THE CONSTRUCTION BAR ASSOCIATION OF IRELAND

CONSTRUCTION LAW CONFERENCE – 5TH JULY, 2014

ARGUE NOW, PAY LATER?
CHALLENGES TO THE ENFORCEMENT OF ADJUDICATION DECISIONS

SENAN ALLEN S.C.

Introduction

1. The Construction Contracts Act, 2013, provides for a new (in this country) scheme for the interim resolution of disputes in relation to construction contracts and for the enforceability of the decisions of adjudicators by court proceedings. I have been given a fairly roving brief to contemplate the basis upon which applications to court to enforce such decisions might be challenged and the sort of practical problems that might be encountered.

2. The concept of binding adjudication is new to us but the process is well (in the sense of firmly) established in the United Kingdom, where it originated, since 1996. I propose firstly to look briefly at the history of statutory adjudication and then in a little detail at the English cases, offering some observations as I go. Against that background I will look at the Irish legislation and offer a view as to the extent to which it may be expected that the Irish courts will follow the approach of the judges there.

History of statutory adjudication in the United Kingdom

3. ***Hudson's Building and Engineering Contracts***[1] traces the genesis of adjudication to the decision of the House of Lords in ***Modern Engineering (Bristol) Limited v.***

[1] (12th edition) (2010)

Gilbert-Ashe (Northern) Limited[2] which confirmed the entitlement of all of the parties to a building contract to exercise a right of set-off or abatement of amounts due unless those rights were specifically excluded by the contract.

4. This statement or restatement of the law in England (which is mirrored by the decisions of the High Court in ***P.J. Hegarty & Sons Limited v. Royal Liver Friendly Soc***[3] and ***Moohan v. S. & R. Motors (Donegal) Limited***[4]) led to the introduction in the Joint Contracts Tribunal form of domestic subcontract of a restriction on the main contractor's right of set-off and procedure to allow for the provisional determination of the main contractor's claim and from there to the regime of statutory adjudication introduced in the United Kingdom by the Housing Grants, Construction and Regeneration Act, 1996. But while the genesis and the evolved creature are clear, the evolution is not clear, to me at least.

5. In ***CIB Properties Ltd v. Birse Construction Ltd***[5] Judge John Toulmin Q.C. recalled that in the debate on the United Kingdom legislation in the House of Lords[6] Lord Ackner had said that:-

> *"[Adjudication] was a highly satisfactory process. It came under the rubric of 'pay now argue later' and was a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up the completion of important contracts."*

6. Judge Toulmin immediately went on to observe that the procedure is being used in that jurisdiction long after the contract the subject matter of the dispute has come to an end and, as in that case, as a form of intense confrontational litigation which was very costly. I am sure that much more was said in the course of the parliamentary debate than the short passage cited but I offer the view that the experience of voluntary adjudication within the industry affords no justification for a statutory scheme of general application.

---

[2] [1974] A.C. 689
[3] [1985] 1 I.R. 524
[4] [2008] 3 I.R. 650
[5] [2005] 1 WLR 2253
[6] Hansard (HL debates), vol. 571, cols. 989 - 990

7. The philosophy underlying adjudication appears to be to facilitate and encourage the performance of construction contracts. That, it seems to me, does not extend to completed contracts or even, fully at least, to contracts which have irretrievably broken down. Adjudication is certainly a useful tool in the dispute resolution box but it appears to have been embraced in England as a panacea.

8. ***Hudson*** explains in reasonably positive terms the rationale behind contractual (and therefore, to the extent of the ability of any contractor to negotiate away from the industry forms, voluntary) adjudication between main contractors and sub-contractors but appears to be less than entirely enthusiastic about statutory adjudication, writing of the *"perceived purpose"* of extending the adjudication process to all construction contracts, specifically to main building contracts. The authors suggest that mandatory adjudication *"might not unreasonably be seen as the serious erosion ... of employers' long established rights under construction contracts"* and that the prospect of a later entitlement to a definitive determination of the dispute as *"of little practical consolation to an employer ... given the expense of arbitration or litigation and the financial frailty of many contractors."*[7] It seems to me that there is force in this.

