

APPROVED

[2021] IEHC 619



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 6 October 2021

INTRODUCTION

1. These proceedings seek to enforce a decision made by an adjudicator pursuant to the Construction Contracts Act 2013. The principal judgment was delivered on 13 September 2021 and bears the neutral citation [2021] IEHC 562. This second judgment addresses the form of order to be made in consequence of the principal judgment. More specifically, this judgment addresses the following issues: (i) whether the judgment debt should be adjusted by reference to the outcome of a *second*

adjudication between the parties; (ii) whether interest is payable on the judgment debt; and (iii) the allocation of the costs of the proceedings.

2. The parties filed written legal submissions towards the end of September 2021, and these were elaborated upon at a short hearing on 4 October 2021.

(1). SHOULD SUM PAYABLE BE REDUCED

3. As appears from the principal judgment, the applicant has been 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 in the same manner as a judgment of the High Court. Judgment is to be entered against the respondent in the sum of €257,165.09 (exclusive of VAT).
4. Notwithstanding this prior holding of the High Court, the respondent now contends that a different form of order should be made. It is submitted that the adjudicator's decision of 25 June 2021 is no longer binding on the parties, having been superseded by a decision made in a second adjudication between the same parties. The decision on the second adjudication was, seemingly, notified to the parties on the day following the delivery of the principal judgment in these proceedings. The descriptor "*the first adjudicator's decision*" and "*the second adjudicator's decision*" will be used in this judgment to differentiate between the two decisions.
5. To assist the reader in understanding the respondent's submission, it is necessary to recall the narrow basis on which the first adjudication had been determined. The first adjudicator's decision has been summarised at paragraphs 62 to 66 of the principal judgment. As appears, the adjudication had been resolved on the basis that the failure of the respondent to deliver a response to a payment claim notice had triggered a default payment. The respondent was obliged to pay the full amount demanded by the applicant

in the payment claim notice, notwithstanding that that amount might exceed the “true” value of the claim. The first adjudicator acknowledged that the respondent would be entitled to adjudicate the true value of the claim subsequently. The first adjudicator held, however, that before the respondent would be able to commence such an adjudication, it must first comply with his decision, i.e. by discharging the full amount of the default payment. The first 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 general proposition (“*Grove Developments Ltd*”).

6. The first adjudication had been initiated by a referral made by the applicant. It seems that, during the currency of the first adjudication, the respondent subsequently made its own referral to adjudication. It appears from the submissions now made by the respondent that the second adjudicator has valued the works in dispute at a figure less than that specified in the payment claim notice, and has determined that the net balance payable to the applicant is €94,789.38 (exclusive of VAT). The respondent submits that it should not be required to pay the sum of €257,165.09 (exclusive of VAT) pursuant to the first adjudicator’s decision in circumstances where it has since been decided, in the second adjudication, that the actual balance outstanding is far less.
7. The legal status of a decision made on a subsequent adjudication between the same parties under the same construction contract, and, in particular, its relevance to an application to enforce the earlier adjudicator’s decision, would require careful consideration. The court would have to consider whether the legislative intent is to prioritise the immediate obligation to comply with an adjudicator’s decision. On one analysis, it might be said that the principal purpose of the Construction Contracts Act 2013 is to provide for the expeditious resolution of payment disputes (albeit on a

provisional basis) and for there to be an immediate payment obligation in order to protect the financial position of the payee. It would undermine this purpose were the function of the court to go beyond providing a mechanism for the enforcement of an adjudicator's decision, and were the court, instead, to embark upon a consideration of the net indebtedness between the parties by setting-off one decision against another. Such an exercise is also likely to lead to delay in the enforcement of the earlier adjudicator's decision. The paying party might, for example, seek to adjourn an application for leave to enforce pending the notification of an imminent decision in a second adjudication. The tight timetable provided for in the legislation would be undermined.

