

**Statutory Adjudication and the Constitution –
Some preliminary observations**

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STATUTORY ADJUDICATION AND THE CONSTITUTION – SOME PRELIMINARY OBSERVATIONS

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Introduction

This paper considers some of the problems and issues which may arise in the operation of the adjudication process provided for in section 6 of the Construction Contracts Act 2013 (**‘the 2013 Act’**) and the draft code of practice which, pursuant to section 9 of the Act, has been prepared in the form of a schedule to a statutory instrument and circulated by the Office for Government Procurement (**‘the draft code of practice’**) in light of the requirements of natural or constitutional justice.¹ It does not address other grounds upon which adjudication decisions, or their enforcement, may be contested or resisted, such as, for example, challenges to the jurisdiction of an adjudicator.²

The paper has three sections.

Section 1 offers a summary of the requirements of natural or constitutional justice as these have been articulated by the Irish courts.

Section 2 considers how these general requirements should and might be construed and applied in the specific context of construction adjudication and with respect to particular issues (e.g. the right to an oral hearing, the admissibility of hearsay evidence etc.)

In light of that analysis, section 3 considers some additional points of practical guidance for good practice.

1. The requirements of natural or constitutional justice

For present purposes the relevant principles of Irish constitutional law can be summarised as follows:

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¹ This topic has already been the subject of a lecture given by Mr Justice Frank Clarke to Engineers Ireland on 29th January 2014 entitled ‘Adjudication – The Role of the Courts’. See <<https://www.engineersireland.ie/EngineersIreland/media/SiteMedia/services/dispute-resolution/The-Role-of-the-Courts-by-Justice-Frank-Clarke-29-01-14.pdf>> (last accessed 26th June 2014).

² For a concise discussion of jurisdictional issues, albeit with reference to the UK statutory scheme, see ‘Guidance Note: Jurisdiction of the UK Construction Adjudicator’ (2nd edn, December 2012) prepared by the Adjudication Society and Chartered Institute of Arbitrators <[http://www.adjudication.org/sites/default/files/Guidance Note Jurisdiction of the Adjudicator 2.pdf](http://www.adjudication.org/sites/default/files/Guidance%20Note%20Jurisdiction%20of%20the%20Adjudicator%202.pdf)> (last accessed 26th June 2014).

First, the two fundamental maxims of natural justice known at common law, namely *audi alteram partem*³ and *nemo iudex in causa sua*,⁴ have been ‘subsumed’⁵ in Irish law into what the Supreme Court has termed ‘constitutional justice’.⁶

Second, following the Supreme Court’s decision in *East Donegal Co-Operative v Attorney General*,⁷ it must be presumed ‘that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice’.⁸

Third, the principles of constitutional justice can also be described, from the point of view of any individual affected or potentially affected by such proceedings, procedures, discretions and adjudications, in terms of that person’s constitutional

³ Lit: hear the other side.

⁴ Lit: no one a judge in his own case.

⁵ *Goodman International v Mr. Justice Hamilton* [1992] 2 IR 542 at 609 (McCarthy J).

⁶ See *McDonald v Bord na gCon* [1965] IR 217 at 242 (Walsh J); *The State (Furey) v Minister for Defence* [1988] ILRM 89 at 99 (McCarthy J); *Dellway Investments Ltd v NAMA* [2011] 4 IR 1 at 225 and 234 (Denham J). For an early Supreme Court decision dealing with the requirements of ‘natural justice’ at common law see *Green v Blake and Others* [1948] IR 242 at 269 (Black J).

⁷ [1970] IR 317.

⁸ *East Donegal Co-Operative v Attorney General* [1970] IR 317 at 341 (Walsh J). The full passage state:

‘...the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts.’

See also *Glover v BLN Ltd* [1973] IR 388 at 425 (Walsh J) (quoted with approval in *Dellway Investments Ltd v NAMA* [2011] 4 IR 1 at 203 (Murray CJ):

‘It is sufficient to say that public policy and the dictates of constitutional justice require that statutes, regulations or agreements setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures.’ (emphasis added).

See also in *re Haughey* [1971] IR 217 at 264 (O’Dálaigh CJ):

‘...in proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution, the State, either by its enactments or through the Courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights.’

It is not wholly clear on the face of the six judgments in *Dellway Investments Ltd v NAMA* [2011] 4 IR 1 dealing with the constitutional right to fair procedures whether such a right may only be invoked by a party whose constitutional rights are liable to be directly affected by the decision in question. Compare, for example, the dicta of Hardiman J at 285-6 and 288-9 with those of Fennelly J at 326-9. For a detailed discussion of the differences between the judgments in this regard see Kenny, ‘Fair Procedures In Irish Administrative Law: Toward A Constitutional Duty To Act Fairly In *Dellway Investments v Nama*’ *Dublin University Law Journal* 34 (2011) 47 at 59-71. The issue is academic for the current discussion in that entitlements arising under a contract are undoubtedly a form of property for the purposes of at least engaging a person’s constitutional property rights. See *Dellway Investments Ltd v NAMA* [2011] 4 IR 1 at 287-8 (Hardiman J) and cases cited therein.

right to fair procedures under Article 40.3⁹ or, correlatively, from the point of view of the decision-making authority, in terms of that authority's 'constitutional duty'.¹⁰

Fourth, the principle of *nemo iudex in causa sua* can be understood as a specification or natural corollary of a more general principle of (or right to) adjudicative impartiality. A further corollary of this principle of impartiality is the so-called 'rule against bias', which may be formulated summarily as follows: no person shall be a judge in a case where she is affected by bias or where, if she were to act 'a reasonable person in the circumstances would have a reasonable apprehension that the applicants would have not have a fair hearing from an impartial judge on the issues.'¹¹

Fifth, the principle of *audi alteram partem* can be understood as comprising, at a minimum, two distinct categories of rights designed to protect, respectively, (1) the opportunity to know the case being made against one (or the proposed decision that is liable to affect one's rights, interests or privileges¹²) and (2) the opportunity to be heard and to make one's own case in response.¹³ In essence, the

⁹ *In re Haughey* [1971] IR 217 at 264 (Ó Dálaigh CJ); *Kiely v Minister for Social Welfare* [1977] IR 267 at 281 (Henchy J); *The State (Irish Pharmaceutical Union) v. Employment Appeals Tribunal* [1987] ILRM 36 at 40 (McCarthy J); *Dellway Investments Ltd v NAMA* [2011] 4 IR 1 at 227 (Denham J), 283-5 (Hardiman J) and 322 (Fennelly J). See also:

Maguire v Ardagh [2002] 1 IR 385 at 566 (Denham J):

'Taken with other fundamental rights protected under the Constitution, it illustrates the human rights foundation in this basic law. The rights protected include not only good name but also rights of due process and fair procedures.'