9. As ***Hudson*** goes on to show, the courts in England and elsewhere have taken a robust line in their approach to enforcing adjudication decisions so as to achieve the underlying objective of *"pay now"*, if necessary at the expense of the entitlement to *"argue later"*. A review of the decisions in that jurisdiction shows that there is scope for a difference of emphasis or enthusiasm in the approach to the enforcement of decisions which was more or less acknowledged by the Court of Appeal[8] in ***Pegram Shopfitters Ltd v. Tally Weijl (UK) Limited***[9] but the trend in the Construction and Technology Court, at least, is to order the enforcement of decisions with little critical analysis. I offer the view that whether this approach promotes confidence in the process must be at least debatable.

[7] (12th edition) (2010) para. 11-002

[8] Maye L.J., at para. 9, said that he understood anecdotally that the Court of Appeal might be regarded as less than entirely supportive of the policy of the Act. He explained that an examination of the cases in which it had upheld challenges to the enforceability of decisions of adjudicators showed that this had occurred when legal principle had to prevail over the broad brush policy.

[9] [2004] 1 WLR 2082

10. The Code of Practice published by the Minister for Public Enterprise and Reform[10] will require reasoned decisions. I offer the view that the whole point of requiring reasons is to allow some assessment to be made of the validity and correctness of the decision. It remains to be seen to what extent the Irish courts may be willing to see the innocent hang to ensure that the guilty do not escape.

The United Kingdom enforcement cases

11. In ***Macob Civil Engineering Ltd v. Morrison Construction Ltd***[11], Dyson J., in a passage later cited repeatedly with approval, expounded the policy of the legislation.

> *"The intention of Parliament in enacting this Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement; see section 108(3) of the Act and paragraph 23(3) of Part I of the Scheme. The timetable for adjudications is very tight (see section 108 of the Act). Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. So far as procedure is concerned, the adjudicator is given a fairly free hand. It is true (but hardly surprising) that he is required to act impartially (section 108(2)(e) of the Act and paragraph 12(a) of Part I of the Scheme). He is, however, permitted to take the initiative in ascertaining the facts and the law (section 108(2)(f) of the Act and paragraph 13 of Part I of the Scheme). He may, therefore, conduct an entirely inquisitorial process, or he may, as in the present case, invite representations from the parties. It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the*

[10]On the Engineers Ireland website there is a PDF document called Construction Contracts Act 2013 (Code of Practice)(Adjudication) Order 2014 (S.I. No. XXX of 2014) dated the 6th March, 2014, but if was ever made it is not at the time of writing on the Irish Statute Book.
[11] [1999] B.L.R. 93

dispute resolution process. Crucially, it has made clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved."

12. Although familiar with the grinding detail of the traditional approach, I have no difficulty in understanding and accepting the process of adjudication. What I do have difficulty accepting is the uncritical rubber stamping of decisions, in some cases in the face of fundamental and obvious error. I suggest that the process of adjudication and the confidence of participants in the process are undermined by a policy of refusing to look at the correctness of the decision. I do not advocate a grinding analysis of all of the evidence or a root and branch review of the process but I do not see that the legislative policy is advanced by the enforcement of decisions which, although they may have answered the question put, can be shown to have been vitiated by a serious and significant error or series of such errors.

13. In ***Ryanair plc v. Aer Rianta cpt***[12] Fennelly J. said that the public interest in the administration of justice is not confined to the relentless search for perfect truth. To say that the traditional approach to resolving disputed in the construction industry has proven to be unsatisfactory would be an understatement. Adjudication undoubtedly can be a very valuable alternative, saving time and expense and facilitating cash flow. What I do find difficult to accept in the proposition that Oireachtas Eireann must be taken to have been aware that injustice was likely to result or can have intended that the Courts should summarily enforce decisions that are likely to lead to injustice. As I will later suggest, there appears to be good reason to believe that the Irish courts may take a different view.

14. The approach taken by the English courts to the enforcement of adjudicators' decisions is illustrated by the decision in ***Carillion Construction v. Devonport Royal Dock Yard***[13]. That was an application to the Court of Appeal for leave to appeal against an order granting summary judgment on foot of an adjudicator's decision that the Defendant should pay to the Claimant stg£12,376,454.54. The underlying contract was very complicated and valuable, coming out at stg£114 million, and the dispute

[12] [2003] 4 I.R. 264
[13] [2005] EWCA Civ. 1358

centred, broadly, on the correct calculation of the *"gainshare"* or *"painshare"*. The referral notice ran to 67 pages and was accompanied by 7 lever arch files. The response ran to 67 pages; the reply to 56 pages; and a rejoinder to 76 pages. The adjudicator ended up with 29 folders and, the parties having agreed to two extensions of time, had a total of 10 weeks in which to consider and decide the issues.

