Letter of Intent had not been replaced, then a “different legal scenario” could arise.

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