Re Eurofood IFSC Ltd [2004] 4 IR 370 at 419 (Fennelly J):

'The principle of fair procedures in all judicial and administrative proceedings is, in Irish law, a principle of public policy of cardinal importance. It derives both from the rules of natural justice of the common law and from constitutional guarantees of personal and individual rights.'

¹⁰ See *McCormack v Garda Síochána Complaints Board* [1997] 2 IR 489 (Costello P) at 500 (quoted with approval in *Dellway Investments Ltd v NAMA* [2011] 4 IR 1 at 203 (Murray CJ), 282 (Hardiman J) and 322 (Fennelly J):

'Constitutional justice imposes a constitutional duty on a decision-making authority to apply fair procedures in the exercise of its statutory powers and functions.'

¹¹ *Bula Ltd v Tara Mines Ltd (No. 6)* [2000] 4 IR 412 (SC) at 441 (Denham J, as she then was), applied by Supreme Court in *Kenny v TCD* [2008] 1 ILRM 241 at 245, *O'Callaghan v Mahon* [2008] 2 IR 514 at 666 and *O'Ceallaigh v An Bord Altranais* [2011] IESC 50 at para 35 (Fennelly J). This test is reflected in the wording of paragraph 4 of the draft code of practice to be made under section 9 of the 2013 Act – see 3.2 below. For detailed discussion, distinguishing different categories of bias and related tests, see generally Delaney, *Judicial Review of Administrative Action* (3rd edn, Round Hall, Dublin 2013) 249ff and Hogan & Gwynn Morgan, *Administrative Law in Ireland* (4th edn, Round Hall, Dublin 2010) Chapter 13.

¹² See generally: *Glover v BLN Ltd* [1973] IR 388 at 425 (Walsh J); *The State (Philpot) v Registrar of Titles* [1986] ILRM 499 at 507 (Gannon J); *Garvey v Ireland* [1981] IR 75 at 97 (O'Higgins CJ); *Dellway Investments Ltd v NAMA* [2011] 4 IR 1 at 288 (Hardiman J), 328 (Fennelly J) and 341 (Macken J).

¹³ On this twofold distinction between rights to be notified and rights to respond see Hogan & Gwynn Morgan, *Administrative Law in Ireland* (4th ed, Round Hall, Dublin 2010) at [14.01] and, e.g., *Glover v BLN Ltd* [1973] IR 388 at 425 (Walsh J); *Gunn v Bord an Choláiste Náisiúnta Ealaíne is Deartha* [1990] 2 IR 168 (SC) at 179 (Walsh J); *Mooney v An Post* [1998] 4 IR 288 (SC) at 298 (Barrington J); *Haughey v Moriarty* [1999] 3 IR 1 at 75 (Hamilton CJ); and *J&E Davy t/a Davy v. Financial Services Ombudsman* [2010] 3 IR 324 at 360 (Finnegan P).

first category concerns the rights to timely and adequate notice.¹⁴ The practical implications of the second category, the right to be heard, may include any or all of the following:¹⁵

- right to adequate time to make or respond to representations;¹⁶
- right to legal advice or representation;¹⁷
- right to an oral hearing - encompassing the right to cross-examine, personally or by counsel, one's accuser or accusers (understood in the broad sense); the right to give rebutting evidence; and the right to address, personally or by counsel, the decision-making body;¹⁸
- right to be informed of the reasons for the decision.¹⁹

Seventh, what, in any given case, is actually required by natural or constitutional justice or constitutes fair procedures depends to a considerable extent on all of the circumstances of the case.²⁰ In short, while the duty to abide by fair procedures is virtually absolute,²¹ the content of that duty is variable and typically context-dependent. This is stated in emphatic terms in the following passage from *De Smith's Judicial Review*²² which was cited with approval in *Dellway Investments Ltd*:²³

The content of procedural fairness is infinitely flexible. It is not possible to lay down rigid rules and everything depends on the subject-matter. The requirements necessary to achieve fairness range from mere consultation at the lower end, upwards through an entitlement to make written representations, to make oral representations, to a fully fledged hearing

¹⁴ *Dellway Investments Ltd v NAMA* [2011] 4 IR 1 at 296 (Hardiman J): 'It is trite law to say that a right to a hearing carries with it a right to notification of the proposed decision and to sufficient detailed information, including criteria, as may be necessary to allow the person to be affected to make the best case he can against the decision which he fears.'

¹⁵ See, e.g., *Flanagan v UCD* [1988] IR 724 at 731 (Barron J); and *The State (Healy) v Donoghue* [1976] IR 325 at 335 (Gannon J), cited with approval by Supreme Court on appeal at 349 (O'Higgins CJ).

¹⁶ *Curran v Attorney General* (unreported 27th February 1941, High Court, Gavan Duffy J); *O'Callaghan v Clifford* [1993] 3 IR 603; and *The State (Healy) v Donoghue* [1976] IR 325 at 349 (O'Higgins CJ).

¹⁷ *Burns v Governor of Castlereagh Prison* [2009] 3 IR 682 (SC).

¹⁸ See *In Re Haughey* [1971] IR 217 at 263 (Ó Dálaigh CJ) and *Khan v HSE* [2008] IEHC 234 at 16 (McMahon J). See also 2.4.3 and 2.4.5 below.

¹⁹ *McCormack v Garda Síochána Complaints Board* [1997] 2 IR 489 (Costello P) at 500; *Mulholland v An Bord Pleanála (No. 2)* [2005] [2006] 1 IR 453, at 460-1 (Kelly J); *Rawson v The Minister for Defence* [2012] IESC 26 at para 6.8-6.10 (Clarke J); *Mallak v Minister for Justice, Equality and Law Reform* [2012] 3 IR 297 at 322 (Fennelly J). See also 2.4.6 below.

²⁰ See, e.g., *Flanagan v UCD* [1988] IR 724 at 730 (Barron J); *Doupe v Limerick County Council* [1981] IRLM 456 at 563 (Costello J) – both cited with approval in *Dellway Investments Ltd v NAMA* [2011] 4 IR 1 at 227 (Denham J). See also: *Irish Family Planning Association Ltd v Ryan* [1979] IR 295 at 313 (O'Higgins J) and *Keady v Commissioner of An Garda Síochána* [1992] 2 IR 197 at 213 (O'Flaherty J).

²¹ *Dellway Investments Ltd v NAMA* [2011] 4 IR 1 at 208 (Murray CJ), 227-30 (Denham J), 289-97 (Hardiman J).

²² 6th edn, 2007 at p 377.

²³ [2011] 4 IR 1 at 333 (Fennelly J).

with most of the characteristics of a judicial trial at the other extreme. What is required in any particular case is incapable of definition in abstract terms.

In light of the fluidity in form of the right to fair procedures, the question naturally arises as to what type of procedures are required if construction adjudication is to be conducted in a constitutionally compliant manner. Given that the 2013 Act says very little about the adjudication process itself, where along the spectrum identified above by *De Smith's Judicial Review* should it be located? There are two aspects of construction adjudication in particular which may in practice give rise to tensions with the constitutional right to fair procedures, namely its inquisitorial nature and its tight timeframe.