15. Chadwick L.J., giving the judgment of the court, said:-

> *"85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with a decision of an adjudicator. The courts should give no encouragement to the approach adopted by [the appellant] in the present case: which ... may, indeed, aptly be described as 'simply scrabbling around to find some argument, however tenuous, to resist payment.'*
>
> *86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels 'excess of jurisdiction' or 'breach of natural justice'. It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their sub-*

contractors. The need to have the 'right' answer has been subordinated to the needs to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions. Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult question of law would be referred to adjudication under the statutory scheme; or whether such disputes are suitable for adjudication under the scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in a case like the present.

87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the grounds that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest of cases) is likely to lead to a substantial waste of time and expense – as, we suspect, the costs in the present case will demonstrate only too easily."

16. This, it is submitted, is very heavily biased in favour of contractors and against employers.

17. The proposition that a defendant resisting the enforcement of an award is to be viewed as *"simply scrabbling around to find some argument, however tenuous, to resist payment"* tends, I suggest, to prejudge any issue the defendant would raise.

18. The proposition that the legislation is directed to protecting contractors against insolvency through a wrongful withholding of payments properly due tends, firstly, to prejudge any issue as to whether the payments are properly due and, secondly, to ignore the risk that an order for payment in a case where construction has ceased may delay or prevent the completion of the project.

19. Similarly, the proposition that a challenge to an adjudicator's decision is likely to lead to a substantial waste of time and expense prejudges the merit of the challenge.

20. ***CIB Properties Ltd v. Birse Construction Ltd***[14] was another largish and complicated dispute. Following termination by the claimant of the defendant's contract on the contract in December, 2001, and the completion of the project in May, 2003, a demand for payment was made in July, 2003, for a sum of nearly stg£17 million (with 15 folders so overfilled that the papers made up 22 folders in the trial bundle). The Court found that the demand for payment had been in preparation from the end of 2002, and that both sides had been jockeying for position in a way *"which is apparently permitted in adjudication but is not permitted in current litigation practice".*[15] The dispute was referred to adjudication in November, 2003, and adjudicated upon on the 24th February, 2004, by an award of a little more than stg£2 million. The process followed a telescoped version of the procedure one might expect in an arbitration or commercial list case which was facilitated by the agreement of the parties to extend the time for adjudication. The decision of the adjudicator ran to 139 pages.

21. The application for enforcement was resisted on a number of grounds, notably, that adjudication was inappropriate for a dispute of that complexity.

22. I pause here to observe that ***CIB Properties Ltd*** and ***Carillion Construction*** highlight the danger to respondents in particular of being drawn in to a process which may have no upside. If the adjudicator is against the claimant, he can start again by litigation or arbitration and much of the expense of the adjudication will enure to the benefit of the new claim. But if the decision is against the respondent he must pay now and sue or arbitrate for the return of his money.

23. In ***CIB Properties Ltd v. Birse Construction Ltd*** Judge John Toulmin Q.C. recalled what was said by Lord Ackner in the debate in the House of Lords but did not suggest how this tied in to a claim on foot of a contract which had long ago been terminated. In the immediately following paragraph he mentioned that the costs of each of the

[14] [2005] 1 WLR 2253
[15] Para. 80

parties was a little more or less than stg£1 million which *"...could not be described as inexpensive"*.

24. The procedure of adjudication, said Judge Toulmin, can often, and in that case had, encouraged the parties to engage in tactical manoeuvring. Rather sanguinely, at paragraph 11, he observed that:-

> *"There can be no doubt that a wrong or unenforceable decision of an adjudicator can lead to great unfairness to one side or the other. That is inherent in the legislation."*

25. At paragraph 24 Judge Toulmin noted that:-

> *"The Act confers a general right to refer a dispute or difference to adjudication provided it can be adjudicated in accordance with a procedure complying with section 108(2). This general right exists irrespective of the apparent complexity of the dispute but it does not require an adjudicator to reach a decision if he is unable to do so within the time limits imposed by section 108(2) of the Act."*

26. The judgment sets out in some detail the background to the dispute, the progress of the adjudication and the contentions of the parties on the enforcement application but the judge's assessment of the decision was largely based upon his unreserved acceptance of the adjudicator's statement that he would not have made a decision if he had not felt able to make a decision which was fair to the parties.[16]

27. At paragraph 173, Judge Toulmin said:-

> *"In my view, the test which the adjudicator set himself, namely that he could only reach a decision if (a) he had sufficiently appreciated the nature of any issue referred to him before giving a decision on that issue, including the submissions of each party and (b) if he was satisfied that he could do broad justice between the parties, was impeccable."*

[16] Para. 193

28. I would not quibble for a moment with the test but as I read the judgment the judge appears to have accepted, without himself testing it, the adjudicator's own view that he had met that test.

