**APPROVED** **[2021] IEHC 562**

THE HIGH COURT

2021 No. 161 MCA

IN THE MATTER OF THE CONSTRUCTION CONTRACTS ACT 2013

BETWEEN

AAKON CONSTRUCTION SERVICES LIMITED

APPLICANT

AND

PURE FITOUT ASSOCIATED LIMITED

RESPONDENT

**JUDGMENT of Mr. Justice Garrett Simons delivered on 13 September 2021**

**INTRODUCTION**

1. The Construction Contracts Act 2013 has put in place a statutory scheme whereby payment disputes under construction contracts can be referred to adjudication. An adjudicator's decision is *provisionally* binding on the parties and is subject to summary enforcement. This approach is sometimes referred to informally as "*pay now, argue later*".

2. These proceedings take the form of an application for leave to enforce an adjudicator's decision. Section 6(11) of the Act provides that an adjudicator's decision can, with the

leave of the court, be enforced in the same manner as a judgment or order of the High Court.

3. The paying party seeks to resist the application for leave to enforce on the basis that the adjudicator's decision is "*invalid*". Two grounds are advanced in support of this contention. First, it is said that the adjudicator had not been conferred with jurisdiction to reach the decision that he did. Secondly, it is said that the adjudicator breached the rules of fair procedures and constitutional justice by failing to address a substantive defence raised by the paying party in its written response to the referral. These grounds of opposition have been set out in the replying affidavit, as required under Order 56B of the Rules of the Superior Courts. A third ground of opposition, which questioned the impartiality of the adjudicator, has, very sensibly, been withdrawn.

4. For ease of exposition, this judgment has been structured in three parts as follows. Part I sets out the legislative context and offers an overview of the statutory adjudication process provided for under the Construction Contracts Act 2013. Part II sets out a summary of the referral to adjudication and the adjudicator's decision. Part III consists of the court's consideration of the application for leave to enforce, and, in particular, of the grounds of opposition.

## PART I

### OVERVIEW OF CONSTRUCTION CONTRACTS ACT 2013

5. The Construction Contracts Act 2013 has put in place a statutory scheme of adjudication whereby payment disputes under construction contracts can be heard and determined in a very short period of time. The adjudication process is designed to be far more expeditious than conventional litigation or arbitration. The default position is that the adjudicator shall reach a decision within 28 days beginning with the day on which the

referral is made. This period can be extended by up to 14 days, with the consent of the party by whom the payment dispute was referred. Both parties may agree to a longer period.

6. To assist in achieving compliance with the tight timeframe, the legislation allows an adjudicator to take the initiative in ascertaining the facts and the law in relation to the payment dispute. The role of an adjudicator is thus more inquisitorial than that of a court.

7. The fact that an adjudication will be heard and determined within a matter of weeks has the consequence that the legal costs incurred by the parties will be much less than those of conventional litigation or arbitration. Moreover, the losing party is not liable to pay the costs of the successful party: section 6(15) of the Act provides that each party shall bear his or her own legal and other costs incurred in connection with the adjudication.

8. Of course, the fast-track process will be of limited practical benefit if the outcome of the process, i.e. the adjudicator's decision, cannot be enforced promptly. There is little point in putting the adjudicator under the cosh to produce a decision within a matter of weeks, only for there to be a delay of months, or even years, thereafter in the enforcement of that decision. The Act seeks to ensure that an adjudicator's decision may be enforced promptly by making it binding upon the parties on a provisional basis. The innovative feature of the legislation is that it provides that an adjudicator's decision shall be enforceable, by leave of the High Court, in the same manner as a judgment or order of that court with the same effect. Where leave is given, judgment may be entered in the terms of the adjudicator's decision.

9. The purpose and aim of the Construction Contracts Act 2013 has been summarised as follows by the High Court (Meenan J.) in *Principal Construction Ltd v. Beneavin Contractors Ltd* [2021] IEHC 578 (at paragraph 12):

> "The purpose and aim of the Act of 2013 is to provide for a summary procedure to enforce the payment of moneys from one party to another in a building contract, notwithstanding that it may ultimately transpire that such moneys are, in fact, not owed. This ensures that moneys are paid without having to await the outcome of arbitration or litigation, which, more often than not, involves delay. The necessary timelines for payment in the building and construction industry are very different to the timelines in arbitration and litigation. It is clear that the provisions of the Act of 2013 enable a speedy payment of moneys. Firstly, as referred to above, s. 2 (5) (b) makes clear that the Act applies irrespective of the terms of the construction contract agreed between the parties. Thus, there is a statutory right to refer a payment dispute to adjudication. Secondly, the decision of the adjudicator is binding until the payment dispute is finally settled by the parties, or until a decision arises from arbitration or litigation. Thirdly, there is a summary procedure for enforcing a decision of the adjudicator."

10. I respectfully adopt this as a correct statement of the purpose and aim of the legislation.

**LIMITS TO THE "BINDING" NATURE OF ADJUDICATOR'S DECISION**

11. The Construction Contracts Act 2013 does not designate a decision of an adjudicator as final and conclusive. Rather, it is envisaged that an adjudicator's decision may be superseded by a subsequent decision reached in arbitral or court proceedings. This is provided for under subsections 6(10) and (11) of the Act 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 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."

12. The special feature of the legislation is that an adjudicator's decision is binding in the interim, unless and until superseded by another decision. Even though the adjudicator's decision is not final and conclusive, it nevertheless gives rise to an immediate payment obligation. The successful party is entitled to enforce the adjudicator's decision forthwith, by invoking a summary procedure, notwithstanding that the adjudicator's decision is amenable to being overreached by a subsequent decision of an arbitrator or a court.

13. The qualifying words "*if binding*", as used in section 6(11) of the Act, are merely intended to address the contingency of the adjudicator's decision having been superseded by a subsequent decision of an arbitrator or a court. A party will not be allowed to enforce an adjudicator's decision which has already been overtaken by events: such a decision will no longer be binding. The words "*if binding*" 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. See *Principal Construction Ltd v. Beneavin Contractors Ltd* [2021] IEHC 578 (at paragraph 17).

14. In many other statutory schemes which provide for a second stage of decision-making, the decision at first instance is not normally enforceable pending the outcome of the second stage. Even in those statutory schemes where it is, in principle, open to rely on the decision of first instance, it is often possible to apply for a stay pending the outcome of the second stage. The factors to be taken into account in deciding whether to grant a stay will include, *inter alia*, the balance of justice and the relative strength of the parties' respective cases. By contrast, the Construction Contracts Act 2013 mandates that the decision at first instance is to be binding unless and until superseded by a subsequent decision of an arbitrator or a court.

15. The rationale underlying the legislation is that it is in the public interest that payment disputes under construction contracts be resolved expeditiously and that the decision of an adjudicator should be capable of being enforced immediately. This rationale is sometimes described by the shorthand "*pay now, argue later*". The paying party is entitled to pursue the matter further whether by way of arbitral or court proceedings. In the event that it is successful, it will then be entitled to recover any overpayment from the other side.

16. This "*pay now, argue later*" approach presents, in certain instances, a risk of injustice. The obligation to make an immediate payment may result in cash flow difficulties for the paying party. The ability to recover an overpayment may be lost if the payee is insolvent by the time the second stage proceedings have been determined.

17. In order to guard against such risks, the Courts in England and Wales have interpreted the equivalent legislation in the United Kingdom as imposing limits on the binding nature of an adjudicator's decision. As elaborated upon at paragraph 39 *et seq*. below, the case law from England and Wales cannot simply be "*read across*" to the Construction

Contracts Act 2013. This is because the domestic legislation differs in a number of respects from the equivalent legislation in the United Kingdom.