The remainder of this paper addresses these and related issues. In section 2, I discuss the principles relevant for concretising the requirements of fair procedures generally and, more particularly, as they relate to construction adjudication. In section 3, I add some additional points of good practice.

2. Determining the concrete requirements of fair procedures

One can distinguish several distinct but complementary lines of analysis by which the abstract right to fair procedures can be rendered more concrete²⁴ and applied to the circumstances of construction adjudication. Running from the more general to the more applied, these are:

- First-principles / jurisprudential reflection on the nature or purpose of adjudicative decision-making (2.1).
- Irish precedents on the types of considerations to be taken into account when determining what natural justice requires in a given situation (2.2).
- The nature or purpose of construction adjudication as provided for by the 2013 Act (2.3).
- Irish precedents discussing different aspects of fair procedures as they apply to decision-making bodies or processes analogous to construction adjudication (2.4).
- UK precedents dealing with challenges to construction adjudication decisions based on alleged breaches of natural justice (3).

I consider the first four points in the remainder of this section. In section 3 of the paper I draw on UK precedents in discussing some further points of practical guidance for good practice with respect to fair procedures.

2.1 First-principles reflection on the purpose of adjudication

²⁴ I apologise for what is a bad though unintended pun. A more accurate alternative for 'concrete' (and cognate expressions relied on throughout this paper) is the Thomistic concept of *determinatio* but I have decided to err on the side of the vernacular.

The purpose of this sub-section is to provide some conceptual flesh to the familiar but often bare-boned common-places about fair procedures. This might seem an idle task but well-formulated ‘first principles’ can often provide valuable guidance when dealing with areas of law that are highly fact or context dependent. Such dependence means that clear-cut rules of general application will rarely be available and case law will often be of limited precedential value. In practice, this means construction adjudicators will be required to make judgment calls about how to proceed fairly in any given scenario based more on a prudential application of general principles of fairness than on conformity with a checklist of invariable dos and don’ts. (Nevertheless, the time-pressed reader may prefer to skip to the concluding paragraphs of this sub-section).

It is a sound practical principle²⁵ of wide application (from ethics to engineering) that form should follow function. In other words, how one acts should be guided by what one is (or should be) intending to do. Our ends literally *in-form* our means. Accordingly, one way to determine the concrete form which the general requirements of natural or constitutional justice should take for a particular class of decision-maker is to reflect upon the ends which that decision-maker should be orientated towards. Or, as one of the great legal theorists of the 20th century, Lon Fuller, neatly put it: ‘*You cannot describe what a judge is doing without taking into account what he is trying to do.*’²⁶

In the case of construction adjudication, what an adjudicator is ‘*trying to do*’ can be considered at both a general and a more specified level. Staying at the general level,²⁷ the adjudicator’s ends are those of any person appointed to determine effectively and authoritatively a dispute constituted by conflicting claims of entitlement as between two or more parties. Thus, one core end or function of such a process is to do justice between the parties by applying in a truly reasonable way to the facts of the case all of the normative standards which are relevant and appropriate given the nature of the entitlement at issue.²⁸ In other words (and where the entitlement claimed is one governed, say, by law and contract) the goal is to apply the law and contract correctly, wisely and fairly.²⁹

²⁵ I use ‘*practical*’ here in its philosophical or Aristotelian sense, i.e. related to deliberate or intentional human doing or making.

²⁶ Lon L. Fuller, ‘Reason and Fiat’ (1946) 59 Harvard Law Review 376, 392. For a recent example of a theory of law which exemplifies this type of functionalist or purposive methodology by two distinguished Irish philosophers of law see Garret Barden and Timothy Murphy, *Law and Justice in Community* (Oxford University Press, Oxford 2010).

²⁷ The more specific level is discussed below at section 2.3.

²⁸ Or as Barden and Murphy conclude: ‘*In societies in which it is thought that what is just is to be intelligently, reasonably, and responsibly discovered, the ideal is that an impartial, intelligent, reasonable, and responsible person is chosen to arbitrate.*’ *Law and Justice in Community* (Oxford University Press, Oxford 2010) p 132. From the perspective of the jurist, the term ‘*societies*’ in this passage can be replaced with ‘*constitutional orders*’ and there can be no doubt that Bunreacht na hÉireann founds an order of the type described by Barden and Murphy.

²⁹ These requirements are distinct and cumulative. There may often be several correct answers, hence the need for a wise or prudent decision as between them. There may also be various routes to such a decision, but the rights of the parties and, relatedly, the legitimacy and efficacy of the judicial process requires that it be arrived at through a process that both is and appears fair.

A second core end or function is to bring finality to the dispute by ensuring that the adjudicative decision is made in a timely, authoritative and effective manner. In this regard, both the moral authority and practical efficacy of an adjudicative process depends, in various ways, on its fairness, both as a matter of substance and perception.

The basic form which any adjudicative practice should take follows from these two functions or ends. Speaking again at the more general level, I suggest the following two principles of adjudicative 'form':

Formal principle 1: Adjudication takes into account, and must be seen to take into account, all relevant considerations and only relevant considerations.

The first formal principle speaks to the requirements of sound judgment generally, of which sound adjudicative decision-making is but one type. From this perspective the requirements of the common lawyer's 'natural justice' traditionally marked out by maxims such as *audi alteram partem* and *nemo iudex in causa sua* (including its related rules against bias) can be seen as simply tried-and-tested juristic rules of thumb that render more determinate this most fundamental principle of good decision making.³⁰ The various other rules of a legal system dealing with, for example, evidence and witnesses or with the conduct of proceedings prior to and during trial and so on are also intelligible as further instantiations of this principle, all made with a view to establishing litigation processes which are both manifestly fair and likely to facilitate well-informed and reasonable judgments. Less formal processes of adjudication do not have to replicate the letter of court rules, but they should be governed by the same spirit or underlying principle of taking into account all and only relevant considerations.

Formal principle 2: Adjudication provides an effective opportunity to the parties for argumentative participation in the adjudicative process before a decision is made.

This second formal principle relates to the particular requirements of reasonable and effective adjudicative decision-making. Fuller argued that what distinguishes adjudication from other forms of social ordering, such as contracts and elections, is that adjudication '*confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favour.*'³¹ Indeed Fuller considered that judicial duties, such as to be impartial and to hear both sides, were simply the rational consequences of this defining mode and ideal of participation (what might be called 'argumentative'

³⁰ On the history of *audi alteram partem* in English common law and classical and Christian antiquity see John M. Kelly, 'Audi Alteram Partem' (1964) 9 *Natural Law Forum* 103.