29. ***CIB Properties Ltd v. Birse Construction Ltd*** illustrates a feature of (or flaw or kink in?) the United Kingdom process which is mirrored in Ireland. The claimant has a period of 5 days from a *"payment claim date"* within which to deliver a payment claim notice. This appears to be a strict time. The respondent then has whatever is left of 21 days from the payment claim date within which to deliver a response. In practical terms the claimant can dictate what time the respondent has to respond between 21 and 16 days.

30. The delivery of the response crystallises the dispute and stops the clock. Thereafter theoretically either party but more often it will be the claimant can restart the clock *"at any time"* by referring the dispute to adjudication. In the meantime the claimant will have been able to prepare his claim, his response to the substance of the defence and to any counterclaim (which will be evident from the response) and assemble his proofs. The claimant will have had as long as he wants to prepare but the claim must be met by the respondent within so much of the 28 day period as will allow the adjudicator to make his decision. There is a great deal of scope for jockeying for position.

31. If the adjudicator may decide that he has insufficient time to make a decision, there will inevitably be a temptation to have something to show for a month of intensive work. If the adjudicator is tending to the view that time is too short, any extension of time will initially be in the gift of the claimant who will presumably sniff the wind before agreeing to it. While it is true that a respondent to a payment claim notice can tool up against the risk of a referral, this would surely distract from the building project and is hardly calculated to save cost.

32. If there has been such tactical manoeuvring it may have a significant effect on the decision. As far as enforcement is concerned, the issue will whether, and if so the extent to which, a court may be persuaded to examine whether, and if so the extent to

which there has been such an effect. It is submitted that the blind acceptance of the assessment of the adjudicator, however eminent[17], is not satisfactory.

33. In ***Bouyges (UK) Limited v. Dahl-Jensen (UK) Limited***[18], the adjudicator, before the release of retention was due, wrongly calculated the balance due to a mechanical and electrical sub-contractor by subtracting the total of the sums paid from the gross contract sum, with the result that he calculated a sum due to the sub-contractor of £200,000, whereas €140,000 would have been due to the main contractor had retention been deducted from the gross contract sum. Dyson J. in the Construction and Technology Court and the Court of Appeal held that the adjudicator had made an error within his jurisdiction and that his decision was not unenforceable on that ground.

34. Dyson J. recalled and applied two expert valuation cases.

35. The first was ***Jones v. Sherwood Computer Services plc***[19] where it was claimed that a firm of accountants appointed as experts to decide a dispute under an agreement to purchase shares had failed to take account of transactions which ought to have been taken into account. Dyson J. adopted what had been said by Dillon L.J. ***Jones***:-

> *"On principle, the first step must be to see what the parties have agreed to remit to the expert, this being, as Lord Denning M.R. said in Campbell v. Edwards [1976] 1 WLR 403, 407G, a matter of contract. The next step must be to see what the nature of the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from his instructions in a material respect – e.g. if he valued the wrong number of shares, or valued shares in the wrong company, or if as in Jones (M) v. Jones (R.R.) [1971] 1 WLR 840, the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that – either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do. The present*

[17] The adjudicator in CIB Properties was noted to have been a CBE, QC. If CBE is a construction industry qualification it is not one I have previously come across.
[18] [2000] B.L.R. 522
[19] [1992] 1 WLR 277

case is quite different, however, as Coopers have done precisely what they were asked to do."

36. The second case was ***Nikko Hotels (UK) Ltd v. MEPC plc***[20] where an independent expert determining a rent review for a hotel construed the expression *"average room rate"* as being the average of the published prices at which rooms were said to be available rather than the rates achieved. The tenants claimed that the decision was a nullity, since it was based on a misinterpretation of the rent review clause. The summons was dismissed on the grounds that the expert's decision was conclusive and not open to review on the grounds that it was erroneous in law unless it could be shown that the expert had not performed the task assigned to him:-

"If he 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."

