

CONSTRUCTION AND ENGINEERING

Adjudication under the Construction Contracts Act 2013: can Judicial Review halt the process?

22 December 2020

The [Construction Contracts Act 2013](#) (“CCA”) introduced the right for a party to a construction contract to refer payment disputes arising under the contract for adjudication at any time. The CCA provides an expedited procedure in which an adjudicator must be appointed, submissions made and a decision issued, a key objective of the CCA being to maintain cash flow, “the life blood of the building industry”. However, it is now clear that adjudication can be subject to challenge by way of judicial review – so what does this mean?

The CCA applies to contracts entered into [after 25 July 2016](#). [Annual reports](#) issued by the Chairperson of the Ministerial Panel of Adjudicators indicate a steady increase in the use of adjudication, and it is to be expected that issues requiring clarification will arise as the process beds down. A Court can refuse to enforce an adjudicator’s decision under the procedure for enforcement of the decision if the process has failed to meet the requirements of the CCA. However, it is now clear that the Court can also intervene if one of the parties seeks to judicially review, for example, whether or not the adjudicator has jurisdiction to hear the dispute. It is also clear that, where this happens during the course of an adjudication, the upshot may be that a stay will be put on the adjudication.

One of the key distinctions between the CCA and relevant legislation in the UK is that, in Ireland, adjudication and the role of the adjudicator is a creature of statute, rather than contract. In the UK, the legislation provides that parties are required to include certain provisions [in their contracts](#) with regard to an adjudication process, absent which, the scheme will be *implied* into the contract. In Ireland, however, the provisions of section 6 of the CCA operate by virtue of that legislation [regardless](#) of what the contract says.

We know from the recent judgment in [O’Donovan and others v Bunni and others](#) of two instances during 2020 in which the respondent to an adjudication sought judicial review of whether or not the adjudicator had jurisdiction to hear the dispute in question. In both cases, and following principles applied in other judicial review cases, the High Court **stayed the adjudication process pending hearing of the judicial review**.

BACKGROUND

[O’Donovan and others v Bunni and others](#) concerns a dispute over payment for electrical works done by OCS One Compete Solution Limited for Cork GAA at Páirc Uí Chaoimh. Part payment was made to OCS but there was a dispute about the final account of €6.6m. That dispute had been referred to first conciliation and then arbitration, with the arbitration likely to conclude in late 2021. OCS also referred a dispute to adjudication in respect of certain works for €1m (which was part of the wider final account dispute).

The Chairperson of the Panel of Adjudicators, Dr Bunni, appointed an adjudicator. Following the appointment, Cork GAA argued that the adjudicator had no jurisdiction to hear the dispute (on the basis that the relevant “construction contract” was a letter of intent which had

been entered into **prior to** the coming into effect of the CCA). The adjudicator considered written submissions from both sides and issued his view that he [did](#) have jurisdiction. Cork GAA then applied to Court and obtained leave to apply for judicial review of this question, and also sought a stay on the continuance of the adjudication pending conclusion of the judicial review.

OCS APPLY TO HAVE THE STAY LIFTED

This was the core issue before the court in this decision: OCS applied to Court to have the stay on its adjudication lifted, arguing that, thanks to the stay, it would suffer an injustice because it would be deprived of its right to adjudication under the CCA. It would still be open to Cork GAA to challenge any award made by the adjudicator when OCS would try to enforce the award.

Cork GAA, on the other hand, said the stay should remain in place and undertook to resume the adjudication if it lost its judicial review case. It argued that allowing the adjudication to proceed in the meantime would mean that it could end up being subject to a binding decision that was ultimately unenforceable while it waited for its judicial review to be heard.

WHICH COMES FIRST, THE ADJUDICATION OR THE JUDICIAL REVIEW?

In the circumstances of this case, the judicial review. The Court decided that the interests of justice were best served by continuing the stay on the adjudication until the final determination of Cork GAA's judicial review.

However, it may not necessarily work out like that in all cases. What does the judgment say about how the Court will treat this type of situation?

First, the burden of proof on the appropriateness of continuing the stay rests with the applicants (here, Cork GAA).