³¹ Lon L. Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353, 364. (See also T.R.S. Allan, 'Text, Context, and Constitution: The Common Law as Public Reason' in Douglas E. Edin (ed), *Common Law Theory* (CUP 2007) 202.) Since Fuller wrote, of course, Irish law has seen a significant broadening of the categories of decision-making which, to be lawful, must provide for some degree of participation from parties affected. See *Dellway Investments Ltd v NAMA* [2011] 4 IR 1 at 279-81 (Hardiman J).

participation) in order to ensure that such participation is not rendered ineffective or *pointless*.³² This recognition of the defining importance for adjudication of its facilitation of participation by the parties shows that the adjudicative function demands more than just impartiality. As Fuller put it:

*We cannot define a judge simply as one who is bound to reach his decisions impartially; such a definition would not distinguish him from many others who exercise powers of government. A judge is one who decides disputes within an institutional framework assuring to the litigant a collaborative role, which consists in the opportunity to state, prove, and argue his case. This participation of the affected party loses its point if the litigants talk past one another, so that all each says is irrelevant to the other's conception of the issues involved in their controversy.*³³

One might add to this the 'talking past' one another which also occurs where matters not raised or relied upon by the parties turn out to be material to the conclusions reached by an adjudicator and no opportunity is given to the parties to comment upon them before the decision is finalised.

It is obvious that the elaborate machinery for affording argumentative participation found in the practice and procedure of the superior court are not necessary for every form of adjudication. But, again, any adjudicative process should, of its essence, be governed by the same spirit or underlying principle of facilitating effective participation by the parties. This principle applies whether the process is at the adversarial or inquisitorial end of the procedural spectrum as traditionally conceived.

These cursory jurisprudential musing lead to an unsurprising conclusion. The essence of the general right to fair procedures which is enjoyed by any party to an adjudicative process worthy of the name compromises at least three more specific rights which can be summarised thus:

- (1) Right to reasonable notice of claims being made;
- (2) Right to reasonable opportunity to make representations to decision-maker in respect of those claims before a decision is made;
- (3) Right to an impartial or unbiased hearing and determination.³⁴

The first two rights facilitate meaningful participation by the parties and thereby increase the likelihood that all relevant considerations will be brought to the attention of the decision-maker. The third right seeks to minimise the potential for irrelevant considerations to be taken into account or to appear to be taken into account.

³² Fuller, 'The Forms and Limits of Adjudication' (1978) 92 Harvard Law Review 353, 365, 382-4.

³³ Lon L. Fuller, *Anatomy of the Law* (Pelican Books 1971) 154 (emphasis added).

³⁴ See cases cited at note 13 above.

The identification of these two formal principles of adjudication and the three rights constitutive of fair procedures is perhaps not much of an advance on the discussion in section 1 but it provides at least a solid touchstone for any assessment of what fair procedures might require in the context of any construction adjudication.³⁵ It is also a modest improvement on the laconic guidance offered by the Act³⁶ and the draft code of practice.³⁷ Nevertheless, for further guidance one should certainly supplement one's prudential application of these first-principles with a consideration of the relevant jurisprudence of the Irish courts.

2.2 Irish precedents on determining the requirements of fair procedures

The judgment of Macken J in *Dellway Investments Ltd v NAMA*³⁸ throws some useful light on what sort of considerations should generally be taken into account when trying to discern the concrete consequences of respecting an individual's right to fair procedures in any given scenario. In that case the Supreme Court held that the National Asset Management Agency was required to give borrowers an opportunity to be heard before their loans were transferred from commercial banks to the agency. The Court stressed the reputational impact such a transfer might have and it also noted that the statutory powers of the Agency were far more extensive than those enjoyed by commercial banks. Applying standard *East Donegal* principles the Court rejected a construction of the National Management Agency Act 2009 which would have wholly excluded the right to fair procedures in the circumstances. In particular, the Court was expressly concerned with only one, albeit fundamental, aspect of the right to fair procedures, namely the bare right to be heard. Nevertheless, it is submitted that the following observations of Macken J are of wider relevance:

So fundamental to administrative law is the principle audi alteram partem, that it may well be that [sic] little is said as to its applicability in recent case law, save almost in passing. It seems to me, however, that the particular value underlying a procedural fairness rule of this nature relates to the principle that the individual affected by a decision should have the opportunity to present his case fully and fairly, and have a decision affecting his rights, interests or even privileges made using a fair and impartial process. That of course will depend also on the appropriateness of the process to any statutory, institutional and/or

³⁵ A similar trio of fair procedures 'rights' was derived from the common law rules of natural justice by the Court of Appeal in *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2005] BLR 1 at 6 (Dyson J) (overturning High Court finding of apparent bias on the part of a construction adjudicator).

³⁶ Section 6(8) of the 2013 Act states:

'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.'

³⁷ Paragraph 3 of the draft code of practice provides:

'The adjudicator shall observe the principles of procedural fairness and act impartially and independently and without bias.'

³⁸ [2011] 4 IR 1.

particular context in which the decisions are made. Clearly, that context must play a particularly important role in the assessment of the fair procedure in issue, in this case the right to be heard. There are several general criteria which could be propounded, I believe, for the purposes of assessing whether, in a given case, fair procedures require that a person be heard before a decision is made, including, for example: (a) the nature of the decision; (b) the nature of the statutory scheme; (c) the importance of the decision to the person invoking the right - in this case - to be heard; and (d) the choice of procedure, if any, adopted by the decision-maker. There may be others, such as legitimate expectation, and so forth, but the above are ones which resonate in the case law in this jurisdiction...³⁹

It would seem to follow that, at the very least, considerations such as these should also be taken into account when assessing whether, in a given case, fair procedures require that some particular procedural right should be acknowledged by an adjudicator (e.g. right to an oral hearing, right to cross-examine etc.) and what that should mean in concrete terms. Such an analysis will therefore require, at a minimum, consideration of the relevant statutory provisions (2.3) in light of any case law addressing similar questions of fair procedures in respect of analogous statutory bodies or quasi-judicial tribunals (2.4.1-6). It is to these matters that I now turn.

2.3 *The nature of construction adjudication under the 2013 Act*

The 2013 Act introduces into Irish law a statutory mode of dispute resolution for the construction industry that has been operational in several other common law jurisdictions, beginning with the UK, for more than a decade.⁴⁰ It is clear from the Act itself and from those foreign precedents upon which it has clearly been consciously modelled, that this class of dispute resolution is typically characterised by the following five features:⁴¹

³⁹ *Dellway Investments Ltd v NAMA* [2011] 4 IR 1 at 341-2 (Macken J) (emphasis added). The judgment of Hardiman J also includes (at 293) a valuable list of factors which he believed relevant for deciding whether the case was one to which the principles of constitutional justice did not apply.

⁴⁰ UK: Housing Grants, Construction and Regeneration Act 1996; and Local Democracy, Economic Development and Construction Act 2009.

New Zealand: Construction Contracts Act 2002.