37. Dyson J. at paragraph 35 of ***Bouygues UK Ltd*** recalled his decision in ***Macob***. He said that:-

"It is inherent in the scheme that injustices will occur, because from time to time, adjudicators will make mistakes. Sometimes those mistakes will be glaringly obvious and disastrous in their consequences for the losing party. The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation, and possibly even by a subsequent adjudication. Sometimes they will not be able to do so, where, for example, there is an intervening insolvency, either of the victim or the fortunate beneficiary of the mistake.

Where the adjudicator has gone outside his terms of reference, the court will not enforce his purported decision. This is not because it is unjust to enforce such a decision. It is because such a decision is of no effect in law. In deciding whether a decision has been made outside an adjudicator's terms of reference, the court should give a fair, natural and

[20] [1991] 2 EGLR 103

sensible interpretation to the decision in the light of the disputes that are the subject of the reference. There will be some cases where it is clear that the adjudicator has decided an issue that was not referred to him or her. But in deciding whether the adjudicator had decided the wrong question rather than given the wrong answer to the right question, the court should bear in mind that the speedy nature of the adjudication process means that mistakes will inevitably occur, and, in my view, it should guard against characterising a mistaken answer to an issue that lies within the scope of the reference as an excess of jurisdiction."

38. The decision of Dyson J. was upheld by the Court of Appeal but execution was stayed because the Defendant was entitled to a set off in the liquidation of the claimant.[21]

39. To return briefly to ***CIB Properties Ltd*** and the reliability of the adjudicator's own assessment of his decision, it is interesting to note that in ***Bouygues UK Ltd*** the adjudicator did not acknowledge but Dyson J. found that he had *"plainly made a mistake"*.[22]

40. ***Westfields Construction Ltd v. Lewis***[23] is another example of a fairly uncritical approach to the enforcement of an adjudication decision.

41. The claim was for stg£17,393.91 (seventeen thousand pounds odd) on a valuation number 6 of a contract for the refurbishment of a Knightsbridge flat which cost stg£7.6 million. The issue was whether the contract came within the residential occupier exception. The report does not disclose whether the work had been suspended or abandoned for non-payment or continued by the contractor in the confident expectation that he would eventually be paid, with interest.

42. In ***Westfields Construction Ltd*** the Defendant employer was found by Coulson J. after a *"hearing [that] took so long that judgment had to be reserved"* to have established no defence. In a case which turned on a contested issue of fact as to whether the

[21] The claimant's ability to repay money awarded by an adjudicator after a judgment or award clawing back the money is a matter which may be considered by the Court in deciding whether to grant a stay of execution. See Hudson at para 11-150.
[22] Para. 27
[23] [2013] 1 WLR 3377

Defendant was a *"residential occupier"*, the judge expressed surprise that the parties had been permitted to call oral evidence. The issue as to whether the Defendant was or was not a residential occupier went to the jurisdiction of the adjudicator but Coulson J. observed that *"such a lengthy enforcement process might not be thought to be in keeping with the principle of fast and uncomplicated justice central to construction adjudication"*. But whether the claim was properly the subject of construction adjudication was the central issue and Coulson J. offered no suggestion as to how, otherwise than by *viva voce* examination, cross-examination and his assessment of the witnesses on which he based his decision, he might otherwise have decided the case.

43. Hard cases make bad law. Coulson J. may, with some justification, have been miffed that the precious time of the Queen's Bench Division was being wasted on a Civil Bill claim - perhaps one which the defendant could easily pay and the claimant could easily repay after arbitration - but his approach was not qualified by any such considerations.

44. ***Pegram Shopfitters Ltd v. Tally Weijl (UK) Limited***[24] was a case in which the courts in England decided (eventually) that a decision ought not to be enforced. The ground is interesting but the decision also shows, perhaps, a more measured approach. It should be borne in mind in looking at this decision that, by contrast with the 2013 Act, adjudication is available in England only where the construction contract is in writing or evidenced by writing.

45. The employer in ***Pegram*** was peppering to get started and work had commenced before contract documents had been prepared but on the basis that a contract would be entered into as the work progressed. In that case there was a *"battle of forms"* with various proposals and counterproposals and when the dispute arose, the employer contended that there was no contract and that adjudication was not possible. The report shows that there was more to the dispute than the availability of the procedure for the contract which the contractor contended for would have allowed a rate for the work which, said the employer, was more than a fair rate. The employer participated in the adjudication process without prejudice to its objection to jurisdiction.