8. An alternative analysis of the legislation would be to say that it would be artificial to disregard the outcome of the subsequent adjudication, by enforcing the payment of monies pursuant to the first adjudication notwithstanding that part of those monies will have to be repaid pursuant to the second adjudication (assuming the second decision is valid). Rather, the two decisions should be netted off, and the balance paid. Such an approach would not only be pragmatic, it would also avoid the risk that any overpayment may become unrecoverable because of the subsequent insolvency of the payee.
9. The approach of the Courts of England and Wales has been to say that the paying party must first comply with an earlier adjudicator's decision before embarking upon an adjudication to obtain a true valuation of the work. Put otherwise, the paying party must discharge their immediate payment obligation. The Court of Appeal of England and Wales has held that the UK legislation cannot sensibly be construed as permitting the adjudication regime to trump the prompt payment regime (*Grove Developments Ltd*, paragraph 107).
10. The same result does not necessarily arise under the Construction Contracts Act 2013. This is because, in contrast to the UK legislation, the domestic legislation does not

expressly provide that the failure to deliver a timely response to the payment claim notice triggers a default obligation to pay.

11. As appears from this brief summary, the interrelationship between a first and second adjudication is not clear cut and would require careful consideration of the legislative intention underlying the Construction Contracts Act 2013. For the reasons which follow, I have concluded that it is neither necessary nor appropriate to embark upon such a consideration for the purpose of resolving the present proceedings.
12. First, the respondent has not laid the evidential basis for such a consideration. The second adjudicator's decision has not been adduced in evidence. Still less has the respondent taken any steps to enforce the decision: no proceedings have yet been instituted pursuant to section 6(11) of the Construction Contracts Act 2013. It is apparent from the limited submissions which the court has heard to date that the applicant may wish to dispute the validity of the second adjudicator's decision. In the absence of having sight of the second adjudicator's decision, and having regard to the procedural history, it would be inappropriate for this court simply to assume that the second adjudicator's decision is valid and hence enforceable.
13. Secondly, the legal basis upon which the respondent asserts that the second adjudicator's decision has superseded the first decision is misconceived. The respondent mistakenly relies on section 6(10) of the Construction Contracts Act 2013. This section reads 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.”

14. As appears, a different decision must have been reached in court proceedings or arbitral proceedings before an adjudicator's decision is superseded. (This is subject always to the possibility of the parties reaching a settlement between themselves). A second or subsequent adjudication does not have the legal effect of setting aside or otherwise undoing the binding effect of an earlier decision. The interrelationship between decisions in serial adjudications is more complex. The existence of a subsequent adjudicator's decision is merely a factor which a court might, in a suitable case, take into account in the exercise of its discretion to grant leave to enforce.
15. Thirdly, any argument that the respondent had been entitled to pursue a second adjudication and to rely on the second adjudicator's decision without having complied with the first adjudicator's decision would be inconsistent with the stance of the respondent to date. The respondent had expressly relied on the judgment of the Court of Appeal of England and Wales in *Grove Developments Ltd* in the course of its submissions in the first adjudication. As discussed above, this judgment stands as authority for the proposition that a paying party, having lost an earlier adjudication as the result of its failure to respond to a payment claim notice, may only enforce a decision in a subsequent adjudication on the true value of the works where that party has complied with the first adjudicator's decision.
16. The respondent will not now be permitted to commit a *volte face* and seek a stay on the enforcement of the first adjudicator's decision on the basis that the principles underlying the judgment in *Grove Developments Ltd* do not apply in this jurisdiction.
17. I turn next to address the respondent's fall back submission which is to the effect that, having entered judgment in the full amount, the court should either (i) direct that payment in the amount of €94,789.38 (exclusive of VAT) only be made, or (ii) direct that the full amount be paid in escrow, until the determination of any enforcement proceedings in

respect of the second adjudication. With respect, no evidential basis has been laid which would justify withholding any or all of the payment. No affidavit evidence has been filed which demonstrates that there is a real risk of the applicant company becoming insolvent or being otherwise unable to make a repayment (assuming that an obligation to make a repayment is ultimately established).

18. It follows, therefore, that the applicant is entitled to judgment in the full amount of the first adjudicator's decision.