Singapore: Building and Construction Industry Security of Payment Act 2004.

Australia: Commentators on the different legislative schemes of the various Australian states distinguish between 'East Coast' and 'West Coast' models, with the latter most closely resembling the UK regime. See generally *Hudson's Building and Engineering Contracts* (12th edn, Thomson Reuters, London 2010) at [11.014-017] and [11.053-066]; and Robert Fenwick Elliott and Jeremy Coggins, 'Adjudication Down Under: A survey of the Adjudication Legislation in Australia' (2007) 23(5) *Construction Law Journal* 364.

⁴¹ For discussions concisely comparing and contrasting construction adjudication with other modes of dispute resolution along the spectrum from informal agreement to litigation see G. Brian Hutchinson, *Arbitration and ADR in Construction Disputes* (Thomson Reuters, Dublin 2010) Chapter 2; and Henry Brown and Arthur Marriott, *ADR Principles and Practice* (3rd edn, Thomson Reuters, London 2011) pp 19-24. For specialist texts on construction adjudication in the UK see: *Coulson on Construction Adjudication* (2nd edn, Oxford University Press, Oxford 2011); and Dominique Rawley et al, *Construction Adjudication and Payments Handbook* (Oxford University Press, Oxford 2012).

- (a) an underlying legislative policy of ‘pay now, argue later’⁴² intended to alleviate the risk of cash-flow problems on the part of contractors as a result of disputes arising during the construction process, and to that end:
- (b) a (deliberately) speedy process to ensure a relatively rapid post-referral appointment⁴³ and decision;⁴⁴
- (c) an informal⁴⁵ and inquisitorial⁴⁶ process adequate for the administration of ‘rough justice’⁴⁷;
- (d) the absence of an appeal from the decision of an adjudicator;⁴⁸
- (e) a decision which is binding⁴⁹ and, to that extent, enforceable⁵⁰ but does not finally determine the rights of the parties, i.e. enjoys only so-called ‘temporary finality’⁵¹ pending the final determination of the dispute by arbitration, litigation or agreement.⁵²

In the following sub-section each of these features shall be briefly considered in so far as they are relevant to the question of what fair procedures requires and in light of precedents relating to other adjudicative decision-making processes and bodies.

⁴² See cases cited in *Hudson’s Building and Engineering Contracts* (12th edn, Thomson Reuters, London 2010) at 11.010 note 22.

⁴³ See section 6(3) and 6(4) of the 2013 Act.

⁴⁴ See section 6(6) and 6(7) of the 2013 Act. Elsewhere default time limits for the carrying out of the adjudication and delivery of a decision vary from 14 days (Singapore) to 20 days (New Zealand) to 28 days (UK).

⁴⁵ See section 6(8) of the 2013 Act and draft code of practice (discussed at 3.2 below).

⁴⁶ See section 6(9) of the 2013 Act. Its effect is summarised thus at paragraph 19 of the draft code of practice:

‘The adjudicator shall reach a decision within 28 days of the date that a referral is made. This period can be extended by a further 14 days with the consent of the Referring Party or such longer period as is agreed by the parties.’

⁴⁷ See, e.g., *Gipping Construction Ltd v Eaves Ltd* [2008] EWHC 3134 (TCC) at para 8 (Akenhead J):

‘This court (the Technology & Construction Court) and the Court of Appeal has said on many occasions that adjudication is a form of rough justice, in the sense that within a very short period of time (28 days usually) the adjudicator has to receive submissions and evidence from the parties and produce his or her decision; inevitably the justice that is meted out is not always as pure and as well prepared for as cases which proceed to a full trial in this court or to a substantive hearing before an arbitrator.’

⁴⁸ Hudson notes that (as of 2010) only the Australian state of Victoria provided for a statutory right of review of an adjudicator’s decision. *Hudson’s Building and Engineering Contracts* (12th edn, 2010) at [11.004].

⁴⁹ See section 6(10) and 6(12) of the 2013 Act.

⁵⁰ Section 6(11) of the 2013 Act.

⁵¹ *Hudson’s Building and Engineering Contracts* (12th edn, Thomson Reuters, London 2010) at 11.014.

⁵² See section 6(10) of the 2013 Act. Note that care should be taken in formulating terms of settlement in respect of disputes which have been referred for adjudication under section 6 as it should be made clear whether the settlement enjoys the same status as an adjudication decision (and hence does not preclude a final determination of the same matters by arbitration or litigation) or is intended to ‘finally’ settle the rights of the parties. See Foskett, *The Law and Practice of Compromise* (7th edn, 2010) at 31.68.

In the remainder of this sub-section, however, I wish to consider the logically prior question of whether construction adjudication as provided for in the 2013 Act does engage a party's constitutional right to fair procedures in the first place. In my opinion it does and, far more importantly, this is also the opinion (expressed extra-judicially) of at least one member of the Supreme Court.⁵³ Possible considerations weighing for and against this view include the following:

- The construction adjudication process and the authority of the adjudicator over the parties is '*permitted, provided for, or prescribed*' by an Act of the Oireachtas.⁵⁴
- As the decision of the adjudicator is binding and enforceable (pending final resolution of the dispute by arbitration, litigation or agreement) there is '*a real risk*' that it will have '*material practical effects on the exercise and enjoyment of*⁵⁵ a party's rights (or that a party will be '*adversely affected*'⁵⁶) in the event that there is an adverse decision.
- The Act confers an immunity and protection on an adjudicator (expecting bad faith) in respect of any form of subsequent challenge to the adjudication decision or any claim for compensation.⁵⁷
- There is no appeal from a decision of the adjudicator provided for under the Act and the decision is effective immediately and for such a period of time (likely not insubstantial) as may elapse until any contrary and final determination of the matter occurs through arbitration, litigation or agreement. In this regard the case of *McNamee v Revenue Commissioners*⁵⁸ refers. It concerned a challenge by way of judicial review to a notice of opinion issued to the applicant by the Revenue Commissioners pursuant to section 811 of Taxes Consolidation Act 1997 (as amended). The section gives the Revenue certain powers (subject to appeal) to reverse, or set at naught, arrangements deemed to be tax avoidance schemes or transactions. One of the arguments made by the applicant was that he did not have sufficient opportunity to make representations as to (i) why the Revenue should not form the opinion it did and (ii) why this was not an appropriate case for the Revenue even to invoke section 811. In rejecting this argument McGovern J noted the extensive rights of appeal provided for under the statute⁵⁹ and

⁵³ See the lecture of Mr Justice Clarke (at note 1 above) at p 6. Moreover, whether one agrees with this assessment or not, it would appear prudent from a purely pragmatic perspective for all parties to operate on the assumption that it is.

⁵⁴ *East Donegal Co-Operative v Attorney General* [1970] IR 317 at 341 (Walsh J).

⁵⁵ *Dellway Investments Ltd v NAMA* [2011] 4 IR 1 at 328 (Fennelly J).