18. The case law is nevertheless of great assistance in addressing the question of principle as to whether and when a court should depart from the literal meaning of the legislation, which designates an adjudicator's decision as "*binding*". In brief, the case law from England and Wales identifies two broad exceptions to the binding nature of an adjudicator's decision. The first concerns the adjudicator's jurisdiction. It has been held that where an adjudicator exceeds the jurisdiction conferred upon him by the parties, the adjudicator's decision will be treated as invalid (subject to the possibility of severance). The second exception concerns the requirement that an adjudicator comply with fair procedures. If it is demonstrated that fair procedures have not been properly observed and that this has had a material effect on the outcome of the adjudication process, then, again, the adjudicator's decision will not be regarded as valid.

19. There has been much debate as to the precise legal basis for these exceptions and as to how they can be reconciled with the literal wording of the legislation, i.e. "*the decision of the adjudicator is binding until …*". There is some suggestion in the case law from England and Wales that an adjudicator's decision which has been reached in excess of jurisdiction or in breach of fair procedures is a nullity; and thus does not actually represent a "*decision*" within the meaning of the legislation. This is similar to the approach adopted, in the context of public law, in the landmark judgment in *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 A.C. 147.

20. Moreover, when speaking of an adjudicator's jurisdiction, one has to consider whether same is concerned only with the initial jurisdiction to enter upon a consideration of a payment dispute, or, alternatively, whether an error of law made in the course of the decision-making might itself be characterised as having been made outside jurisdiction.

21. These are difficult issues, and given that, to date, there have only been a handful of written judgments delivered in respect of the Construction Contracts Act 2013, it is appropriate to proceed with caution. The precise contours of the High Court's discretion to refuse to enforce what is expressed under legislation to be a binding decision should be developed incrementally.

22. On the facts of the present case, the court has only been invited to make modest incursions upon the binding nature of the adjudicator's decision. The party resisting the enforcement of the adjudicator's decision does so on relatively narrow grounds. First, it is said that the adjudicator's decision goes beyond the terms of the payment dispute referred to him. More specifically, it is said that the adjudicator's jurisdiction is defined by the notice of intention to refer. Secondly, it is said that an adjudicator, as with any statutory decision-maker, is obliged to comply with the requirements of fair procedures and constitutional justice. The adjudicator is alleged to have breached this obligation by failing to consider all of the lines of defence which had been advanced.

23. It will be necessary to examine both of these grounds of objection in some detail in due course. For present purposes, what requires to be addressed is the legal basis upon which the court would be entitled to refuse to enforce a decision which the legislation proclaims to be "*binding*" until superseded by another decision.

24. The "*binding*" status is only conferred on an adjudication which meets the criteria prescribed under the Construction Contracts Act 2013. A court, in exercising its discretion to grant leave to enforce, must be entitled to consider whether a purported adjudication meets the statutory criteria. To take an obvious example, the provisions of the Construction Contracts Act 2013 only apply to construction contracts entered into after 25 July 2016. The court would need to be satisfied that this temporal criterion had

been fulfilled before it would grant leave to enforce. See, by analogy, the judgment of the High Court (O'Moore J.) in *O'Donovan v. Bunni* [2021] IEHC 575.

25. On the same logic, it would seem to follow that the court must also be satisfied that the adjudication has been made in respect of a "*payment dispute*". Unlike the position obtaining under the equivalent UK legislation, the statutory scheme of adjudication is confined to payment disputes and does not extend to other types of dispute which might arise in the context of a construction contract.

26. It is only a small step, then, to say that the court should also consider whether the adjudicator's decision is confined to the dispute which had been referred for adjudication. It seems to me that, by analogy with the approach taken to arbitration proceedings, the court is entitled, on an application for leave to enforce, to confirm that the adjudicator's decision does not exceed the scope of the referral to adjudication. An adjudicator does not enjoy an inherent jurisdiction, rather it must be conferred upon him or her by the parties.

27. An objection that the adjudicator's decision has exceeded the scope of the referral can also be analysed in terms of fair procedures. The party against whom a decision is sought by way of adjudication must be afforded a right of defence. The court should be careful to ensure, therefore, that the adjudicator has not purported to decide issues in respect of which the responding party had not been on notice.

28. This, then, leads into the more general entitlement of the court to examine whether the adjudication process has complied with fair procedures. A loose analogy might be drawn with the approach taken in judicial review proceedings. The court will not normally entertain an application for judicial review where there is an adequate alternative remedy available by way of statutory appeal. The court will, however, intervene by way of judicial review if there has been a fundamental breach of fair procedures at the first stage.

If the legislative scheme has provided for two stages of decision-making, then it is no answer to an allegation that there has been a fundamental failure of fair procedures at stage one to say that there is a right of appeal. (See, for example, *Sweeney v. District Judge Fahy* [2014] IESC 50 (at paragraphs 3.14 and 3.15)).

29. This analogy is imperfect in that the grant of leave to enforce does not affect the paying party's entitlement to a second stage, i.e. in subsequent court or arbitral proceedings. The court is not being asked to consider whether the second stage will compensate for the alleged lack of fair procedures at the first stage. Rather, the court is concerned with the distinct question of whether the "*pay now, argue later*" policy under the Construction Contracts Act 2013 should be disapplied where it is obvious that there has been a breach of fair procedures. Nevertheless, notwithstanding these very real differences between judicial review and leave to enforce, it seems to me that it is consistent with the general supervisory jurisdiction of the High Court in respect of statutory decision-makers to say that a court should not enforce, even on a provisional basis, an adjudicator's decision which has clearly been reached in breach of fair procedures.

30. Another useful analogy is with the approach taken to the enforcement of foreign judgments. Such judgments will not generally be enforced where to do so would be inconsistent with public policy. It is arguable that it would be contrary to public policy to enforce an adjudicator's decision where it is obvious that the right of defence had not been respected.

31. In summary, and having regard to the very specific and limited grounds of objection advanced in this case, I am satisfied that the court—in the exercise of its statutory discretion to grant leave to enforce—is required to consider, first, whether the adjudicator's decision comes within the terms of the payment dispute as referred; and, secondly, whether fair procedures, and, in particular, the right of defence, has been

respected. As the case law evolves, it will be necessary to address more difficult questions, such as whether errors of law are similarly capable of examination in the context of an application for leave to enforce.

32. It should be reiterated that the only matter currently before this court is an application for leave to enforce. The role of the court on such an application is narrow, and is circumscribed by the wording of the Construction Contracts Act 2013 which confers binding effect on a "*decision*" of an adjudicator, albeit on a provisional basis.

33. Importantly, however, the legislation envisages that a payment dispute may subsequently come before the court again in a different form, namely, in proceedings "*initiated in a court in relation to the adjudicator's decision*" within the meaning of section 6(10) of the Act. The court would have jurisdiction in the context of proceedings of the latter type to embark upon a much fuller consideration of the payment dispute. The legislation thus envisages that the High Court might grant leave to enforce an adjudicator's decision, only to rule in subsequent proceedings that the adjudicator's decision was incorrect and that the paying party has an entitlement to recover any overpayment.

34. The legislation does not oust the High Court's jurisdiction, rather it regulates the timing of the exercise of that jurisdiction. The successful party in an adjudication can seek to enforce the adjudicator's decision immediately, by way of a summary procedure instituted by originating notice of motion. The unsuccessful party must await the outcome of plenary proceedings (or, more typically, arbitral proceedings) before it can recover any overpayment.