[24] [2004] 1 WLR 2082

46. Maye L.J., at para. 8 cited with approval the statement of Dyson J. in ***Macob Civil Engineering Ltd v. Morrison Construction Ltd.*** of the policy of the legislation.

47. Maye L.J., at para. 9, said that he understood anecdotally that the Court of Appeal might be regarded as less than entirely supportive of the policy of the Act. He explained that an examination of the cases in which it had upheld challenges to the enforceability of decisions of adjudicators showed that this had occurred when legal principle had to prevail over the broad brush policy. I confess difficulty with the notion that legal principle can ever be suborned to broad brush policy, even for small claims.

48. At paragraph 12, Maye L.J. recalled that:-

> *"Simon Brown L.J. said in Thomas-Frederic's (Construction) Ltd v. Wilson [2004] BLR 23, 28, paras 19-20 that it did not follow that, because the policy of the Act was 'pay now, argue later', even in the short-term the adjudicator's decision binds the parties if a respectable case has been made out for disputing the adjudicator's jurisdiction."*

49. In ***Pegram Shopfitters Ltd*** the adjudicator and the Technology and Construction Court appear to have failed to appreciate the difference between a contract and an entitlement to be paid on a quantum meruit basis and so to have failed to understand the defendant's case. The mere fact that a contractor has started to build does not necessarily mean that there is a contract. Counsel for the builder had submitted that the trial judge had been entitled to conclude that there was a written construction contract and that the identification of its precise terms was a matter of detail which did not impugn the existence of the contract, whatever its terms might have been. Maye L.J. recalled that in argument he had *"rather rudely characterised this submission ... as palm tree contractual analysis. He apologised for the rudeness but adhered to the sentiment."*

50. Maye L.J. concluded, at paragraph 33:-

"I entirely accept that the court should be vigilant to examine arguments of this kind critically. If they are insubstantial and advanced for tactical reasons, the court will not be deterred from giving summary judgment where this is appropriate. But, as I said earlier in this judgment, there may be cases when legal principle has to prevail over broad brush policy. I consider this to be such a case."

51. Hale L.J. referred to another passage from the judgment of Simon Brown L.J. in ***Thomas-Frederic's Construction) Limited v. Wilso****n* where it was said:-

"It is only if the defendant had advanced a properly arguable jurisdictional objection with a realistic prospect of succeeding upon it that he could hope to resist the summary enforcement of an adjudicator's award against him."

Enforcement of decisions under the Construction Contracts Act, 2013

52. ***Hudson***[25], giving the background to the Enforcement of Adjudication Decisions and Associated Litigation in the UK Jurisdictions observes that the nature of enforcement of adjudicator's decisions there is contractual. The cause of action in those jurisdictions is not a failure to pay a sum due under the contract but a failure to pay, as the Defendant has agreed to pay, what the adjudicator has said is to be paid.

53. It is here that the Irish legislation diverges from the United Kingdom. I suggest that the divergence may be of considerable significance when it comes to enforcing decisions.

54. Section 3 of the Construction Contracts Act, 2013, puts in place the basic structure in which the adjudication process is to operate. It does this by requiring that the construction contract should provide for payment claim dates, and otherwise applies the Schedule to the contract. The construction contract is obviously a private law matter and that status in unaffected by the regulation of its terms.

[25] (12th edition) (2010) para. 11-038

55. Section 4 defines a payment claims notice and makes provision for what is to happen in the event of delivery of such a notice. By contract with section 3 (and with section 108 of the U.K. Housing Grants, Construction and Regeneration Act, 1996) section 4 does not modify the contract but is directed to the claim. That section 4 does not create contractual rights or obligations is underlined by section 4(5) which provides that the rights and obligations in the section are additional to those conferred or imposed by the construction contract.

56. Section 6 creates the right to refer a payment dispute to adjudication. The parties have a window within which to agree on an adjudicator but otherwise he is appointed by the chair of the panel appointed by the Minister for Public Expenditure and Reform. The adjudicator must comply with the Code or Practice published by the Minister and, by section 6(10), the decision of the adjudicator is binding. Contrast this with section 108(3) of the U.K. Act which provides that *"The contract shall provide that the decision of the adjudicator is binding …"*.