⁵⁶ *Dellway Investments Ltd v NAMA* [2011] 4 IR 1 at 289 (Hardiman J).

⁵⁷ Section 6(14). The statutory conferral of an immunity from suit on the decision-maker was deemed a relevant consideration in *Dellway Investments Ltd v NAMA* [2011] 4 IR 1 at 293 (Hardiman J).

⁵⁸ [2012] IEHC 500 (McGovern J).

⁵⁹ Section 811(7) provides that any person aggrieved may, by notice in writing within 30 days of the date of the notice of opinion, appeal to the Appeal Commissioners. Furthermore, if the taxpayer is dissatisfied with the outcome of the hearing of the appeal before the Appeal Commissioners, he has a right to a further appeal by way of rehearing to the Circuit Court. The taxpayer also has a right to

that a section 811 notice did not become effective until the appeal process was exhausted or if there is no appeal to the Appeal Commissioners, until after the period for appealing had elapsed. In this regard the Court observed:

45. An important factor in determining whether a right to make representation exists at all is whether a person affected by a decision has a right of appeal. In Dellway, Macken J. stated, after a discussion of "fairness of procedures", that:-

"If anything, the scale of the NAMA statutory discretion and its statutory powers, and the fact that there is no appeal from its decision to acquire eligible assets referred to above, emphasises the importance of scrupulous adherence to the rules of natural justice."

46. A key factor may be that a decision does not come into effect until the appeal has been heard or, if no appeal is taken, until the period for appeal has elapsed. ...

47. In *Gammell v. Dublin County Council* [1983] I.L.R.M. 413, the court was dealing with an order prohibiting the erection of temporary dwellings which had been made under the Local Government (Sanitary) Services Act 1948. Referring to the right of aggrieved persons to apply to the Minister for the Environment within fourteen days concerning such a notice, Carroll J. held that this sufficed for compliance with the *audi alteram partem* rule. At p. 417, she stated:-

*"There is machinery set up under the section whereby an aggrieved party can make representations why the order should not come into operation. If successful the order is annulled by the Minister and it never becomes operative. This is very different to the *Ingle*⁶⁰ case and the *Moran*⁶¹ case where the revocation of the licence became operative immediately and of necessity there had to be a time lag between the revocation and the determination of an appeal in the District Court."⁶²*

The case of *Ingle v O'Brien*⁶³ referred to by Carroll J is instructive. In holding that the decision by An Garda Síochána to revoke a taxi licence pursuant to powers conferred by statutory regulations had breached the rule of *audi alteram partem* and was therefore invalid despite a right of appeal to the District Court, Pringle J concluded in *Ingle*:

appeal on a point of law (by way of Case Stated) to the High Court from any decision of the Appeal Commissioners, or of the Circuit Court.

⁶⁰ *Ingle v O'Brien* (1975) 109 ILTR 7.

⁶¹ *Moran v Attorney General* [1976] IR 400.

⁶² *McNamee v Revenue Commissioners* [2012] IEHC 500 (McGovern J) (emphasis added).

⁶³ (1975) 109 ILTR 7.

As regards the submission that the licence holder is sufficiently protected by the right of appeal under which the principles of natural justice would be complied with, I cannot accede to this submission. The revocation of a licence to drive public service vehicles, even for a short period pending an appeal, may seriously damage the holder's livelihood.

It does not seem to be much of a stretch to say that, similarly, the binding and enforceable requirement to pay a sum to a contractor on foot of an adjudication decision may seriously damage the payer's livelihood. The obvious example being where arbitration or litigation subsequently determines that the payment was not due but the payee has become insolvent in the interim period.⁶⁴

As against the foregoing points, possible considerations weighing against the view that construction adjudication is subject to the requirements of constitutional justice and fair procedures include:

- The legislative intent, as discerned from the terms of the 2013 Act, for a speedy and, by reasonable implication,⁶⁵ relatively informal process.
- The resulting decision has a '*temporary or interlocutory*'⁶⁶ character and any effect on or interference with a party's contractual or other rights is (legally speaking) of a provisional or interim nature.
- If the adoption of such a summary process, even as an interim measure, is an interference with the right to fair procedures of the parties, it is arguably a proportionate one in that it is restricted to a defined class of disputes (i.e. '*any dispute relating to payment arising under the construction contract*') with a view to addressing a particular mischief.
- It is not necessary nor, arguably, probable that any reputational harm will result from an adverse decision in respect of a payment dispute under a construction contract.

The last point is an obvious red herring. While reputational harm was a factor at play in the decision of the Supreme Court in *Dellway*, there was no suggestion that it is always a relevant consideration. It is sufficient that a party's property rights (in

⁶⁴ For cases where a licensing decision's potential impact on the right to earn a livelihood or business interests appeared to influence the court's recognising of a duty to comply with fair procedures see Hogan & Gwynn Morgan, *Administrative Law in Ireland* (4th edn, Round Hall, Dublin 2010) at 14.193n.

⁶⁵ For whatever reason the 2013 Act omits any express prescription as to the informality of the procedures to be adopted, in contrast to, for example, the Residential Tenancies Act 2004 and the Central Bank and Financial Services Authority of Ireland Act 2004 (both discussed below). Unlike those two acts, statutes prescribing informality in procedures typically relate to family or medical matters or concern vulnerable persons and tend not to concern commercial matters. See, e.g., Civil Partnerships and Certain Rights and Obligations of Cohabitants Act 2010, section 144(1); Freedom of Information Act 1997, section 37(6); Hepatitis C Compensation Tribunal Act 1997, section 3(11); Domestic Violence Act 1996, section 16(3)(a); Child Care Act 1991, section 29(4); Judicial Separation and Family Law Reform Act 1989, section 33(3); Status of Children Act 1987, section 12(3).

⁶⁶ To borrow a phrase from *Dellway Investments Ltd v NAMA* [2011] 4 IR 1 at 293 (Hardiman J).

the form of contractual entitlements) may be adversely affected or interfered with by an adjudicator's decision.

With respect to the second point and third points, the cases already considered above would appear to indicate that the interlocutory status of a decision-making process does not necessarily place it beyond the reach of constitutional justice and the requirements of fair procedures, particularly where any decision is effective pending any further or final determination.

Finally, and with respect to the first bullet point, it should be noted that the 2013 Act is not unique in seeking to establish a relatively speedy and informal dispute resolution process. Other examples to be found on the Irish statute book include the statutory adjudication provided for under the Residential Tenancies Act 2004 (as amended)⁶⁷ and the Financial Services Ombudsman created by Part VIIB of the Central Bank Act 1942 (as inserted by section 16 of the Central Bank and Financial Services Authority of Ireland Act 2004). The Residential Tenancies Act is of little use for the present discussion, however, as section 124(3) expressly provides that non-compliance with '*a requirement of procedural fairness*' is a grounds for resisting the enforcement by a court of any determination made under the Act.