(2). INTEREST ON JUDGMENT DEBT

19. Section 6(11) of the Construction Contracts Act 2013 envisages that, where leave is granted, an adjudicator's decision is to be enforced in the same manner as a judgment or order of the High Court with the same effect.
20. Section 22 of the Courts Act 1981 confers a discretion on a court, which orders the payment by any person of a sum of money, also to order the payment of interest on that sum between the date when the cause of action accrued and the date of the judgment. The rate of interest is fixed by Ministerial Order. Such interest is referred to informally as "*Courts Act interest*".
21. The objective of section 22 of the Courts Act 1981 has been described as follows by the Supreme Court in *First Active plc v. Cunningham* [2018] IESC 11; [2018] 2 I.R. 300 (at paragraph 57):

“The purpose of s 22 of the 1981 Act was to remedy a void which had the capacity of creating a major injustice to a successful plaintiff who, as the law stood prior to its enactment, may not have been in a position to recover his full loss even if completely successful at trial. As indicated, there was no mechanism by which he could have been

compensated for being out of his money between the cause of action and the date of judgment. That period inevitably would vary from case to case, but in virtually all situations it had the potential of being substantial. Therefore, awarding interest on the judgment debt only would fall significantly short of satisfying the full loss, the recovery of which should be inherent or intrinsic in a successful judgment decree. As the discretionary nature of the section shows, it was never intended to over-compensate a plaintiff or provide him with a sum in excess of the true loss; equally, it was never intended to punish or penalise a defendant or be ‘oppressive’ to him, in a legal sense. Its simple purpose was to equalise the position as if the default, howsoever arising, had not occurred. Whilst the rate is fixed, I am satisfied that the other elements of the section are such that in any given case the court can, by way of adjustment, ensure that neither side is affected by its operation in any of the ways above described.”

22. The Supreme Court went on to identify the following as factors which may be relevant to the exercise of the court’s discretion to direct the payment of interest:

- the nature of the case;
- the reasons why the debt was not discharged at an earlier date;
- the conduct of each party to the litigation;
- the reason for the passage of time or delay in the processing of the litigation;
- the absence of any contractual clause dealing with interest in circumstances where its existence might be expected;
- the desire to achieve full restoration, but no more, for the judgment creditor;
- the avoidance of penalising the judgment debtor.

23. As appears, the determination of whether to direct the payment of interest will involve the court considering the detail of the underlying relationship between the parties and the conduct of the litigation.
24. I have concluded that the general power under section 22 of the Courts Act 1981 does not apply to the enforcement of an adjudicator's decision under the Construction Contracts Act 2013. This is because the statutory discretion to direct the payment of interest is not freestanding, but is contingent on the court having jurisdiction to adjudicate on the entitlement of the party to payment of the debt.
25. The distinguishing feature of the Construction Contracts Act 2013 is that the jurisdiction to determine the payment dispute resides, initially, with the adjudicator alone. It is only in the event that substantive legal proceedings are taken subsequently that the court would have jurisdiction to address the merits of the payment claim. Insofar as an application for leave to enforce is concerned, the court's jurisdiction is much more limited; and as explained in more detail in the principal judgment, is confined largely to a consideration of the *validity* of the adjudicator's decision. The court does not have jurisdiction, in an application under section 6(11) of the Construction Contracts Act 2013, to engage in the type of in-depth consideration of the underlying relationship between the parties which would be necessary to make an informed decision on whether to order the payment of interest. It would be inconsistent with the summary nature of an application for leave to enforce, and, more generally, inconsistent with the policy of the Construction Contracts Act 2013, to expect the court to do so.
26. The proper interpretation of the legislation is that it is a matter for the adjudicator to decide whether interest should be payable from the date upon which the obligation to discharge the payment claim notice fell due. This decision falls to be made as an aspect of the adjudicator's overall resolution of a payment claim dispute.