**ORDER 56B OF THE RULES OF THE SUPERIOR COURTS**

35. The procedure to be followed on an application for leave to enforce is prescribed under Order 56B of the Rules of the Superior Courts. The application is made by way of

originating notice of motion. The basic proofs which must be averred to in the grounding affidavit are as follows.

The affidavit must:

(i) identify the construction contract to which the decision relates;

(ii) exhibit the decision of the adjudicator;

(iii) set out the basis upon which the court should conclude that the decision of the adjudicator is binding on the respondent;

(iv) confirm that—

(a) the payment dispute has not been finally settled by the parties;

(b) a different decision has not been reached on a reference of the payment dispute to arbitration;

(c) a different decision has not been reached in proceedings initiated in a court in relation to the adjudicator's decision;

and

(v) set out the facts relied upon to demonstrate that the respondent has failed to comply with the decision of the adjudicator.

36. The respondent must file and serve its replying affidavit within seven days. The grounds relied upon by the respondent to resist the applicant's claim must be set out precisely in the replying affidavit.

37. Practitioners should be alert to the fact that the time-limits prescribed under Order 56B are not merely aspirational, but should be complied with unless there is good and sufficient reason for not doing so. It is expected that the exchange of affidavits between the parties should have been completed prior to the first return date. This is to allow a hearing date to be fixed immediately for the application for leave to enforce.

38. The President of the High Court has recently issued a Practice Direction establishing a special list for applications for leave to enforce. Such applications should be made returnable before me as the nominated judge. The Practice Direction came into effect on 26 April 2021 and bears the reference HC 105.

**EQUIVALENT LEGISLATION IN THE UNITED KINGDOM**

39. The Construction Contracts Act 2013 has many similarities to the Housing Grants, Construction and Regeneration Act 1996 in the United Kingdom. The latter legislation has given rise to an impressive body of case law in England and Wales. Moreover, one of the leading judges from the Technology and Construction Court (now a Lord Justice of the Court of Appeal) has published an excellent textbook on the topic: *Coulson on Construction Adjudication* (Oxford University Press, 4th ed., 2018).

40. There is an understandable temptation for practitioners and judges in this jurisdiction to borrow from this extensive learning when interpreting and applying the Construction Contracts Act 2013. The case law from England and Wales must, however, be approached with a degree of caution. This is because there are significant differences between the legislative approaches adopted in the two jurisdictions. There are also significant differences in the procedure governing the enforcement of an adjudicator's decision. These distinctions are all too easy to miss in that many of the concepts underlying the UK legislation seem familiar to us.

41. It is neither necessary nor appropriate for the purpose of this judgment to attempt to enumerate all of the differences. It is sufficient to the cause to identify the following. First and foremost, provision is made under the Construction Contracts Act 2013 for an adjudicator's decision to be enforced as if it were an order of court. An adjudicator's decision thus has an enhanced status under the domestic legislation. By contrast, the

normal procedure for enforcing an adjudicator's decision under the UK legislation is to apply for summary judgment. Much of the case law is, therefore, concerned with whether the party resisting enforcement has been able to establish an arguable defence. In some instances, the party resisting enforcement will have brought a parallel application challenging the decision of the adjudicator, and seeking a final determination by way of court declarations (a so-called Part 8 CPR application). A failure to appreciate the difference between the two procedural regimes led the respondent in the present case to rely, mistakenly, on the judgment in *Hutton Construction Ltd v. Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC). As explained in that judgment, the requirement for separate set aside proceedings is not simply a matter of form.

42. Secondly, the adjudication process under the domestic legislation is statutory in origin. By contrast, the UK 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 this jurisdiction might, in principle, be amenable to judicial review. (This point does not yet appear to have been directly decided).

43. Thirdly, the provisions in respect of payment claim notices under the Construction Contracts Act 2013 are materially different to those under the UK legislation. In particular, there is no express statutory provision under the Irish legislation which stipulates what the consequences of a failure to respond to a payment claim notice are to be.

44. Fourthly, and of immediate relevance to these proceedings, the status of a notice of intention to refer to adjudication under the Construction Contracts Act 2013 is different to that of an "*adjudication notice*" under the UK legislation.

45. Finally, whereas both the Irish legislation and the UK legislation envisage that an adjudicator's decision is to be binding until superseded by another decision, there is a

potential difference in the role of the court. Section 108(3) of the Housing Grants, Construction and Regeneration Act 1996 (as amended) provides that an adjudicator's decision is binding until the dispute is finally determined by legal proceedings, by arbitration or by agreement.

46. In contrast, the Irish legislation refers to court proceedings initiated "*in relation to*" the adjudicator's decision. This might be taken as suggesting that it is necessary to challenge an adjudicator's decision head on—rather than simply initiate independent proceedings seeking declaratory relief *de novo* as to the rights of the parties—and that some weight may have to be given to the adjudicator's decision. Conversely, the form of wording used under the UK legislation indicates that the adjudicator's decision is a neutral factor in any subsequent litigation or arbitration.

**PAYMENT CLAIM NOTICES**

47. To assist the reader in understanding the principal issue which arose on the adjudication, it is necessary to address one further aspect of the Construction Contracts Act 2013 as follows. Section 3 of the Act stipulates that a construction contract shall provide for (a) the amount of each interim payment to be made under the construction contract, and (b) the amount of the final payment to be made under the construction contract, or for an adequate mechanism for determining those amounts. In the case of a *subcontract*, as in the present case, matters relating to payment are regulated in accordance with the schedule of the Act, except to the extent that the subcontract itself makes provision which is *more favourable* to the executing party.

48. Section 4 of the Act regulates the delivery of, and response to, payment claim notices. In brief, a party seeking payment under a construction contract is to deliver a payment

claim notice in specified form. If the other party contests the sum claimed, then it is required to deliver a response to the claim notice in specified form.

49. As noted by Hussey in *Construction Adjudication in Ireland* (Routledge, 2017), the domestic legislation differs from comparable legislation in other jurisdictions in two significant respects. 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.

50. As discussed presently, the adjudicator interpreted section 4 of the Construction Contracts Act 2013, and the corresponding provisions of the subcontract, as giving rise to a default payment. The adjudicator held, in effect, that the failure of the respondent to deliver a response to the payment claim notice made by the applicant had the legal consequence that the former was required to discharge same.

51. It should be emphasised that this court is not concerned, on this application for leave to enforce, with the question of whether this interpretation of the legal position is correct. The court is concerned only with the narrow issue of whether the alleged failure on the part of the adjudicator to embark upon a "*true*" valuation of the works represented a breach of fair procedures.

## PART II

### THE ADJUDICATOR'S DECISION ON THE REFERRAL

52. The payment dispute arises under a subcontract entered into between the applicant (as subcontractor) and the respondent (as main contractor). The parties are agreed that the subcontract represents a "*construction contract*" for the purposes of the Construction Contracts Act 2013.

53. The referral to adjudication had been made against the backdrop of a purported termination of the subcontract. The respondent had purported to invoke a clause of the subcontract which allowed, *inter alia*, for termination without fault. The notice of termination had been served on 12 November 2020.

54. As it happens, the applicant had delivered a payment claim notice shortly before the termination notice. This payment claim notice is dated 27 October 2020. The respondent assessed and certified the claim in the amount of €119,065.23. The certified amount was ultimately paid between 26 January 2021 and 9 February 2021.

