Kevin Harnett
kharnett@hayes-solicitors.ie
+353 (0)1 6624747
+353 (0)86 127 6917

Twenty Practical Adjudication Questions Answered

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. 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.

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 – see q. 12 below.)

Q.4 Does the right to a defense 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 respondent cannot pursue a counterclaim in adjudication.

There is an important caveat to this: it appears from *Principal v Beneavin* (Meenan J) that a counterclaim may be raised by way of set-off in defence against the applicant's claim for payment. It cannot, however, have the intention or ultimately result in a monetary award in the respondent's favour.

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.*

Q.11 Who bears the burden of proof in an enforcement application?

The burden lies with the applicant, but only to the extent that, once the 'formal proofs' have been established, leave to enforce will generally be allowed. Put another way, once the papers are in order, the adjudicator's decision will be enforced.

The burden then shifts to the respondent. According to Simons J in *John Paul v Tipperary Co-Operative Creamery*, the 'onus is upon the party resisting the application for leave to demonstrate that there has been an obvious breach of fair procedures such that it would be unjust to enforce the adjudicator's decision, even on a temporary basis. The breach must be material in the sense of having had a potentially significant effect on the overall outcome of the adjudication'.

In simple terms, if you are the respondent and the adjudicator's decision has gone against you, you will need a good reason to resist enforcement.

Q.12 Does this apply in all scenarios? Are so-called 'smash-and-grab' adjudications allowed?

The Act makes no distinction between different types of payment disputes.

'Smash-and-grab' adjudications are a continuing matter of uncertainty. Used here, the term means an adjudication in which the applicant claims payment of the full amount of an application for payment on the basis that the respondent has failed to deliver a response within time to a payment claim notice under the Act.

The case law has not directly decided whether such claims are legitimate under the Act.

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

From experience, some adjudicators have taken the view that the failure to issue a response to a payment claim notice gives rise to a crystallised entitlement to be paid the full amount in the payment claim notice. Others have taken the opposite view. There are good arguments which can be deployed in support of either position.

The High Court has not yet been asked to decide this question directly, but the view of the Court might be hinted at in the following passage from *Aakon v Pure Fitout:*

> *"First, the domestic legislation does not set out the consequences of a failure on the part of the paying party to deliver a response within the required time; and, secondly, it does not state that, in the absence of a response, the amount claimed in the payment claim notice is payable by default."*

In contrast, the English legislation sets out the consequences, which are that the amount claimed in the payment notice is payable by default in the absence of a 'pay less notice' (equivalent to a response). The comments in the *Aakon v Pure Fitout* judgment invite an inference accordingly.

The court may have been forced to engage with that question in greater detail if the respondent had resisted enforcement on the basis that the adjudicator had erred in law in reaching his conclusion about the consequences of the absence of a response. Equally, the court might take the view that this is more properly a matter for judicial review. Either way, it is an issue which is calling out for greater legal certainty, whether (potentially) through judicial review, or (preferably) through legislative amendment.

Q.13 Surely it is not fair if adjudicators are allowing smash-and-grab adjudications where the payment claim does not reflect the true value of the account. Is there any solution to this problem?

While the High Court appears willing to enforce a 'smash-and-grab' adjudication award, that does not mean that the respondent is left without any remedy.

It can be said with some degree of confidence that a second true valuation adjudication will be allowed, but that the timing of same and how it interacts with any enforcement application in respect of any prior 'smash-and-grab' adjudication remains uncertain.

The approach which appears to have been taken by the adjudicator in *Aakon v Pure Fitout* was that it was permissible for the respondent to pursue a 'true valuation' adjudication, but that the respondent

could not obtain such a determination on the true valuation until such time as it had paid the amount awarded in the earlier decision. This is consistent with the approach taken in the UK case law[2].

The High Court did not ultimately have to decide this point directly in *Aakon v Pure Fitout* because the second adjudicator's decision was not put in evidence in the enforcement application in respect of the first adjudication and no enforcement steps had been taken in respect of the second adjudication. It should be noted that the respondent had in fact commenced and seemingly obtained a favourable award in the second 'true valuation' adjudication, notwithstanding the views of the first adjudicator.

Q.14 If different adjudicators are forming different views on 'smash-and-grab' adjudications, is there an issue about the consistency and quality of decisions being made by adjudicators?

An expectation of precisely uniform decision-making by adjudicators is not a realistic expectation, given the relative infancy of the process, the confidential nature of the decisions, the number of adjudicators in practice, and the varying professional backgrounds of those adjudicators.

As the issues in dispute continue to repeat themselves, consistency of opinion on issues of frequent dispute will develop over time.

In overall terms, a positive view on the quality of decision-making can be drawn from the general support for the process in the High Court, and in particular the apparent willingness of the Court to enforce the decisions being made by adjudicators. There is an argument for greater transparency, which would improve consistency and thereby increase certainty of outcome, and this would be assisted by the publication of adjudicator's decisions. It is possible, along the lines of decisions of the Tax Appeals Commission, for decisions to be anonymised if the commercial interests of the parties are of sufficient weight to justify that protection.

Q.15 Is it possible to judicially review an adjudicator's decision?

This is a matter of some uncertainty.

One of the earliest decisions (*O'Donovan v Bunni)* appears to have proceeded on the basis that judicial review was available. That case could be viewed as having gone even further, as it allowed for judicial

---

[2] *Grove Developments Limited v. S & T (UK) Limited* [2018] EWCA Civ 2448; (2018) 181 ConLR 66.

review of a 'view' taken by an adjudicator (i.e. not even a decision) regarding the extent of his own jurisdiction.

