

SCSI Presentation of 29 September 2021  
Adjudication Enforcement under Construction Contracts Act 2013

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

### **Background to the proceedings**

- In Aakon a dispute was referred to adjudication whereby the applicant (sub-contractor) sought payment from the respondent (main contractor). The applicant argued that the respondent failed to issue a response to a payment claim notice within the mandated timeframe. In the alternative the applicant claimed that the measured works and variations should be valued in accordance with the contract. The respondent contended that the purported payment claim notice was invalid and that the applicant had not established entitlement to the sums for variations and measured works.
- The adjudicator found that the failure to respond to the payment claim notice had the consequence of triggering a default requirement to pay the amount claimed. The adjudicator then indicated that there was no need to evaluate the sums 'properly' payable by evaluating the measured work and variations.
- The proceedings of the High Court take the form of an application for leave to enforce the adjudicator's decision after the respondent sought to resist the decision on a number of grounds (detailed below).

### **Judgment of Mr Justice Garrett Simons ("Simons J")**

#### Jurisdiction of the Adjudicator

- The respondent argued that the payment dispute was invalidly referred to adjudication as (1), the payment claim notice was ambiguous as it didn't refer to the payment the claim was made in respect of and it didn't specify the relief sought (2), it was impermissible to advance more than a single dispute under the one 'notice of intention to refer' and (3) two applications were made for the appointment of an adjudicator.
- In relation to the alleged ambiguity of the notice, Simons J found that failing to indicate the relief sought in the notice of intention to refer a dispute was not fatal as unlike the position in respect of a notice of intention to refer under the United Kingdom legislation, there was no express requirement under the statutory code of conduct that a notice of intention to refer must specify the 'relief' sought.
- The respondent's contention that multiple disputes cannot be referred to adjudication was also rejected. Section 6(9) of the 2013 Act 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, Simons J noted that under the United Kingdom 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. There was nothing which precluded the applicant from arguing that its entitlement to payment can be analysed as triggering a default payment, or, in the alternative as capable of being measured as a variation or dayworks.
- The respondent alleged that there were material differences between the description of the dispute outlined in the applicant's form submitted in its first attempt to appoint the adjudicator when compared to the form submitted in the second attempt. Simons J held that any differences between these two forms were irrelevant as they lacked legal status and the first application was superseded by the second.

#### Failure to Consider a Defence

- The respondent alleged that the adjudicator openly acknowledged that the 'true' value of the works was not considered. However, Simons J held this to be incorrect as the adjudicator deemed this line of defence to be inadmissible, rather than dismissing it, reasoning that a

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valuation could not be commenced until the adjusted amount had been paid.

- Citing the England and Wales Court of Appeal case of *Grove Developments Ltd v. S & T (UK) Ltd [2018]*, Simons J stated the right to adjudicate or litigate the true value of the payment is contingent on the respondent complying with the decision of the adjudicator directing it to pay the adjusted amount outstanding under the payment claim notice, i.e. the sum of €242,225.09.

## **Key differences between the 2013 Act and similar legislation in the United Kingdom**

In his judgment, Simons J also warned that practitioners and judges in this jurisdiction should be cautious when using case law from England and Wales when interpreting and applying the Construction Contracts Act 2013 ("2013 Act") as there are significant differences between the legislative approaches adopted in the two jurisdictions.

Among the key differences that Simons J noted were the following:

- Simons J noted that in Ireland an adjudicator's decision is enforced as if it were an order of court whereas under the UK legislation, an application for a summary judgment is made to enforce an adjudicator's decision. As such, in Ireland, an adjudicator's decision has an enhanced status.
- The adjudication process under the 2013 Act is statutory in origin. By contrast, the United Kingdom legislation gives effect to a right to adjudication by implying terms into construction contracts. One practical consequence of this distinction is that an adjudicator's decision in Ireland might, in principle, be amenable to judicial review.
- Dissimilar to the UK legislation, there is no express statutory provision under the 2013 Act which stipulates what the consequences of a failure to respond to a payment claim notice are to be.
- There may be a potential difference in the role of the Court under the Act when compared to the Courts in the United Kingdom. In the United Kingdom an adjudicator's decision is binding until the dispute is finally determined by legal proceedings, by arbitration / litigation or by agreement. However, the 2013 Act refers to court proceedings initiated 'in relation to' the adjudicator's decision. This suggests that it is necessary to challenge an adjudicator's decision head on - rather than initiating independent proceedings seeking declaratory relief de nova as to the rights of the parties - and that some weight may have to be given to the adjudicator's decision.

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