55. The applicant delivered a further payment claim notice on 25 November 2020, that is, a number of weeks after the termination notice. The applicant contended, before the adjudicator, that it was entitled to submit a payment claim notice. In support of this contention, the applicant cited clause 13 (payment) and clause 21 (termination of employment) of the subcontract, and section 4 of the Construction Contracts Act 2013. The applicant submitted that the respondent had failed to issue a response to the payment claim notice within 21 days and that this entitled the applicant to be paid the full invoiced amount.

56. In the alternative, the applicant contended that the measured works and additional works carried out by it in complying with the respondent's instructions and/or requirements should be treated, valued and paid under sub-clause 21.1 of the subcontract. It was said that the respondent is liable for all payments properly due to the applicant for the work executed and completed up to 10 November 2020. On the applicant's case, there was an outstanding balance of €242,225.09 owing to it.

57. The applicant then set out further arguments, in the alternative, based on unjust enrichment and estoppel by convention.

58. The respondent served a detailed response to the referral on 2 June 2021. Relevantly, the respondent submitted that the purported payment claim notice of 25 November 2020 was invalid. The respondent identified, in particular, five or six alleged deficiencies in the purported payment claim notice. The respondent further submitted that the effect of the (alleged) failure to issue a compliant payment claim notice was that clause 13.9 of the subcontract did not become operational. It was said that if no compliant payment claim notice had been issued, then no payment was due.

59. The respondent made additional submissions, in the alternative, to the effect that the applicant had failed to establish entitlement in respect of the alleged sums for variations in accordance with the subcontract. In brief, it was said that the requirements for the confirmation and approval of variations as stipulated under the subcontract had not been complied with. It was further submitted that, having failed to establish entitlement, it followed that a quantification exercise was not to be carried out and that any evaluation could never amount to any more than a nil amount.

60. The respondent had also made detailed submissions, first, in respect of the correct interpretation of clause 21.1 of the subcontract; and, secondly, to the effect that payments against interim certificates were merely approximate payments and not conclusive as to the applicant's entitlement.

61. The respondent also reiterated its objection to the adjudicator's jurisdiction and expressly reserved the right to challenge any decision on this basis.

62. The adjudicator issued a detailed decision on 25 June 2021. The adjudicator's decision engages fully with the submissions advanced on behalf of the respondent in respect of the alleged invalidity of the payment claim notice of 25 November 2020. The adjudicator held that the payment claim notice was a valid notice in accordance with the subcontract and the Construction Contracts Act 2013. It was held that the payment claim notice

complied with clause 13 (payment), and that the terms of clause 3 (subcontractor obligations), clause 11 (instructions and variations) and clause 12 (valuation of variations) do not deal with the form requirements as to a compliant payment claim notice.

63. Ultimately, the adjudicator decided that the respondent's failure to respond to the payment claim notice and, in particular, to serve a valid pay less notice had the draconian consequence that the respondent was obliged to pay the whole sum stated in the payment claim notice. Put otherwise, the adjudicator accepted that the failure to respond to the payment claim notice had the consequence of triggering a default requirement to pay the amount claimed.

64. The adjudicator analysed the statutory provisions governing payment claim notices as follows (at §6.14 to §6.16 of his decision):

> "The provisions of section 4.3 (a) of the Construction Contracts Act 2013 exist so that a contractor or sub-contractor will know what sum it is due to be paid in a timely manner, and the reasons why the amount claimed will not be paid if that is the case. Therefore, it follows that there would be consequences if the Responding Party failed to comply with the provisions of section 4 (3) (a).
>
> As set out at paragraph 5.1 above the Responding Party has referred extensively to UK case law which cites the draconian and harsh consequences that can accrue from the Responding Party failing to serve a response to the payment claim notice (Pay Less Notice). The consequence is that the Responding Party is required to pay the sum claimed in the Referring Party's 25th November 2020 Payment Claim Notice No. 6.

> It was always open to the Responding Party to issue a timely Pay Less Notice advancing any of the arguments it has cited in this adjudication. It simply failed to do so. It is not for the Adjudicator to rescue the Responding Party from not complying with the Sub-Contract or the Law."

65. Having made these findings, the adjudicator then indicated that he would not evaluate what sum was "*properly*" payable by evaluating the measured work, variations and dayworks. The adjudicator acknowledged that, notwithstanding that it had failed to serve a response to the payment claim notice, the respondent was nevertheless entitled to adjudicate the true value of an interim application. The adjudicator held, however, that before the respondent would be able to commence such an adjudication, it must first comply with the adjudicator's decision in this adjudication. The adjudicator cited the judgment of the Court of Appeal in England and Wales in *Grove Developments Ltd v. S & T (UK) Ltd* [2018] EWCA Civ 2448; (2018) 181 ConLR 66 as authority for this proposition. As discussed presently, far from suggesting that the judgment of the Court of Appeal is incorrect or inapplicable, the respondent itself relies on this very judgment in these proceedings. I will return to this issue at paragraph 115 *et seq*. below.

66. The adjudicator also directed the respondent to pay €14,940 in respect of the adjudicator's fees and expenses.

## PART III

### (1). WHETHER PAYMENT DISPUTE VALIDLY REFERRED TO ADJUDICATION

67. The respondent contends that the adjudicator had not been conferred with jurisdiction to reach the decision that he did. It is said that the notice of intention to refer a payment dispute to adjudication issued by the applicant on 14 January 2021 ("***the notice of***

***intention to refer***" or "***the notice***" ) is invalid on a number of grounds as follows. First, the notice is alleged to be ambiguous in that it is not apparent whether the claim is in respect of an interim payment or a termination payment. The notice does not set out the relief or redress sought by the applicant. This is said to render the notice inadequate in that it does not make clear what the ambit of the adjudicator's jurisdiction is to be. Secondly, it is said that several claims are unlawfully advanced under the one notice of intention to refer. Thirdly, much is made of the fact that there had been two attempts to apply to the Chairperson of the Construction Contracts Adjudication Panel for the appointment of an adjudicator. The respondent, again, alleges that the applicant was seeking to unlawfully advance several claims under the one notice of intention to refer.

68. I address each of these grounds, in turn, below.

**(A). ADEQUACY OF NOTICE OF INTENTION TO REFER**

69. Before turning to address the detail of the respondent's arguments under this heading, it is necessary, first, to consider the role played by a notice of intention to refer in the statutory scheme.

70. Section 6 of the Construction Contracts Act 2013 confers upon a party to a construction contract the right to refer for adjudication any dispute relating to payment arising under the construction contract. Such a dispute is referred to in the Act as a "*payment dispute*".

71. The right to refer to adjudication is exercised by serving, on the other person who is party to the construction contract, a notice of intention to refer the payment dispute for adjudication. Such a notice may be served "*at any time*".

72. The form and content of a notice of intention to refer is not prescribed under the Act itself, but is addressed as follows at §5 of the statutory code of practice published by the Minister under section 9 of the Act:

"A Notice of Intention shall include:

(i) the name, address and contact details of each party to the construction contract;

(ii) relevant details of the payment dispute to include the amount in dispute (even if the amount is zero), the nature of the payment dispute, and the site address;

(iii) a copy of the relevant payment claim notice, and any response to that payment claim notice as provided for in section 4 of the Act; and

(iv) relevant details to identify the construction contract and any supporting information that may assist an Adjudicator in understanding the nature of the payment dispute. Where a written construction contract exists, this must be attached."

73. The service of a notice of intention to refer marks the commencement of the statutory adjudication process. In particular, service of the notice sets the first of the statutory time-limits running. The parties to the construction contract have 5 days, beginning with the day on which notice is served, within which to agree to appoint an adjudicator. Failing agreement between the parties, the adjudicator shall be appointed by the chair of the panel selected by the Minister, i.e. the Chairperson of the Construction Contracts Adjudication Panel.