57. What I suggest is that the scheme of statutory adjudication in Ireland is truly a scheme of statutory adjudication which looks very much more like a public law scheme than a private law agreement. This, I suggest, may direct the approach of the courts to enforcement applications. The philosophy underlying the enforceability of arbitrators' awards is that the parties have agreed to be bound by the decision of the person who they have agreed is to determine any disputes. If that philosophy applies to the U.K. scheme (albeit that the agreement may not be free but is required by legislation) it does not apply to the 2013 Act. If the scheme is a public law scheme, the issue arises as to whether, or the extent to which, it and decisions made under it are to be subject to judicial review, in the sense of review by judges.

58. There are three other significant differences between section 6 of the 2013 Act and the U.K. Act.

59. The first is the addition in section 6(10) to the proposition that *"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 a payment dispute to*

arbitration…."[26] of the words "… *or in proceedings initiated in a court in relation to the adjudicator's decision."* In as much as this caveat is directed to the binding nature of the adjudication, it seems to contemplate or even invite proceedings in a court to challenge it. What those proceedings might be is unclear. Certainly there is no express statutory appeal but if, even under the Code of Practice, the decision must be reasoned, it must be susceptible to some review. The Code of Practice is contemplated by section 9 as something that *"may"* be prepared and published by the Minister but by section 6(8) adjudicators must comply with *"the code of practice"*. The must in section 6(8), I suggest, makes the may in section 9 a must and opens all decisions to review on the grounds of non-compliance with the Code.

60. Section 6(14) gives the adjudicator statutory immunity[27]. The requirement to comply with the Code would have no teeth unless in the context of a review of the decision.

61. The second difference is in section 6(11). This expressly provides that the decision of an adjudicator shall be enforceable by action or by leave of the High Court but is subject to the caveat *"... if binding…"*. What exactly this means remains to be seen but I would suggest that it does not convey an unswerving legislative policy of *"pay now, argue later"* irrespective of the risk of injustice. On one view at least, the differences between the Irish and the U.K. legislation might point to an appreciation by the Oireachtas of a risk of injustice and of the need to guard against it.

62. The third difference that struck me was section 6(12) which has no equivalent in the U.K. Act. This says that a decision, if binding, shall be binding for all purposes. I am uncertain what this adds to the notion that the decision should be binding. I should have thought that a decision, if binding, would necessarily be binding for all (and not some, only) purposes and would be available by way of defence, set-off, or otherwise in any legal proceedings. If this does add anything, it is also subject to the caveat *"... if binding…"*.

[26] Which more or less reflects section 108(3) of the 1996 Act, save that it optimistically contemplates the prospect of a settlement as more likely than the prospect of a fight.
[27] Again this is conferred directly by the Act of 2013 rather than indirectly, by modification of the construction contract by section 108(4) of the 1996 Act,

Summary and conclusions

63. In England adjudicators' decisions will be enforced unless the defendant can establish either (a) that the adjudicator acted without jurisdiction or (b) that he has so far departed from his terms of reference that he answered the wrong question.

64. In England adjudicators' decisions will be summarily enforced unless the defendant can make out a *"properly arguable"* or *"respectable"* case to challenge it.

65. The English cases recognise that the complexity of disputes may be such that they are not susceptible to adjudication but leave it exclusively to the adjudicator to decide whether they are or not.

66. The English courts will, apparently, enforce decisions arrived at by mistakes which are *"glaringly obvious"* and may have *"disastrous consequences"*.

67. In some cases the disastrous consequences of enforcing a bad decision may be avoided or mitigated by a stay of execution.

68. Consistently, the English courts have taken the view that, to be effective, adjudication decisions must be capable of speedy and more or less unquestioned enforcement. I am unconvinced. To be sure we have all seen unmeritorious complaints and counterclaims marshalled to avoid paying sums rightfully due and we have all been involved in protracted, bitter and ruinously expensive disputes but if the risk of rough justice or injustice from a *"quick and dirty"*[28] process is a price worth paying to drive contracts on, that underlying objective will be unattainable when the relationship has broken down.

69. In terms of its operation, the scheme of statutory adjudication in Ireland is very similar to that in the United Kingdom but the legal basis upon which the Irish scheme is established is different. There are, I suggest, solid arguments to be made by reference to the terms of the legislation that Irish decisions may be open to review as to procedural fairness by reference to the Code of Practice and as to substance by reference to the written reasons given.