Second, the principles to be applied when deciding whether it is appropriate to continue the stay are set out in [Okunade v Minister for Justice](#). In summary:

- a. First, does the applicant have an arguable (substantive) case? If not, the stay should not be maintained.
- b. Then, where would the greatest risk of injustice lie? The court has to give appropriate weight to the orderly implementation of measures which are prima facie valid; the public interest in the orderly operation of the scheme in which the measure under challenge was made; any additional factors in the case which would heighten the public interest of the measure not being implemented pending resolution of the proceedings; but also the consequences for the applicant of being required to comply with the measure in circumstances where that measure could then be found to be unlawful.
- c. Would damages (if relevant) be available and be an adequate remedy?
- d. While judicial review is not a detailed investigation of fact or complex questions of law, the court can place all due weight on the strength or weakness of the applicant's case.

WHAT FACTORS IN THIS CASE LED THE COURT TO KEEP THE STAY ON THE ADJUDICATION?

In the circumstances of this case, the Court reached several conclusions which are discussed below.

- As regards the public interest in the

preservation of statutory schemes, the purpose of the adjudication process is to provide a fast, fair and efficient method of determining payment disputes. The timeframes in the CCA are very tight to ensure that disputes are adjudicated quickly. However, the Court said that it also had to consider the circumstances of the case.

- The Court considered it relevant that OCS had already been paid a substantial sum for works carried out. We think it is reasonable to question, however, whether this is relevant to a party's entitlement to have its claim for further monies resolved by adjudication.
- The Court noted that OCS's final claim was referred to arbitration and considered it reasonable to assume that the arbitration hearing would take place in Q4 of 2021.
- Adjudication is a fast process, but the court considered OCS delayed "for an inordinate period" in invoking the process. In this respect, we think it is reasonable to note that, under the CCA, the right to refer the dispute to adjudication may be exercised **at any time**.
- The Court did not accept that the stay meant that the timetable in the CCA would pass and an adjudicator's decision would not be capable of being delivered. The CCA envisaged an adjudication continuing beyond the 42-day period by agreement of the parties. The Court considered that the stay did not mean that OCS would be deprived of its statutory right to adjudication; rather, the right would be deferred for a number of months, which would not cause OCS undue prejudice. We think it is worth noting, in relation to this point, that there was not in fact "agreement" of the parties to extend the adjudication, but simply an offer by Cork GAA to do so.
- The Court considered that lifting the stay would be somewhat futile because, if the adjudicator made a final award and OCS sought to enforce it in the High Court, Cork GAA would be entitled to raise the jurisdiction issue as a bar to enforcement. The Court would then decide to await the determination of the judicial review.
- The Court also considered that, once

Cork GAA challenged the jurisdiction of the adjudicator, they could not participate further in the process (without being open to the charge that they were estopped from alleging lack of jurisdiction), and they would be greatly prejudiced by their lack of participation. However, we consider that it would have been open to Cork GAA to reserve their position and entitlement to ultimately challenge the adjudicator's decision.

- In terms of the relative strengths of the parties' cases in the substantive dispute, Cork GAA had already satisfied the Court that it had an arguable case when it obtained leave to apply for judicial review. The Court went further: it considered that Cork GAA had a strong case. The Letter of Intent was a detailed document. Around 90% of the work claimed in the final account was completed before execution of the later contract. The later contract was not just a reiteration of the previous terms, but included material alterations to what had gone before.

COMMENT

These proceedings mark an interesting development in statutory adjudication in Ireland. When participating in an adjudication, it is always important to ensure that you and, more importantly, the adjudicator comply with the CCA and Code of Practice Governing the Conduct of Adjudications. Concerns around jurisdiction and observance of these requirements should be raised early to avoid (in the case of successful parties) being frustrated from enforcing an award, and (in the case of unsuccessful parties) being estopped from resisting enforcement of an award. In addition, it is now clear that decisions may be subject to judicial review proceedings and it is hoped that this will not present obstacles to parties being able to avail fully of the statutory process to secure an adjudicator's decision quickly. It is worth emphasising that adjudication remains an expeditious mechanism that may be used - often with the agreement and support of both parties - to resolve the disputes that sometimes do arise in the normal course of business.

The authors would like to thank Adam Lacey for his contribution to this article.

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