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Twenty Practical Adjudication Questions Answered – Part I

At the time of writing in July 2022, there is now a helpful number of cases on adjudication in Ireland which establish some guiding principles on how the process ought to work. While there are issues yet to be teased out, a lot of insight is now available in terms of how the High Court interprets the Construction Contracts Act 2013 (the "Act"). This case law tells us a lot about the kinds of legal arguments which will, or will not, succeed, both in the course of adjudication itself, and also in the context of attempts by respondents to resist enforcement of adjudicators' decisions. The case law also hints at how the remedy of judicial review interacts with the adjudication process, though there is still significant uncertainty in how that will play out.

In briefings produced by others and available online, there are detailed summaries of the facts and outcomes in many of the cases, produced in each instance at or around the time the judgments were released. This article endeavours to take into account the various Irish cases to date, in the round. It is presented in a simple Q&A format by reference to the key questions which are emerging and, in many instances, being answered by the cases. The article is divided into two parts, in view of the number of issues emerging.

It seeks to distil the lessons from the cases to their essence, with the focus very much on the provision of practical guidance to users of the process. Some of the questions and answers are drawn from the author's own experience to date with the process, where the case law has not yet answered the points. The answers are brief, but the considerations underpinning those answers are in some cases complex and uncertain. This Part I deals with issues such as the Courts' overall attitude to adjudication, issues of jurisdiction and defences to enforcement of adjudicators' decisions.

The lessons from the case law are vitally important to bear in mind, not only for lawyers who may be drafted in to assist in an enforcement action, but also for all participants in the adjudication process, right from the outset. The approach which is taken to the prosecution or defence of claims in adjudication from the beginning sets the direction of travel for the dispute, which can be difficult to reverse at a later stage.

Rather than cluttering this article with citations, a table of citations of the Irish case law to date is set out in an appendix, with links to each of the judgments referenced.

Q.1 What is the attitude of the courts towards adjudication?

After a slow start, the decisions of the High Court are now robustly supportive of adjudication. A specific case management list for adjudication has been created, with the effect that a dedicated judge (Mr Justice Simons) is in charge of all adjudication enforcement applications in the High Court. These procedural structures lend practical support to adjudication, and to the prompt enforcement of adjudicators' decisions.

It can be expected that an application for enforcement will be heard and decided within a short number of weeks, rather than the period of months and, in some cases, years that many other types of cases spend languishing in the courts system.

Some of the early decisions, in particular the decision in *O'Donovan v Bunni* (Barr J) in December 2020, raised a question about how the High Court viewed the process. In the early days of the Act there was also much commentary, including commentary from senior judges speaking in an extra-judicial capacity, raising questions about the compatibility of the adjudication process with principles of natural and constitutional justice.

As the decisions have emerged, and in particular the decisions of Mr Justice Simons and Mr Justice Meenan, a definite trend is emerging of the Act being interpreted in a way which lends itself to adjudication being an effective and robust remedy for payment disputes.

The importance of these developments cannot be overstated. If the courts did not apply their scarce resources to lend practical support, or if the decisions had interpreted the Act in a restrictive way, the practical utility of adjudication would be greatly diminished.

As it stands, the process is effective and is becoming, if it has not already become, the norm in the resolution of payment disputes in the industry.

Q.2 If I am a respondent and an adjudicator's decision has gone against me, what can I do?

If the applicant seeks to recover sums claimed on foot of an adjudicator's decision, it may bring an application to the High Court by way of originating motion to enforce the decision.

There are two grounds on which the application for enforcement may be resisted: (i) in reaching his or her decision, the adjudicator has breached fair procedures and/or natural justice, and (ii) the adjudicator has exceeded his or her jurisdiction.

Q.3 What is an example of an adjudicator breaching fair procedures and/or natural justice?

The classic example of a breach of fair procedures is a failure to consider the defence put forward to the claim by the paying party. This concerns a basic tenet of fair procedures, the right to be heard. The High Court will have regard to the adjudicator's decision in the round – it is generally sufficient that the substance of the defence has been addressed in the decision. The Court should not be expected to parse the decision line-by-line.