[28] Concrete Structures (NZ) Limited v. Palmer HC of NZ [2006] NZHC. 342

70. While under the 2013 Act statutory adjudication applies to all construction contracts, whether or not in writing, it only applies if there is a contract. Unless there is writing, disputes may arise as to the existence of a contract which will go to the entitlement of the builder to interim payments and to the availability of adjudication. In cases where there is no writing, the respondent to a payment claim notice will need to carefully consider his response.

71. At least until it has been established whether the adjudicator's own assessment of his ability to understand and fairly decide a complex dispute in a very tight timeframe is amenable to review, a respondent to a complex claim will need to carefully consider whether he should agree to an extension or extensions of time.

Section 6 of the **Construction Contracts Act, 2013,** provides:-

*"**6**.-(1) A party to a construction contract has the right to refer for adjudication in accordance with this section any dispute relating to payment arising under the construction contract (in this Act referred to as a 'payment dispute').*

(2) The party may exercise the right by serving on the other person who is party to the construction contract at any time notice of intention to refer the payment dispute for adjudication.

(3) The parties may, within 5 days beginning with the day on which notice under subsection (2) is served, agree to appoint an adjudicator of their own choice or from the panel appointed by the Minister under section 8.

(4) Failing agreement between the parties under subsection (3), the adjudicator shall be appointed by the chair of the panel selected by the Minister under section 8.

(5) The party by whom the notice under subsection (2) was served –

(a) shall refer the payment dispute to the adjudicator within 7 days beginning with the day on which the appointment is made, and

(b) shall at the same time provide a copy of the referral and all accompanying documents to the person who is party to the construction contract.

(6) The adjudicator shall reach a decision within 28 days beginning with the day on which the referral is made or such longer period as is agreed by the parties after the payment dispute has been referred.

(7) The adjudicator may extend the period of 28 days by up to 14 days, with the consent of the party by whom the payment dispute was referred.

(8) The adjudicator shall act impartially in the conduct of the adjudication and shall comply with the code of practice published by the Minister under section 9, whether or not the adjudicator is a person who is a member of the panel selected by the Minister under section 8.

(9) The adjudicator may take the initiative in ascertaining the facts and the law in relation to the payment dispute and may deal at the same time with several payment disputes arising under the same construction contract or related construction contracts.

(10) 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 a payment dispute to arbitration or in proceedings initiated in a court in relation to the adjudicator's decision.

(11) 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 decision of the adjudicator, if binding, shall, unless otherwise agreed by the parties, be treated as binding on them for all purposes and may accordingly be relied on by any of them, by way of defence, set-off or otherwise, in any legal proceedings.

(13) The adjudicator may correct his or her decision so as to remove a clerical or typographical error arising by accident or omission but may not reconsider or re-open any aspect of the decision.

(14) The adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his or her functions as adjudicator unless the act or omission is in bad faith, and any employee or agent of the adjudicator is similarly protected from liability.

(15) Each party shall bear his or her own legal and other costs incurred in connection with the adjudication.

(16) The parties shall pay the amount of the fees, costs and expenses of the adjudicator in accordance with the decision of the adjudicator.

(17) An adjudicator may resign at any time on giving notice in writing to the parties to the dispute and the parties shall be jointly and severally liable for the payment of the reasonable fees, costs and expenses incurred by the adjudicator up to the date of resignation.

(18) The parties to a dispute may at any time agree to revoke the appointment of the adjudicator and the parties shall be jointly and severally liable for the payment of the reasonable fees, costs and expenses incurred by the adjudicator up to the date of the revocation."

Section 108 of the United Kingdom **Housing Grants, Construction and Regeneration Act, 1996,** provides as follows:-

"108.-(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. For this purpose 'dispute' includes any difference.

(2) The contract shall –

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

(c) require the adjudicator to reach a decision within 28 days of the referral or such longer period as is agreed by the parties after the dispute has been referred;

(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;

(e) impose a duty on the adjudicator to act impartially; and

(f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

(3) The contract shall provide that the determination of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

(4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.

(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.

(6) For England and Wales, the Scheme may apply the provisions of the Arbitration Act 1996 with such adaptations and modifications as appear to the Minister making the scheme to be appropriate.

For Scotland, the Scheme may include provision conferring powers on courts in relation to adjudication and provision relating to the enforcement of the adjudicator's decision."