

Key Irish Decision Brings Clarity to Construction Adjudication Enforcement Regime

With effect from 26 April 2021, High Court Practice Direction 105 ("PD 105"), issued by the President of the High Court (Irvine J), puts into place a relatively speedy enforcement process for successful adjudication claimants, to ensure (together with Order 56B of the Superior Court Rules) that the 'swift justice' intentions of the Construction Contracts Act 2013 (the "Act") are not thwarted by subsequent enforcement litigation.

While there are two prior judgements on this topic (*Gravity Construction Limited v Total Highway Maintenance Limited* [2021] IEHC 2019 and *Principal Construction Limited v Beneavin Contractors Limited* [2020 No. 199 MCA]), we now have the first substantive decision of the High Court Judge specifically assigned to hear such enforcement applications (Mr Justice Simons), since the introduction of PD 105 (*Aakon Construction Services Limited v Pure Fitout Associated Limited* [2021] IEHC 562¹).

Key Takeaways

The case concerned Aakon's High Court application to enforce a favourable adjudication decision, under section 6(11) of the Act. The main points of the decision to note are:

- It is in the public interest that construction payment disputes are to be resolved expeditiously and that an adjudicator's decision should be capable of being enforced immediately

- There are significant differences between the UK and Irish adjudication regimes, therefore UK case law, while helpful, should not be simply 'read across' for the purposes of enforcement under the Act
- Even though an adjudicator's decision is not final and conclusive, it nevertheless gives rise to an immediate payment obligation
- The Act considers the adjudicator's decision to be binding, unless and until it is superseded by arbitration or fresh court proceedings (or the dispute is finally settled)
- The court's role in these applications is not to investigate the merits of an adjudicator's decision, but rather to ensure, among other things, that the Act's requirements and fair procedures have been followed
- The precise contours of the court's discretion to refuse to enforce should however be developed incrementally, as further cases arise
- Subject to the above, any dissatisfied paying party must bring its own (court or arbitration) proceedings in relation to the relevant adjudication decision, before it can seek to have that decision overturned

On the facts, the respondent had argued that the adjudicator had acted outside of his jurisdiction and that his decision was,

¹ https://www.courts.ie/acc/alfresco/f277746d-e918-467b-9aa4-f0d414a8406f/2021_IEHC_562.pdf/pdf#view=fitH

accordingly, invalid. The court ultimately found that the respondent's arguments had no merit and was satisfied that leave to enforce should be granted to the applicant.

Where do we go from here?

Simons J's judgement represents a detailed and particularly helpful analysis of the court's role in enforcement applications, and provides some much-needed clarity to the area. Importantly, the decision is a further indication of support from the courts for the 'pay now, argue later' approach envisaged by the Act.

Nonetheless, the court acknowledged that certain potentially difficult issues are still to be fully grappled with, which will fall to be determined on another day. Such issues include:

- (a) Whether an error of law, contained within an adjudicator's decision, is capable of examination in the context of an application for leave to enforce
- (b) Whether adjudicator decisions are generally amenable to judicial review
- (c) How the thorny issue of multiple, sometimes simultaneous, adjudication disputes might be treated by the courts in a non-enforcement context - particularly when those disputes involve so-called 'smash and grab' proceedings, i.e. where the claimant obtains a payment decision purely on the basis of the paying party's failure to deliver a timely 'pay less' notice under the Act, and not on foot of any claim valuation exercise

In the meantime, the decision highlights the continuing importance for paying parties to be fully alive to its requirements to deliver a timely 'pay less' notice, under section 4 of the Act. While not all adjudicators will necessarily approach this question in the same way, (and the High Court has yet to rule on the 'correct' interpretation of the Act in this regard), for now it would be reasonable to expect failure to deliver such a notice in time, to result in a

finding of a default payment obligation. Further, certainty of enforcement has, now, become a great deal clearer.

Either way, the decision also likely serves as a necessary and welcome signal to many contractors and sub-contractors, from a payment and cash-flow perspective.

The applicant in this case was represented by Maples and Calder (Ireland) LLP and Alan P Brady BL, with advice and assistance provided to the applicant at the adjudication stage by Robert Burke of LCB Project Management Ltd.

Further Information

For further information, please liaise with your usual Maples Group contact or the person listed below.

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