By contrast, the extensive case law which has arisen in relation to decisions taken by the Financial Services Ombudsman provides valuable guidance. The most relevant provisions of Part VIIB are as follows. Section 57BB provides:

The objects of this Part are as follows:

...

(c) to enable such complaints to be dealt with in an informal and expeditious manner.

Section 57BK provides:-

...

(4) The Financial Services Ombudsman is entitled to perform the functions imposed, and exercise the powers conferred, by this Act free from interference by any other person and, when dealing with a particular complaint, is required to act in an informal manner and according to equity, good conscience and the substantial merits of the complaint without regard to technicality or legal form.

Of course, in light of the overriding force of constitutional considerations, any legislative desire for speedy or low cost resolution of disputes cannot be relied upon as conclusive grounds for restricting to a bare minimum or trumping altogether a party's entitlement to fair procedures in accordance with the general principles of constitutional justice. Rather it will always be necessary to construe and pursue any legislative objective of expediency in a manner compatible with the basic interests protected by the constitutional guarantee of fair procedures

⁶⁷ See, in particular, the long title and section 101(4) of the Residential Tenancies Act 2004 and *Canty v Attorney General* [2011] IESC 27 at paragraph 8 (Denham J).

given all the circumstances. In *J&E Davy t/a Davy v Financial Services Ombudsman*⁶⁸ the Ombudsman relied on sections 57BB and 57BK(4) (quoted above) to defend its decision not to grant the applicant an oral hearing. While these were accepted as relevant considerations, both the High Court⁶⁹ and Supreme Court found that, on the facts of the case, the Ombudsman had breached fair procedures in failing to allow for an oral hearing in circumstance where there was a dispute as to material facts which required oral evidence and cross-examination for a just determination to be made.

In sum, legislative concerns for procedural efficiency, whether expressly stated by the Oireachtas or not, will not be treated as determinative for the question of whether a particular decision-making process must comply with the principles of constitutional justice and fair procedures. This was well expressed in *Khan v HSE*⁷⁰ by McMahon J as follows:

To those involved in administration, adherence to fair procedure standards may appear cumbersome, irritating and even irksome on some occasions. Undoubtedly, the necessary adherence may slow down the administrators and may not be conducive to efficiency. But that is the way it is. The battle between fair procedures and efficiency has long since been fought and fair procedures have won out. The insistence on fair procedures governs all decision makers in public administration. It governs the courts as well. None of us can ignore the principle. We might wish it were otherwise. We might like to cut through procedural niceties to secure what we perceive as justice in a more expeditious way but unfortunately for decision makers that is no longer an option available to them. It is not sufficient that we justify our decision by alleging that we were focusing on the ultimate objective. It is not sufficient that we were doing our best. It is not sufficient to say that we were motivated by public health and safety objectives. Fair procedures are at the very foundation of all legal systems and all decision makers must observe them whether we like it or not. Fair procedures are necessary for the common good.

Nevertheless, this must not be taken to imply that a legislative intent for informality and expedition in a dispute resolution process should be set at nought. Rather, as was noted by the High Court in *J&E Davy t/a Davy v Financial Services Ombudsman*, such an intention can and should still be given effect in the manner in which any oral hearing is ultimately conducted:

Where there is a requirement that an oral hearing should take place then, in the context of the statute requiring informality and expedition, that oral hearing must be expressly limited to the examination of those witnesses whose testimony is inescapably necessary for the purpose of

⁶⁸ [2010] 3 IR 324 (SC).

⁶⁹ *J&E Davy t/a Davy v Financial Services Ombudsman Ireland* [2008] 2 ILRM 507.

⁷⁰ [2008] IEHC 234 at p 15, approved by *Dellway Investments Ltd v NAMA* [2011] 4 IR 1 at 280 (Hardiman J).

*resolving a disputed issue of fact which cannot otherwise be fairly decided.*⁷¹

Similarly, in *Lyons v Financial Services Ombudsman*⁷² Hogan J noted that

It goes without saying in the context of an adjudicatory system which is statutorily designed to be informal and expeditious that the courts should be reluctant to impose some form of adversarial court-style model...⁷³ Indeed, as MacMenamin J. pointed out in Ryan,⁷⁴ if such a model were in fact to be imposed on the Ombudsman, it would mean in reality that the office simply could not function. The FSO cannot be regarded as some form of miniature version of the Commercial Court and ... it could not practically function if this is what was expected of it.

2.4 Irish precedents on specific aspects of fair procedures

There can be little doubt from what has been said that any adjudicator acting pursuant to the 2013 Act should, at a minimum, ensure that the parties' right to be heard is respected. In the context of an inquisitorial process and the extremely tight timeframe envisaged by the Act, however, the real question is what such a right might entail in any given case. This question is too open-ended and potentially vast to allow for any full answer here. Accordingly I limit myself to some brief comments on existing Irish case law on the following points:

- Adjudication in the absence of co-operation from a party (2.4.1).
- Reliance by adjudicator on matters not addressed by or put to the parties (2.4.2).
- Decision to hold an oral hearing (2.4.3).
- Decision to admit hearsay evidence (2.4.4).
- Decision to permit cross examination (2.4.5).
- Nature of the duty to give reasons (2.4.6).

2.4.1 Adjudication in the absence of co-operation from a party

Where a party to a referred dispute fails or refuses to engage or co-operate properly or at all with the adjudication process, what effect does this have on the

⁷¹ *J&E Davy t/a Davy v Financial Services Ombudsman Ireland* [2008] 2 ILRM 507 at para 38 (Charleton J).

⁷² [2011] IEHC 454 at paragraph 21.

⁷³ Citing to: 'the comments in this regard of Charleton J. in *J & E Davy v. Financial Services Ombudsman* [2008] IEHC 256 and those of MacMenamin J. in *Ryan v. Financial Services Ombudsman*, High Court, 23 September 2011.'

⁷⁴ I have not been able to locate a written judgment matching the description given by Hogan J, i.e. *Ryan v Financial Services Ombudsman*, High Court, 23rd September 2011, MacMenamin J.

adjudicator's duty to respect that party's rights to fair procedures?⁷⁵ In the case of other statutory decision-making bodies, express provision is sometimes made for such circumstances and different approaches have been adopted.⁷⁶ Paragraph 22 of the draft code of conduct provides the following useful guidance:⁷⁷

Non-Compliance

22. If, without showing sufficient cause, a party fails to comply with any request, direction or timetable of the adjudicator made in accordance with his powers, fails to produce any document or written statement requested by the adjudicator, or in any other way fails to comply with a requirement under these provisions relating to the adjudication, the adjudicator may

a) continue the adjudication in the absence of that party or of the document or written statement requested,

b) draw such inferences from that failure to comply as circumstances may, in the adjudicator's opinion, be justified, and

c) make a decision on the basis of the material properly provided.