27. On the facts of the present case, the first adjudicator refused to direct interest for the reasons stated at §7.1 to §7.4 of his decision. This finding is binding on the parties unless and until superseded by a different decision in court or arbitral proceedings. Therefore, the applicant is only entitled to interest from the date of the judgment of this court in accordance with the Debtors (Ireland) Act 1840, i.e. interest will only accrue from the date that the order of this court is perfected.

(3). LEGAL COSTS

(A). Allocation of costs

28. The courts have a discretion, to be exercised on a case-by-case basis, to depart from the general rule that a successful party is entitled to its costs. One of the factors to be considered, under section 169(1) of the Legal Services Regulation Act 2015, is the “*particular nature and circumstances of the case*”. The statutory language is broad enough to allow the court to consider whether the issues raised in the proceedings were of general public importance, and, if so, whether this justifies a modified costs order. In exercising its discretion in respect of costs, a court must seek to reconcile (i) the objective of ensuring that individuals are not deterred by the risk of exposure to legal costs from pursuing or defending litigation of a type which—although ultimately unsuccessful—nevertheless serves a public interest, with (ii) the objective of ensuring that unmeritorious litigation is not inadvertently encouraged by an overly indulgent costs regime.
29. In carrying out this balancing exercise, it will be necessary for the court to consider factors such as (i) the general importance of the legal issues raised in the proceedings; (ii) whether the legal principles are novel, or, alternatively, are well established; (iii) the strength of the applicant’s case: proceedings might touch upon issues of general importance but the grounds of challenge pursued might be weak; (iv) whether the subject-matter of the litigation is such that costs are likely to have a significant deterrent

effect on the category of persons affected by the legal issues; and (v) whether the issues touch on sensitive personal rights. It is not enough to trigger a departure from the default costs position for a party to say that the issues were “*novel*”. There will always have to be a “*first*” case.

30. For the reasons which follow, there is no justification in the present case for departing from the general position that the successful party is entitled to recover its costs from the unsuccessful party. First, the proceedings did not give rise to difficult legal issues which required clarification in the public interest. This is not a case where the arguments were finely balanced. Rather, the grounds of opposition advanced by the respondent were without merit, and, to an extent, internally contradictory. The arguments were also largely fact-specific, turning on the sequence of events leading up to the appointment of the adjudicator, and on the manner in which the adjudicator’s decision addressed one line of defence advanced.
31. Secondly, while it is correct to say that the case law in respect of the Construction Contracts Act 2013 is still evolving, the High Court (Meenan J.) had already delivered a significant judgment on the proper approach to the enforcement of adjudicators’ decisions prior to the hearing of these proceedings. That judgment, *Principal Construction Ltd v. Beneavin Construction Ltd* [2021] IEHC 578, provides important guidance on the interpretation of the Construction Contracts Act 2013.
32. Thirdly, proceedings under the Construction Contracts Act 2013 will, by virtue of the subject-matter of the legislation, generally be undertaken by commercial entities and public authorities acting in pursuit of their own financial interests. In many instances, the parties will be well resourced and familiar with the legal process. This is not an area of the law which is dependent on public-spirited litigants for clarification. If and insofar

as the interpretation of the legislation requires to be teased out, legal costs are unlikely to have a deterrent effect.

(B). Basis for measuring costs

33. Having concluded that costs should be awarded to the applicant as the successful party, it is next necessary to consider the basis on which those costs should be measured. The default position is that costs are measured on what is known as a “*party and party*” basis. On this basis, the party whose costs are being measured will be allowed to recover all such costs as were “*necessary or proper*” for the attainment of justice or for enforcing or defending the rights of that party. The costs are measured objectively, and the costs allowed may be less than those actually incurred. For example, a party may have chosen to retain both senior and junior counsel for a case, but would only be allowed to recover the costs of one of the barristers if the Legal Costs Adjudicator were to decide that it was not “*necessary or proper*” to retain more than one counsel. That party would then have to bear the costs of the second barrister itself.
34. The courts have, however, a discretion to award costs on a different basis, namely, a “*legal practitioner and client*” basis. (Prior to the LSRA 2015, this had been described as “*solicitor and client*”). On this basis, the party whose costs are being measured will be allowed to recover all costs except in so far as they are of an “*unreasonable amount*” or have been “*unreasonably incurred*”. An order on a “*legal practitioner and client*” basis comes closer to providing a full indemnity in respect of the costs actually incurred than does an order on a “*party and party*” basis.
35. The principles governing the exercise of the discretion to award costs on the higher basis have been authoritatively stated by the High Court (Barniville J.) in *Trafalgar Developments Ltd v. Mazepin* [2020] IEHC 13 as follows:

- “(1) The normal position is that where costs are awarded against one party in favour of another, those costs will be taxed or adjudicated on the party and party basis.
- (2) The court has a discretion to depart from the normal position in the particular circumstances of the case, where the court thinks fit to do so, and to direct that the costs be taxed or adjudicated on the solicitor and client basis.
- (3) There has to be a good reason for the court to depart from the normal position and to make an order for costs on the solicitor and client basis (or on the even more severe basis, the solicitor and own client basis).
- (4) The court may exercise its discretion to order costs on the solicitor and client basis where it wishes to mark its disapproval of or displeasure at the conduct of the party against which the order for costs is being made.
- (5) The conduct in question can include:–
- (a) A particularly serious breach of the party’s discovery obligations;
 - (b) An abuse of process by that party in commencing and maintaining proceedings for an improper purpose or for an ulterior motive, designed to seek a collateral and improper advantage;
 - (c) The failure to exercise the requisite caution in commencing proceedings making claims of fraud or dishonesty or conspiracy without ensuring there exists clear evidence supporting a *prima facie* case in relation to such claims;
 - (d) Any other conduct in relation to the commencement or conduct of the proceedings, or any aspect of the proceedings, which the court considers merits be marked by the court’s displeasure or disapproval, such as a particularly serious or blatant breach of a court order, the directions of the court or the Rules of the Superior Courts.
- (6) In considering whether the conduct of a party is such that the court should exercise its discretion to make an order for costs on the solicitor and client basis, the court should:–
- (a) Clearly identify the particular conduct or behaviour of the party which is said to afford the basis for the court exercising its discretion to award costs on the solicitor and client basis;

- (b) Carefully examine and consider the explanation (if any) offered by the party for the conduct or behaviour in question;
 - (c) Carefully consider and examine the consequences (if any) of the conduct or behaviour in question for the other party, whether in terms of delay or costs or any other form of prejudice to that party;
 - (d) In light of the above, determine whether, in all the circumstances, it would be appropriate and in the interests of justice to award costs on the solicitor and client basis under O. 99, r 10 (3).
- (7) While a failure to comply with the provisions of the Rules of the Superior Courts or of a direction or order of the court will normally merit the award of costs against the party in default, such costs will normally be awarded on the party and party basis. It will generally only be if the breach or failure to comply is of a particularly blatant or serious nature, having serious consequences for the other party, that the court will be justified, in the exercise of its discretion, to award costs on the solicitor and client basis (or, exceptionally, on the solicitor and own client basis)."

36. I respectfully adopt the foregoing summary from *Trafalgar Developments Ltd. v. Mazepin* as a correct and comprehensive statement of the legal principles governing the award of costs on the higher basis, i.e. on what is now known as the "*legal practitioner and client*" basis.

37. The applicant has applied for costs to be awarded on the "*legal practitioner and client*" basis. Three matters are cited in support of this application. The first concerns the approach taken by the respondent to the service of the proceedings upon it. The respondent is a company registered in Northern Ireland. It was, therefore, necessary for the applicant to obtain leave to issue proceedings out of the jurisdiction. The High Court (McDonald J.) granted leave on 12 July 2021 (High Court 2021 No. 110 IA). Relevantly, the order directed that the applicant was at liberty to serve notice of the originating notice of motion on the respondent at the respondent's registered address. For reasons which have never been properly explained, papers served at this address were returned to the applicant's solicitors. This is said to have necessitated the applicant incurring additional

costs as its legal team had to prepare an affidavit and submissions addressing the question of the issuance and service of the proceedings.