74. One purpose which a notice of intention to refer fulfils is to allow a *prospective* adjudicator to make an informed decision as to whether to accept appointment. More specifically, the statutory code of practice provides that a prospective adjudicator should only accept an appointment to a payment dispute under the Act if he or she believes that they are competent to determine the issues in dispute. As appears from §5 (iv) of the statutory code of practice, a notice of intention to refer should include, *inter alia*,

supporting information that may assist an adjudicator in understanding the nature of the payment dispute. This information will undoubtedly be of assistance to a *prospective* adjudicator in deciding whether they are competent to accept the appointment.

75. The Construction Contracts Act 2013 is silent on the interrelationship between (i) a notice of intention to refer, and (ii) the subsequent referral of the payment dispute to the appointed adjudicator. The Act does, however, expressly envisage that the referral will be accompanied by extensive documentation and information, which suggests that the referring party is not confined to the information accompanying the notice of intention to refer.

76. The statutory code of practice prescribes the content of a referral as follows (at §22):

> "The referral of the payment dispute to the Adjudicator shall include:
>
> (i) the name, address and contact details of each party to the construction contract;
>
> (ii) relevant details of the payment dispute to include the amount in dispute (even if the amount is zero), the nature of the payment dispute, and the site address;
>
> (iii) a copy of the Notice of Intention including any accompanying documents attached to that Notice;
>
> (iv) the date when the Notice of Intention was served on the Responding Party/Parties and how this was done;
>
> (v) the contentions on which the Referring Party intends to rely upon to support their case; and
>
> (vi) relevant details to identify the construction contract and any supporting information that may assist an Adjudicator in

understanding the nature of the payment dispute. Where a written construction contract exists, this must be attached."

77. As appears, the code of practice contemplates that the referral will to a large extent be self-contained, and will itself identify the relevant details of the payment dispute. Although a copy of the notice of intention to refer is to accompany the referral, the statutory code of practice does not say that the details of the dispute are confined to those set out in the notice.

78. An argument has been advanced in these proceedings that the adjudicator's jurisdiction is defined by reference to the nature, scope and extent of the dispute identified in the notice of intention to refer. Reliance is placed in this regard on the detailed discussion of the status of a "*notice of adjudication*" under the English regime contained in *Coulson on Construction Adjudication* (Oxford University Press, 4th ed., 2018). Counsel for the respondent also took me to the judgment of the Court of Appeal of England and Wales in *Bouygues (UK) Ltd v. Dahl-Jensen (UK) Ltd* (2000) 73 ConLR 135. This judgment is cited as authority for the proposition that an adjudicator's decision is binding only where the adjudicator has confined himself to a determination of the issues that were put before him by the parties. If the adjudicator has answered the right question in the wrong way, his decision will be binding. If he has answered the *wrong question*, his decision will be a nullity.

79. It is unnecessary for the resolution of the present proceedings for this court to make a formal finding on the interrelationship between (i) a notice of intention to refer, and (ii) the subsequent referral of the payment dispute. In particular, it is unnecessary to decide whether the precise parameters of the adjudicator's jurisdiction are forever fixed by the summary of the details of the payment dispute as set out in the notice of intention to refer. This is because the terms of the notice of intention to refer in this case are

comprehensive enough to clothe the adjudicator with jurisdiction to reach the decision that he did. My reasoning in this regard is set out at paragraph 86 *et seq*. below.

80. Insofar as the question of principle in respect of jurisdiction is concerned, it should not automatically be assumed that a notice of intention to refer has the same canonical status as a "*notice of adjudication*" has under the UK legislation. It should be explained that the range of disputes which can be referred to adjudication under the UK legislation is far broader than under the Construction Contracts Act 2013, and the adjudication process is not confined to payment disputes. The detail required to identify a complex non-payment dispute will be greater than that for a payment dispute.

81. In circumstances where the Construction Contracts Act 2013 is largely silent on the status of the notice, it is at least arguable that the detail of the dispute can be further refined by the content of the subsequent referral. To hold that the adjudicator's jurisdiction is rigidly defined by what will, of necessity, be a brief description set out in the notice of intention to refer would appear to be inconsistent with the statutory provision that the adjudicator may take the initiative in ascertaining the facts and the law in relation to the payment dispute (section 6(9) of the Act).

82. Indeed, I note that even in England and Wales the position is not as rigid as suggested by the respondent. See *Coulson on Construction Adjudication* (Oxford University Press, 4th ed., 2018) at §7.86 as follows:

> "What a number of the recent cases have stressed is that, whilst the notice of adjudication remains paramount, it can sometimes be necessary to consider the dispute as it developed in the adjudication to see precisely what the adjudicator did or did not have the jurisdiction to decide. This analysis can be linked to questions of waiver. It can also be important to consider the defences that are

being raised against the original claim in the notice of adjudication for the precise limits of the adjudicator's jurisdiction."

83. Ultimately, the overarching principle is that an adjudication must comply with fair procedures. An essential element of this is that the responding party be aware of the case which it has to meet and afforded a meaningful opportunity to respond to that case. Whereas this will undoubtedly be achieved if the nature and extent of the dispute is set out in full in the notice of intention to refer, it does not follow as a corollary that an elaboration upon the detail of the dispute in the subsequent referral is inimical to fair procedures. Provided always that the notice of intention to refer identifies the gravamen of the payment dispute, and, in particular, identifies the construction contract; the parties; the site address; the payment claim notice; the response, if any, made to the payment claim notice; and the sum claimed, then the refinement of legal argument in the referral will normally be permissible.

84. Moreover, the exigencies of fair procedures demand that a notice of intention to refer not be interpreted narrowly so as to deprive a respondent of a potential defence. A notice of intention to refer is authored by the claiming party and will ordinarily be confined to the claim being advanced. A notice will rarely refer to the points that might be raised by way of a defence to that claim. The notice should, however, be interpreted as encompassing any legitimate available defence. (See, by analogy, *Pilon Ltd v. Breyer Group plc* [2010] EWHC 837 (TCC); (2010) 130 ConLR 90 (at paragraph 25)).

85. At all events, for the reasons outlined below, the decision made by the adjudicator in the present case falls well within the ambit of the payment dispute as described in the notice of intention to refer.

***The wording of the notice of intention to refer***

86. The notice of intention to refer is dated 14 January 2021. The relevant details of the payment dispute are described at part 4 of the notice as follows.

> "4. Relevant Details of the Payment Dispute and the amount in dispute
>
> Aakon issued a valid Payment Claim Notice to Pure Fitout on 25 November 2020 seeking payment of €369,273.68 in respect of works performed by Aakon, pursuant to the Sub-contract (and the Act) for the period up to 25 November 2020. A copy of The Payment Claim Notice and the supporting documentation is enclosed. (Amount in dispute €369,273.68)
>
> Prior to the above-mentioned Payment Claim Notice, Aakon had submitted a Payment Claim for the period up to 27 October 2020, which Pure Fitout had assessed and certified showing an amount of €119,065.23 due for payment. Pure Fitout failed to pay this amount and sought to terminate the contract around about 12 November 2020.
>
> Aakon was entitled to submit a Payment Claim Notice and/or claim for amounts due by way of termination and/or clause 13 of the subcontract agreement and did so accordingly.
>
> Pure Fitout has failed to issue a Payment Certificate to Aakon at all in respect of the Payment Claim Notice issued on 25 November 2020, therefore entitling Aakon to be paid the full invoiced amount.
>
> In addition, Pure Fitout has failed to pay the amount certified with respect to the Payment Claim Notice number 5 within the time agreed in the Sub-contract and/or the Act.