There is a distinction between an inadvertent *failure* to consider a defence and a *refusal* by an adjudicator to consider a defence in certain circumstances. A refusal by an adjudicator to consider a substantive defence has however been held (in *Aakon v Pure Fitout)* not to amount to a breach of fair procedures where an adjudicator refused to embark upon a 'true' valuation of the works in circumstances where the applicant claimed payment because of the failure by the respondent to issue a timely response to a payment claim notice. (This is a so-called 'smash-and-grab' adjudication –this issue is dealt with in Part II of this series.)

Q.4 Does the right to a defence mean that I have the right to an oral hearing in adjudication?

The decisions to date indicate that the right to a defence (or to be heard) does not extend to a right to an oral hearing. The right is primarily about achieving balance in the submissions between the parties, not about achieving a perfect level of information.

Q.5 What is an example of an adjudicator exceeding jurisdiction?

One example of an adjudicator exceeding his/her jurisdiction would be a situation in which the adjudicator purported to make a decision in respect of a payment dispute under a construction contract which had been entered into prior to the designated date under the Act (i.e. 26 July 2016).

An argument of this sort was made in *O'Donovan v Bunni*, in circumstances where a letter of intent had been entered into prior to the commencement of the Act, and a building contract was subsequently entered into after much of the works were complete, and after the commencement of the Act. While the argument failed on the facts, the principle that the adjudicator will only have jurisdiction in respect of construction contracts entered into after 25 July 2016 holds good.

Another example relates to the meaning of the term "payment dispute". An adjudicator can only issue a decision in respect of a payment dispute. if the adjudicator purported to issue a decision in respect of a matter which falls outside the meaning of the term "payment dispute", he or she would be acting in excess of jurisdiction. What constitutes a payment dispute has not been considered in any detail in the judgments to date. One could speculate that, for example, a dispute purely concerned with whether an entitlement to an extension of time is available to a contractor would fall outside the meaning of 'payment dispute', but issues such as that currently remain open for debate.

Q.6 What happens if I am the applicant and I have issued my notice of intention to refer, but I have thought of some more good points. Does the adjudicator have jurisdiction to consider them?

The starting position is that the notice of intention to refer the payment dispute is the foundational document which delimits the extent of the adjudicator's jurisdiction. The adjudicator does not have jurisdiction to determine a payment dispute which has not been referred to him or her (*Aakon v Pure Fitout).*

There is a danger, however, in taking this principle too literally or in applying it too rigidly. The important qualifications are:

1. It is at least arguable that detail of the dispute can be further refined by the content of the subsequent referral (*Aakon v Pure Fitout)*;

2. The claiming party in an intended adjudication cannot, by purporting to define the dispute in narrow terms at the time of the reference, circumscribe the type of defences which the responding party may raise (*John Paul v Tipperary Co-Operative Creamery)*;

3. The applicant is entitled to advance different legal arguments in the alternative to support its claim (*Aakon v Pure Fitout).*

Q.7 Do I need to specify the 'reliefs' required in the notice of intention?

Unlike in the UK, the absence of sharply defined reliefs in the notice of adjudication may not be fatal to the application. In *Aakon v Pure Fitout*, the respondent argued that the reliefs or remedies sought were not expressly set out. The High Court noted the absence of an express requirement of that nature in the

Irish legislation (in contrast to the UK position). The court found that it was in any event "readily apparent" that the applicant was seeking payment under a particular payment claim notice.

Nevertheless, in order to minimize the prospect of jurisdictional squabbles, the prudent approach is to carefully set out the required reliefs in the notice of intention.

Q.8 If a respondent can raise any defence it sees fit in adjudication, can it also pursue a counterclaim?

The case law (*Principal v Beneavin*) suggests that the High Court will not refuse to enforce an adjudicator's decision where the adjudicator refused to allow the respondent to pursue a counterclaim.

This is not, however, the same thing as the High Court finding that an adjudicator is not entitled to give an award on a counterclaim.

While that point remains open for resolution, the decision in *Principal v Beneavin* suggests that a counterclaim may, at a minimum, be raised in adjudication by way of set-off in defence against the applicant's claim for payment.

Conversely, a respondent is not obliged to raise a counterclaim, and any suggestion that a failure to do so acts as a bar on subsequent pursuit of that counterclaim (on the basis of the principle in *Henderson v Henderson* or otherwise) has not found favour with the High Court (*Construgomes v Dragados*).

Q.9 What if the adjudicator has made an error of law in his decision?

As regards errors of law, the case law explicitly leaves open the question of whether enforcement can be resisted on this ground (*Aakon v Pure Fitout)*.