38. The second matter relied upon is the general conduct of the respondent. It is alleged, *inter alia*, that the respondent wrongfully and unlawfully failed to recognise the adjudicator's decision, forcing the applicant to bring enforcement proceedings under the Construction Contracts Act 2013. It is further alleged that the respondent sought to limit and stifle the progress of the within enforcement proceedings at every available step.
39. The third matter relied upon is the making of certain averments in the replying affidavit filed on behalf of the respondent, which averments are said to have been included for the sole purpose of unfairly discrediting the reputation of one of the directors of the applicant company.
40. I am not satisfied that any of the three matters relied upon by the applicant reaches the threshold necessary to justify the making of a costs order on the "*legal practitioner and client*" basis. As to the first matter, the justice of the case is met by making express provision in the costs order that the applicant is to recover the costs of the *ex parte* application on 12 July 2021, the costs of the affidavit of service and the additional work in preparing submissions on the question of the issuance and service of the proceedings outside the jurisdiction. Whereas the respondent's approach to service reflects poorly on it, the conduct falls short of an abuse of process. Moreover, it did not result in any material delay in the hearing of the application for leave to enforce.
41. As to the second matter, the mere fact that the arguments relied upon by a party have been dismissed on their merits does not, without more, justify an award of costs on the higher basis. Rather, it is only in those exceptional cases where the arguments made were so obviously unmeritorious as to give rise to the inference that same were made solely for the purpose of delay that such an order would be warranted. There is nothing

in the conduct of the defence of the present proceedings which comes close to an abuse of process. The arguments made were all respectable arguments, and ones which the respondent was perfectly entitled to pursue. The respondent confined itself to a small number of points. Counsel for the respondent made his submissions ably and concisely, and the hearing finished well within the one day allocated. The fact that the court ultimately rejected these arguments, for the reasons set out in detail in the principal judgment, does not in any sense imply that the arguments should not have been made. Importantly, the making of these arguments did not result in any unjustifiable delay in the determination of the application for leave to enforce. The lapse of time between the institution of the proceedings on 13 July 2021 and the hearing on 3 September 2021 is largely referable to the six week period allowed under the order of 12 July 2021 for the filing of an appearance.

42. As to the third matter, the reference to the financial position of the company and the previous disqualification of one of the directors cannot be said to be irrelevant, scandalous nor to amount to an imputation of fraud. Similarly, if and insofar as there had been some suggestion that non-payment of fees by the respondent might have affected the impartiality of the adjudicator, this suggestion was not pursued at the hearing. It is not relevant therefore to the issue of costs.

CONCLUSION AND FORM OF ORDER

43. For the reasons set out in the principal judgment and in the within judgment, 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). In accordance with the Debtors (Ireland) Act 1840,

interest will accrue from the date that the order of this court is perfected. The application for interest pursuant to section 22 of the Courts Act 1981 stands refused.

44. The applicant is entitled to recover the costs of the proceedings as against the respondent. This reflects the default position under Part 11 of the Legal Services Regulation Act 2015. The costs are to include, *inter alia*, the costs associated with the service of the proceedings; the *ex parte* application on 12 July 2021; the affidavit of service and any work incurred in respect of preparing to make submissions on the question of the issuance and service of the proceedings outside the jurisdiction. The costs are also to include two sets of written legal submissions; and the costs of the hearings on 30 August, 3 September and 4 October 2021. In default of agreement, the costs are to be measured, i.e. adjudicated, by the Office of the Chief Legal Costs Adjudicator under the Legal Services Regulation Act 2015.
45. Having regard to the legislative intent underlying the Construction Contracts Act 2013, it would be inappropriate to stay the execution of the costs order in the event of an appeal. It would be inconsistent with the “*pay now, argue later*” policy were the payee to be denied the opportunity of recovering the costs of an application for leave to enforce pending an appeal.

Appearances

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

Approved
Gemma S. Mans