> In circumstances where Pure Fitout contest the amount claimed by Aakon in its Payment Claim Notice, Pure Fitout was required by Section 4(3) of the Construction Contracts Act, 2013 to deliver to Aakon a response to the Payment Claim Notice not later than 21 days after the payment claim date specifying, *inter alia*, the reason or reasons for the difference between the amount sought by Aakon and that proposed by Pure Fitout to be paid to Aakon and the basis for its calculation. Pure Fitout did not comply with its obligations in this respect, and Aakon received no response to its Payment Claim Notice within 21 days from the Payment Claim Date.
>
> The said sum is due to the Aakon on foot of Pure Fitout's failure to comply with its obligations pursuant to the Construction Contracts Act 2013 and/or the sub-contract."

87. It is perfectly obvious from the foregoing summary of the detail of the payment dispute that one of the principal issues for determination in the intended adjudication would be whether the failure of the main contractor to respond to the payment claim notice resulted in an entitlement on the part of the subcontractor to be paid the full invoiced amount. Put shortly, an issue arose as to whether a so-called default payment had been triggered. The subcontractor's claim expressly cited the provisions of the subcontract and section 4 of the Construction Contracts Act 2013.

88. This is precisely the dispute which the adjudicator ultimately decided. As explained at paragraphs 62 *et seq*. above, the adjudicator decided that the respondent's failure to respond to the payment claim notice, and, in particular, the omission to serve a valid pay less notice, had the draconian consequence that the respondent was obliged to pay the whole sum stated in the payment claim notice of 25 November 2020. (It should be

explained that certain payments had been made *subsequent* to the service of the notice of intention to refer and hence the adjusted sum allowed by the adjudicator is less than the €369,273.68 stated in the notice).

89. Given that the adjudicator's decision corresponds precisely to the principal issue described in the notice of intention to refer, there is simply no basis for saying that the adjudicator exceeded his jurisdiction. Not only is the respondent's jurisdictional objection groundless, it is apparent from the respondent's submissions to the court that, in truth, its grievance is that the adjudicator took too *narrow* a view of his jurisdiction. The logic of the respondent's position is that, far from exceeding his jurisdiction, the adjudicator acted improperly in failing to consider the "*true*" value of the works under the payment claim notice. It is said that this represents a failure to consider a substantive defence properly put forward by the respondent.

90. For the reasons explained at paragraph 116 *et seq*. below, this second objection has also been rejected as unfounded. The relevance of the second objection for present purposes is that it exposes the contradictory and self-serving approach of the respondent. The respondent unashamedly seeks to resist the application for leave to enforce on the ground that the adjudicator did not have jurisdiction to make his decision, yet, in the next breath, criticises the adjudicator for failing to exhaust his jurisdiction.

91. The respondent has sought to criticise the notice of referral as being "*ambiguous*", saying that it is not apparent from the notice whether the claim had been made in respect of an interim payment or a termination payment. This criticism is unfounded. The relevant details of the payment dispute, including the nature of the payment dispute, are clearly and comprehensively stated in the notice. Crucially, the notice identifies the payment claim notice of 25 November 2020 and asserts that the applicant, as subcontractor, is entitled to be paid the full invoiced amount in circumstances where the main contractor

did not respond as required by the subcontract and/or section 4 of the Construction Contracts Act 2013.

92. As with conventional litigation, a party referring a matter to adjudication is allowed to advance different *legal arguments* in the alternative. The factual basis for the claim having been adequately identified in the notice, it was a matter for legal argument thereafter as to how the respective positions of the parties are characterised under the subcontract and the legislation. The applicant was, therefore, permitted to advance its claim by asserting, *inter alia*, an entitlement to claim for amounts due by way of termination and/or clause 13 of the subcontract.

93. No authority has been cited to the court to the effect that adjudication—uniquely among dispute resolution mechanisms—restricts parties to a single line of legal argument only. Any such restriction would undermine the utility of what is intended to be a fast-track procedure for the resolution of payment disputes. The parties would be artificially constrained in the arguments which they would be entitled to make.

94. The litmus test in assessing the adequacy of a notice of intention to refer must be whether the alleged defects impinged upon the responding party's ability to defend the claim against it. It is telling that, notwithstanding its protestations, the respondent had been in a position to prepare a very comprehensive response to the claim. In particular, the respondent has been able to advance detailed arguments as to its understanding of its liability, under clause 21.1 of the subcontract, for all payments properly due to the subcontractor for work executed and completed up to the date of termination. The response expressly addresses the interaction between clause 21.1; and clauses 11, 12 and 13 of the subcontract.

95. The respondent makes a further objection to the effect that the notice of intention to refer does not specify the relief or redress sought by the applicant. The objection seeks to

introduce a requirement of the UK legislation into the domestic legislation. Unlike the position in respect of an "*adjudication notice*" under the UK legislation, there is no express requirement under the statutory code of conduct that a notice of intention to refer must specify the "*relief*" sought. At all events, it is readily apparent from the notice served on 14 January 2021 that the applicant was seeking payment under the payment claim notice of 25 November 2020. It should be recalled that certain payments had been made *subsequent* to the service of the notice of intention to refer and hence the adjusted sum allowed by the adjudicator is less than the €369,273.68 stated in the notice. More specifically, a sum of €119,065.23 had been paid in January and February 2021, leaving a nominal balance of €250,208.45. In the event, however, this figure was revised downwards in the applicant's submissions of 17 May 2021. The sum claimed is €242,225.09. As explained in the adjudicator's decision, the revision is referable to an earlier clerical error whereby a particular variation was claimed in both the variation and dayworks section of the payment claim notice delivered on 25 November 2020.

96. Turning now to the other arguments advanced under this heading, most of the criticisms made by the respondent go to the underlying merits of the payment claim, rather than to the question of jurisdiction. For example, the respondent insists that the payment claim notice issued in November 2020 was "*invalid*", and thus incapable of triggering the right to a default payment. More specifically, the respondent argues that the payment claim notice was not a "*compliant payment claim notice*" as defined under clause 13.6 of the subcontract. This, it is said, had the consequence that there had been no requirement to issue a "*payment certificate*" or a "*pay less notice*".

97. With respect, these arguments all go to the merits of one of the very issues which had been referred to the adjudicator for determination. The respondent is disappointed that this issue has been determined against it. The respondent has, however, signally failed

to establish that the adjudicator did not have jurisdiction to decide the issue. The notice of intention to refer adequately identifies the issue upon which the applicant ultimately succeeded, namely that a right to a default payment had arisen in circumstances where the respondent omitted to issue either a "*payment certificate*" or a "*pay less notice*". The notice of intention to refer had expressly cited clause 13 of the subcontract and section 4 of the Construction Contracts Act 2013. The applicant's contentions were ultimately successful before the adjudicator. If and insofar as the respondent wishes to challenge the correctness of the adjudicator's decision, it may only do so by referring the matter to arbitration or by instituting its own proceedings. It cannot resist an application for leave to enforce on the basis that the adjudicator's decision on the default payment is incorrect.

**(B). MULTIPLE DISPUTES**

98. The objection is made that several claims have unlawfully been advanced under the one notice of intention to refer. This objection is predicated on two assumptions, both of which are incorrect. The first is that it is impermissible to pursue more than a single dispute in an adjudication. The second is that the alternative arguments advanced on behalf of the applicant in support of its payment claim entail separate "*disputes*".