Much of the commentary on adjudication in Ireland has proceeded on the basis that judicial review is available, largely on the basis of the quasi-judicial nature of the function which is imposed upon the parties to a construction contract by statute.

The decision in *John Paul v Tipperary Co-Operative Creamery* casts some subtle doubt on this assumption. Firstly, that decision makes the observation that the availability of judicial review in *O'Donovan v Bunni* was '*accepted by the parties without argument*'. This observation opens the door for a contrary view to be taken by the court in a future case, without implicitly criticizing the existing decision in *O'Donovan v Bunni*. Secondly, while noting that it was unnecessary in that case to address the matter of whether adjudication is amenable to judicial review, Simons J described this as a 'difficult question'.

Whether judicial review is available is a binary question. A binary question which is also a 'difficult question' is one where the answer could just as easily be 'no' as 'yes'. In principle, judicial review should be available.

Q.16 As the respondent, I am willing to take all available steps to resist enforcement. What should I do?

So long as there is a question mark over the availability of judicial review of an adjudicator's decision, there remains a prospect that judicial review may be an available remedy. It should be considered carefully by any resolute respondent.

A number of factors need to be kept in mind. Firstly, there are strict time limits for commencement of judicial review (three months from the date on which the grounds for the application first arose).

Secondly, there is a delicate interaction between judicial review and the alternative approach of seeking to resist enforcement if and when a motion is issued for enforcement in the High Court by the applicant. In general, judicial review is not normally available as a remedy where there is an 'effective alternative remedy' open to the respondent. Whether the availability of grounds to resist enforcement, or indeed the ability to refer the dispute to arbitration, constitutes an effective alternative remedy, remains an open question. This was the subject of some discussion, but no definite conclusion, in *Aakon* v *Pure Fitout.*

Given the ongoing question mark over whether an error of law could be good grounds to resist an enforcement application, it remains viable based on current jurisprudence to pursue judicial review where an error of law is asserted.

In practice, where there are a number of arguments in play, a respondent may wish to protect its position by issuing judicial review proceedings, and also raising defences (issues of jurisdiction and/or natural justice) in any enforcement application.

In practice, the probability is that the related sets of proceedings would be case-managed together, with the natural home for those proceedings being before Mr Justice Simons (or his successor) in the adjudication list.

Q.17 Is it possible to bring a number of separate claims in a single reference to adjudication?

Yes. The Act makes it clear that 'several payment disputes' can be referred in a single adjudication, which differs from the UK position.

There is a practical consideration to bear in mind here: an adjudicator may reasonably choose to resign where the level of detail or complexity in the referral prevents the adjudicator from adequately dealing with the matters in dispute within the time available.

Q.18 Is it possible to divide a claim into constituent parts and bring those claims in a series of separate adjudications?

Provided the given issue referred can properly be described as a payment dispute, there should be no difficulty in principle with the sub-division of issues and the commencement of separate referrals.

Care should be exercised to stress-test whether the breaking out of sub-issues into separate adjudications casts doubt on whether any given sub-issue properly constitutes a payment dispute in its own right.

Sub-division of issues into separate adjudications may be a matter of particular complication in the context of a final account, where consideration needs to be given to how counterclaims and other defences interact with a final account claim which has been broken out into separate adjudications.

Q.19 I have heard there is an argument that adjudication is not really binding. Is that correct?

No.

This issue has caused more uncertainty than is warranted – section 6(10) of the Act provides that the decision is *'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'*. Section 6(11) causes some confusion by stating that the *'decision of the adjudicator, if binding, shall be enforceable…'*

The respondents in *Principal v Beneavin* and in *Aakon v Pure Fitout* appeared to assert that the term 'if binding' in section 6(11) lowered the threshold to resist enforcement of the adjudicator's decision or otherwise raised a doubt about the binding nature of the decision.

On the basis of the decision in *Aakon v Pure Fitout*, the words 'if binding' are simply intended to address the scenario of the adjudicator's decision having been superseded by a subsequent decision of an arbitrator or a court.

Q.20 Is there a difference in section 6(10) of the Act between a 'reference of the payment dispute to arbitration' and 'proceedings initiated in court in relation to the adjudicator's decision'?

Whether the ultimate determination of the dispute is through arbitration or court proceedings depends on the jurisdiction specified for dispute resolution by the parties in their contract.

The apparent distinction between arbitration and court proceedings in section 6(10) creates some doubt. As regards arbitration, it is reasonably clear that a reference of the dispute to an arbitrator would be treated as a *de novo* hearing (i.e. a fresh, free-standing review), with all of the issues to be considered afresh by the arbitrator, and the adjudicator's decision would not have any enhanced status before the arbitrator (*John Paul v Tipperary Co-Operative Creamery).*

With regard to proceedings in court, the use of the term 'in relation to the adjudicator's decision' raises a question about whether such proceedings should be viewed as a form of appeal against the adjudicator's decision, rather than a *de novo* hearing. (If so, this raises questions about the extent to which findings of fact by an adjudicator may be disturbed, as well as questions about where the burden of proof lies).

While a literal reading of section 6(10) might support such a distinction between arbitration and court proceedings, there is no conceivable reason why there ought to be a distinction between arbitration and court proceedings for these purposes. A more sensible interpretation is that arbitration and court proceedings both ought to be treated as *de novo* processes.

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

The contents of this legal update do not constitute legal or commercial advice but are merely indicative of current developments in the law. Readers should seek specific advice before making any decisions.