This remains a key open question in adjudication. If the courts hold that enforcement can be resisted on this ground, this has the potential to open the field significantly to challenges to enforcement. From the point of view of effectiveness of adjudication and the broader payments regime under the Act, it is arguable that expanding the grounds for challenge to errors of law would be a negative development.

This is perhaps one of the most complex open issues in adjudication enforcement and needs to be approached with caution.

Q.10 Can we not just look to the UK for guidance on this question?

In the UK, the position, according to a leading academic authority[1], is that errors of law that do not affect the adjudicator's jurisdiction and do not give rise to some argument as to impartiality or natural justice, will not prevent the enforcement of an adjudicator's decision.

Care should be applied in simply importing this or any other principle from the UK experience, which is under a significantly different statutory and constitutional regime. This caution in applying UK case law was expressly urged by Simons J in *Aakon v Pure Fitout.*

The second of this two-part series will be published next week. Part II deals with matters such as so-called 'smash-and-grab' adjudications, judicial review and related issues.

[1] Sir Peter Coulson, *Construction Adjudication* (4th Ed, Oxford 2019), par. 8.07

Appendix

Case	Judge	Date of Judgment	Link to Judgment
Kevin O'Donovan and Cork GAA v Dr. Bunni, James Bridgeman, and OCS One Complete Solution Ltd [2020] IEHC 623 ("***O'Donovan v Bunni***")	Barr J	2 December 2020	https://www.courts.ie/acc/alfresco/80f75ddf-3689-4a70-834d-8413619fe082/2020_IEHC_623.pdf/pdf#view=fitH
Gravity Construction Limited v Total Highway Maintenance Limited [2021] IEHC 19 ("***Gravity v Total Highway***")	Simons J	26 January 2021	https://www.courts.ie/acc/alfresco/91524a96-1559-4e8c-8d89-166a1674fe89/2021_IEHC_19.pdf/pdf#view=fitH
Construgomes v Dragados and BAM [2021] IEHC 79 ("***Construgomes v BAM***")	Butler J	4 February 2021	https://www.courts.ie/acc/alfresco/855318c4-89c0-404d-a2db-afe03a7bb3aa/2021_IEHC_79.pdf/pdf#view=fitH
Construgomes v Dragados and BAM [2021] IEHC 139 ("***Construgomes v BAM No. 2***")	Butler J	1 March 2021	https://www.courts.ie/acc/alfresco/e3890226-7ad6-484e-95d0-403085d08352/2021_IEHC_139.pdf/pdf#view=fitH
Principal Construction v Beneavin Contractors Limited [2021] IEHC 578 ("***Principal v Beneavin***")	Meenan J	16 July 2021	https://www.courts.ie/acc/alfresco/b7349ab5-06d0-434a-b140-fff3ac521256/2021_IEHC_578-1.pdf/pdf#view=fitH
Kevin O'Donovan and Cork GAA v Dr. Bunni, James Bridgeman, and OCS One Complete Solution Ltd [2020] IEHC 623 "***O'Donovan v Bunni No. 2***")	O'Moore J	29 July 2021	https://www.courts.ie/acc/alfresco/e88fec75-496f-426f-ae1f-5ffcc864da90/2021_IEHC_575.pdf/pdf#view=fitH
Aakon Construction Limited v Pure Fitout Limited [2021] IEHC 562 ("***Aakon v Pure Fitout***")	Simons J	13 September 2021	https://www.courts.ie/acc/alfresco/f277746d-e918-467b-9aa4-f0d414a8406f/2021_IEHC_562.pdf/pdf#view=fitH
Aakon Construction Limited v Pure Fitout Limited [2021] IEHC 619 ("***Aakon v Pure Fitout No. 2***")	Simons J	6 October 2021	https://www.courts.ie/acc/alfresco/5bfdb4ba-bc7f-4ea2-b0ca-b24a7fb1c1b0/2021_IEHC_619.pdf/pdf#view=fitH
John Paul Construction Limited v Tipperary Co-Operative Creamery Limited [2022] IEHC 3 ("***John Paul v Tipperary Co-Operative***")	Simons J	11 January 2022	https://www.courts.ie/view/judgments/67a2a3fc-493c-4bbf-9448-a6efac23a895/a3e06c68-138d-45cb-abc7-34cd8a06fca9/2022_IEHC_3.pdf/pdf