99. The first of these assumptions is mistaken because it fails to distinguish between the requirements of the Construction Contracts Act 2013 and the equivalent UK legislation. Section 6(9) of the Construction Contracts Act 2013 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, under the UK 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.

100. There is no restriction, therefore, under the domestic legislation on a party referring more than one dispute to an adjudicator. In any event, the practical effect of the statutory restriction under the UK legislation is limited. As explained by Coulson J. in *RSC Contractors Ltd v. Conway* [2017] EWHC 715 (TCC); (2017) 171 ConLR 151, there have been few cases where the court has concluded that the adjudicator did not have the necessary jurisdiction because more than one dispute had been referred simultaneously. This is because the concept of a "*dispute*" has been given a broad interpretation. A single "*dispute*" may legitimately encompass a number of individual issues. Most complaints that a referral improperly involves multiple disputes will normally be dismissed on the basis that the referral, when properly analysed, represents a single dispute which raises many issues.

101. On the facts of the present case, it had been entirely legitimate for the applicant to advance alternative arguments in support of its payment claim. There is nothing which precludes a party 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. These are properly characterised as specific issues arising in the context of a single "*dispute*". Even if the referral had involved more than one dispute, this is expressly allowed for under section 6(9) of the Construction Contracts Act 2013.

102. The principal authority relied upon by the respondent is the judgment of the Court of Appeal of England and Wales in *Grove Developments Ltd v. S & T (UK) Ltd* [2018] EWCA Civ 2448; (2018) 181 ConLR 66. This judgment does not actually address the jurisdictional objection raised by the respondent in the present case, namely that the applicant has improperly sought to combine (i) an entitlement claim (predicated on a right to default payment) with (ii) a valuation claim. As explained earlier, this objection is misconceived and ignores the difference in wording between the Irish and

the UK legislation. Insofar as the judgment of the Court of Appeal in *Grove Developments Ltd v. S&T (UK) Ltd* addresses the *timing* of a valuation claim, the judgment entirely undermines the respondent's related objection that the adjudicator should have considered the true value of the payment claim notice delivered by the applicant in November 2020. I will return to consider the judgment in more detail at paragraph 116 *et seq*. below.

## (C). TWO APPLICATIONS FOR APPOINTMENT OF ADJUDICATOR

103. The respondent has sought to make much of the fact that there had been two attempts to apply to the Chairperson of the Construction Contracts Adjudication Panel ("***the Chairperson***") for the appointment of an adjudicator. The first application was made on 27 April 2021. It seems that the applicant was directed thereafter to reapply by the Construction Contracts Adjudication Service ("***the Service***"). The second application was made on 6 May 2021. This application was successful, and the Chairperson appointed Mr. Niall Lawless as adjudicator.

104. The form and content of an application for the appointment of an adjudicator is not prescribed under the primary legislation. The Construction Contracts Act 2013 simply provides that, failing agreement between the parties, the adjudicator shall be appointed by the chair of the panel. The statutory code of practice provides as follows (at §15 thereof).

> "An application to the Chairperson to appoint an Adjudicator from the Panel to a payment dispute shall be in writing and submitted to the Chairperson in accordance with the application procedures set out by the Construction Contracts Adjudication Service of the Department of Jobs Enterprise and Innovation from time to time.

> Such application, shall be copied by the applicant to the other party/parties to the payment dispute at the same time and shall include:
>
> (i) the name, address and contact details of each party to the construction contract;
>
> (ii) relevant details of the payment dispute to include the amount in dispute (even if the amount is zero), the nature of the payment dispute, and the site address;
>
> (iii) a copy of the Notice of Intention including any accompanying documents attached to that Notice;
>
> (iv) the date as to when the Notice of Intention was served on the Responding Party/Parties and how this was done; and
>
> (v) relevant details to identify the construction contract and any supporting information that may assist an Adjudicator in understanding the nature of the payment dispute. Where a written construction contract exists, this must be attached."

105. As a matter of practical convenience, there are forms available on the website maintained by the Construction Contracts Adjudication Service. These forms do not have any particular legal status. One of the "*fields*" to be completed in the form requires a "*brief outline*" of the payment dispute.

106. The respondent has identified what it alleges to be a material difference between the "*brief outline*" of the payment dispute as set out in the two respective application forms. The description in the first application form had been as follows: "*Failure to make payment and issue a payment claim response with reasons and/or at all*"; the description in the second application had been as follows: "*The Responding Party has failed to make*

*any payment. The dispute involves issues with respect to dayworks and variations and some contract works. Largely the dispute is on quantum rather than entitlement*".

107. With respect, any difference in the wording employed as between the first and second application form submitted to the Construction Contracts Adjudication Service is legally irrelevant. The first application had been superseded by the second. The appointment of the adjudicator was made solely on the basis of the application submitted on 6 May 2021.

108. Insofar as the wording of the second application form is not identical to that contained in the notice of intention to refer, this is also legally irrelevant. The online application form employed by the Construction Contracts Adjudication Service has no special legal status. It calls for a "*brief outline*" of the payment dispute. It is entirely unsurprising that the dispute is shortly stated, and does not replicate the much longer description previously provided in the notice of intention to refer. Importantly, the notice of intention to refer had been provided to the Service as part of the documentation accompanying the application for the appointment of an adjudicator.

109. There is no contradiction between the two descriptions. The brief outline provided in the application form correctly identifies that the dispute potentially concerns both quantum and entitlement. Even if there had been a contradiction between the two, the notice of intention to refer would prevail given that it has an enhanced legal status: it is the document which commences the statutory timetable for the purposes of the Construction Contracts Act 2013 and the content of same is prescribed under the statutory code of conduct.

110. Moreover, an application to the Chairperson for the appointment of an adjudicator will not arise in every case: it is only required in those cases where there has been a failure among the parties themselves to agree an adjudicator. Given that an application form

seeking an appointment will not have been submitted in every case, it would be surprising if it were to be foundational to jurisdiction.

**(2). ALLEGED FAILURE TO CONSIDER DEFENCES RAISED**

111. The second basis upon which the application for leave to execute is resisted is on the grounds of fair procedures. Counsel on behalf of the respondent submits that statutory adjudication must be conducted in accordance with the principles of constitutional justice. Reliance is placed in this regard on the seminal judgment in *East Donegal Co-Operative Livestock Mart Ltd v. Attorney General* [1970] I.R. 317 (at page 341) and on *Garvey v. Ireland* [1981] I.R. 75 (at page 97).

112. My attention has also been drawn to the statutory code of practice governing the conduct of adjudications, which stipulates, *inter alia*, that an adjudicator shall observe the principles of procedural fairness and shall give each party a reasonable opportunity to put their case and to respond to the other party's case. Counsel cites the judgment of the High Court of England and Wales in *Pilon Ltd v. Breyer Group plc* [2010] EWHC 837 (TCC); (2010) 130 ConLR 90 as authority for the proposition that a decision of an adjudicator will not be enforced if there has been a breach of the rules of natural justice involving the failure to consider a defence. (The approach in *Pilon Ltd* has been approved of in this jurisdiction by *Principal Construction Ltd v. Beneavin Contractors Ltd* [2021] IEHC 578).

113. It is submitted that the adjudicator in the present case breached his obligation to observe the principles of constitutional justice insofar as he failed to consider a substantive defence which had been advanced on behalf of the respondent. It is said that the adjudicator's decision openly acknowledges that an alternative line of defence, based on

the "*true*" value of the works under the payment claim notice of 25 November 2020, has not been considered by the adjudicator.

114. It will be recalled that the principal line of defence advanced on behalf of the respondent had been that the payment claim notice delivered on 25 November 2020 was "*invalid*", and thus incapable of triggering the right to a default payment. The respondent had, however, made additional detailed submissions, in the alternative, to the effect that the applicant had failed to establish entitlement in respect of the alleged sums for variations in accordance with the subcontract. In brief, it was said that the requirements for the confirmation and approval of variations as stipulated under the subcontract had not been complied with. It was further said that, having failed to establish entitlement, it followed that a quantification exercise was not to be carried out and that any evaluation could never amount to any more than a nil amount. Counsel for the respondent has brought my attention to the relevant part of the response (§4.76 to §4.102).

115. The approach taken by the adjudicator to this alternative line of defence has been severely criticised by the respondent. It is said, variously, that the adjudicator failed to consider and/or rejected a significant defence raised by the respondent, and failed to give reasons for having done so.

116. With respect, these criticisms do not accurately reflect the approach actually taken by the adjudicator. The adjudicator's decision has been summarised at paragraphs 62 to 66 above. As appears, the adjudicator held 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 acknowledged that, notwithstanding that it had failed to serve a response to the payment claim notice, the respondent was nevertheless entitled to adjudicate the true value of the payment claim. The adjudicator held, however, that before the respondent would be able to commence such an adjudication, it must first

comply with the adjudicator's decision in this adjudication. The adjudicator cited the judgment of the Court of Appeal in England and Wales in *Grove Developments Ltd v. S & T (UK) Ltd* [2018] EWCA Civ 2448; (2018) 181 ConLR 66 as authority for this proposition.

117. The Court of Appeal in *Grove Developments Ltd* had to resolve the following important issue of principle, namely whether a party who had been obliged to pay out under a payment claim notice (because of their failure to serve a "*pay less*" notice in response) is entitled thereafter to challenge the valuation in the notice and to recover any overpayment. Put otherwise, is the paying party entitled to have the "*true*" value of the claim determined subsequently, notwithstanding that a default payment had been triggered.

118. On the facts of *Grove Developments Ltd*, there had been three adjudications between the parties. Relevantly, it had been determined in the third adjudication that a pay less notice served by the employer had been invalid, with the consequence that a pay claim had to be paid. One of the questions for determination by the Court of Appeal was whether, in principle, the paying party was entitled to commence a separate adjudication seeking a decision as to the "*true*" value of the interim application for payment. The Court of Appeal held that an earlier finding that a default payment had been triggered does not preclude *subsequent* adjudication or litigation on the question of the "*true*" value of the payment claim. The earlier finding is not conclusive of the true value of the work. This is because the issue determined in the earlier finding, i.e. whether a valid payment response or pay less notice has been served, is not the same issue as the "*true*" value of the payment claim.

119. Put otherwise, a paying party who is obliged to satisfy a payment claim, by dint of their failure to deliver a response to the payment claim notice, has a right thereafter to

adjudicate or litigate the "*true*" value of that payment and recover any overpayment that may have been made.

120. For present purposes, it is the holding of the Court of Appeal on the *timing* of any such true valuation that is most significant. The Court of Appeal held that the right to adjudicate or litigate the true value of the payment is contingent on the payment having been discharged. See paragraph 107 of the judgment as follows:

> "[…] The Act has created both the prompt payment regime and the adjudication regime. The Act cannot sensibly be construed as permitting the adjudication regime to trump the prompt payment regime. Therefore, both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain a revaluation of the work before he has complied with his immediate payment obligation."

121. Returning to the facts of the case before me, the approach adopted by the adjudicator had been to determine, first, the applicant's claim that it was entitled to a default payment. Having determined this issue in favour of the applicant, the adjudicator considered that the principles in *Grove Developments Ltd* precluded the making of any determination on the true value of the works in the payment claim notice of 25 November 2020 until such time as the respondent had complied with the decision directing it to pay the adjusted amount outstanding under the payment claim notice, i.e. the sum of €242,225.09.

122. It is incorrect, therefore, to characterise the adjudicator as having acted in breach of fair procedures by failing to consider a line of defence advanced by the applicant. Rather, the adjudicator made a reasoned decision that a valuation could not be commenced until the adjusted amount had been paid. This is more properly characterised as a finding on

the part of the adjudicator that the line of defence was inadmissible at this time, than as the adjudicator having disregarded or ignored the defence.

123. The approach of the adjudicator in this regard is tenable, and certainly does not disclose an egregious error such as would justify the refusal of leave to execute. It is also telling that far from suggesting that the principles in *Grove Developments Ltd v. S & T (UK) Ltd* are inapplicable, the respondent expressly relied upon the judgment both before this court and before the adjudicator.

124. It should be reiterated that, for the purpose of the application for leave to enforce the adjudicator's decision, this court is concerned only with the allegation that there has been a breach of fair procedures, specifically, the right of defence. This judgment does not, therefore, address the broader question of whether principles similar to those stated by the Court of Appeal in England and Wales in *Grove Developments Ltd v. S & T (UK) Ltd* should be applied to the Construction Contracts Act 2013. Any consideration of this broader question could only properly be carried out in substantive proceedings initiated in respect of the adjudicator's decision.

125. For the purpose of the summary application for leave to enforce, it is sufficient for this court to find that the approach adopted by the adjudicator did not entail any breach of fair procedures.

**CONCLUSION AND FORM OF ORDER**

126. Section 6(11) of the Construction Contracts Act provides that an adjudicator's decision can, with the leave of the court, be enforced in the same manner as a judgment or order of the High Court. Even though the adjudicator's decision is not final and conclusive, it nevertheless gives rise to an immediate payment obligation. The successful party is entitled to enforce the adjudicator's decision forthwith, by invoking a summary

procedure, notwithstanding that the adjudicator's decision is amenable to being overreached by a subsequent decision of an arbitrator or a court. The grant of leave to enforce does not preclude the paying party from pursuing the matter further, whether by way of arbitral or court proceedings. In the event that it is successful, the paying party will then be entitled to recover any overpayment from the other side.

127. For the reasons set out in detail in this judgment, I have concluded that leave to enforce should be granted in this case. The "*proofs*" for the application, as identified in the Act and Order 56B of the Rules of the Superior Courts, have all been satisfied. In particular, the adjudicator's decision has been made in respect of a payment dispute properly referred to him under the Act. The adjudicator acted in accordance with fair procedures and natural justice and did not exceed his jurisdiction. The adjudicator's decision continues to be binding on the parties as it has not been superceded by a subsequent decision of an arbitrator or a court.

128. Accordingly, the applicant is hereby granted leave, pursuant to section 6(11) of the Construction Contracts Act 2013 and Order 56B of the Rules of the Superior Courts, to enforce the adjudicator's decision of 25 June 2021. Judgment will be entered against the respondent in the sum of €257,165.09 (exclusive of VAT).

129. As to the costs of the application for leave to enforce, my *provisional* view is that the applicant, having been entirely successful in its application, is entitled to the costs of these proceedings. This reflects the default position under Part 11 of the Legal Services Regulation Act 2015. I am also of the *provisional* view that the judgment should carry Courts Acts interest.

130. The attention of the parties is drawn to the notice published on 24 March 2020 in respect of the delivery of judgments electronically, as follows:

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

131. If either party contends that the form of order should be other than that indicated above, it should file written legal submissions with the registrar by close of business on Monday 27 September 2021. The proceedings will be listed before me, for final orders, on 4 October 2021.

*Appearances*

Alan Philip Brady for the applicant instructed by Maples and Calder (Ireland) LLP
Jarlath Ryan for the respondent instructed by Caldwell Solicitors

Approved Garrett Simons