It seems reasonable that, in the circumstances described in paragraph 22, the party in default may rightly be deemed to have waived certain entitlements under the right to fair procedures. Such a waiver would operate as a bar, for example, on any future challenge by the party to the decision on the grounds of a breach of fair procedures where the facts of the alleged breach were attributable to the party's own non-compliance with the adjudication process. A number of useful authorities are cited by Mills et al in respect of analogous situations in which a registrant is neither represented nor in attendance at a professional disciplinary

⁷⁵ A separate question may arise as to the effect which the non-attendance by one party at an oral hearing may have on the right to fair procedures of the other party, e.g. where such non-attendance causes one party to be exposed to oral cross-examination without an opportunity to similarly examine the other side. See 2.4.5 below.

⁷⁶ For example it would appear from the terms of section 104(4)(e)-(f) of the Residential Tenancies Act 2004 that a Tribunal hearing appeals under the Act is entitled, and perhaps even required, to proceed to hear and determine disputes notwithstanding that one (or possibly even both) of the parties may not be in attendance at or otherwise taking part in the proceedings before the Tribunal. By comparison, an equivalent provision in the regulations governing the procedure of the Employment Appeals Tribunal appears, at least on its face, to be more permissive than prescriptive in respect of the deciding of an appeal in the absence of one of the parties: '16. *If, after notice of a hearing has been duly given, any of the parties fails to appear at the hearing, the Tribunal may determine the question under appeal or may adjourn the hearing to a later date: provided that before determining the question under appeal the Tribunal shall consider all the evidence before it at the time of the hearing.*' Redundancy (Redundancy Appeals Tribunal) Regulations 1968 (SI No 24 of 1968).

⁷⁷ Paragraph 22 is taken verbatim from 'Scheme for Construction Contracts (England and Wales) Regulations 1998' (SI 1998/649) at Schedule 1, para 15 – and thus includes the very strange wording at sub-paragraph (b) which has since been corrected in the English and Welsh regulations by the 'Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) (Regulations 2011)' (SI 2011/2333) and the 'Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (Wales) Regulations 2011' (SI 2011/1715). For the consolidated text see *Keating on Construction Contracts* (9th edn, Sweet & Maxwell, London 2012) at Appendix B.

hearing dealing with complaints against him or her.⁷⁸ Another decision of potential relevance is *Kastrup Trae-Aluinduet A/S v Aluwood Concepts Ltd*⁷⁹ in which the High Court rejected the respondent's claim that there had been a want of fair procedures in an arbitration conducted in Denmark through the Danish language. Emphasising that the respondent had failed to engage in any meaningful way with the arbitration, MacMenamin J concluded:

*41. No legal authority from any jurisdiction has been cited to me to the effect that want of fair procedures would arise in circumstances where the failing in question might have been immediately remediable by the "aggrieved" party itself taking just the minimal steps required to protect its interests. Had the respondent wished to engage with the process it could have done so. The reason why it did not do so was not due to matters beyond its control. It was due to choice.*⁸⁰

2.4.2 Reliance by adjudicator on matters not addressed by parties

Section 6(8) of the 2013 Act states:

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.

Thus the Act contemplates, or at the very least permits, what is traditionally termed an 'inquisitorial' process as distinct from a purely 'adversarial' one. The essential difference between these two modes of adjudicative practice relates to the right and duty of the decision-maker to adopt either a principally passive/reactive or, alternatively, collaborative/pro-active approach to the identification of the material points at issue between the parties and the material facts and applicable law relevant to the just determination of those points. The default mode of adjudication in Ireland and the common law world is adversarial but it is not uncommon for the inquisitorial approach to be prescribed for specialised statutory bodies charged with quasi-judicial powers and responsibilities. Examples include the adjudication stage of the dispute resolution between residential landlords and tenants entrusted to the Private Residential Tenancies Board,⁸¹ the rights commissioner service under pieces of industrial relations and employment

⁷⁸ See Mills, Ryan, McDowell & Burke, *Disciplinary Procedures in the Statutory Professions* (2011) at 5.76-78. Of particular significance is *Condon v Law Society of Ireland* [2010] IEHC 52 (Kearns P) at pp 17, 20-1; and *O'Callaghan v Disciplinary Tribunal* [1999] IEHC 136 (McCracken J) at p 10.

⁷⁹ [2009] IEHC 577.

⁸⁰ Emphasis added.

⁸¹ See Residential Tenancies Act 2004, section 97(2): '*...the adjudicator...shall inquire fully into each relevant aspect of the dispute concerned and provide to, and receive from, each party such information as is appropriate.*'

law legislation⁸² and the Refugee Applications Commissioner and Refugee Appeal Tribunal (RAT) operating under the Refugee Act 1996 (as amended).⁸³

With respect to fair procedures, a common ground of challenge for decision-makers in an inquisitorial process is the fairness of deciding a case on grounds (legal or factual) other than those raised or brought to the attention of the adjudicator by the parties themselves.⁸⁴ The Technology and Construction Court of England & Wales (a specialist division of the High Court) has addressed this issue on several occasions in respect of construction adjudication under the UK legislation.⁸⁵ In Ireland, we have the benefit of the following very instructive passage from *Idiakheua v Minister for Justice, Equality and Law Reform*⁸⁶ in which Clarke J, upholding a challenge to the findings of the Refugee Appeal Tribunal (RAT) for want of fair procedures, held:

It should be recalled that the process before the RAT is an inquisitorial one in which a joint obligation is placed on the applicant and the decision maker to discover the true facts. It seems to me that an inquisitorial body is under an obligation to bring to the attention of any person whose rights may be affected by a decision of such a body any matter of substance or importance which that inquisitorial body may regard as having the potential to affect its judgment. In that regard an inquisitorial body may, in many cases, be in a different position to a body which is simply required to adjudicate upon the contending positions of two competing parties in an adversarial process. In the latter case the adjudicator simply decides the issues on the basis of the case made

⁸² See, e.g., Industrial Relations Act 1969, section 13(3) which states: ‘a rights commissioner shall investigate any trade dispute referred to him...’.

⁸³ See Refugee Act 1996, section 11 (as amended).

⁸⁴ It is interesting to note that whereas one leading UK textbook on construction adjudication recognises 8 sub-headings under the general topic of ‘Possible Grounds for a Natural Justice Challenge’, 4 of those sub-headings essential relate to this one issue, viz. ‘Denial of Opportunity to Respond to New Material’, ‘Wrongful Reliance on Third Party Advice’, ‘Deciding on a Basis Not Argued’ and ‘Improper Use of One’s Own Expertise’. See Dominique Rawley et al, *Construction Adjudication and Payments Handbook* (Oxford University Press, Oxford 2012) at Chapter 10.

⁸⁵ For example: *Cantillon Ltd v Urvasco Ltd* [2003] BLR 250 at 262 (Akenhead J); *ABB Ltd v BAM Ltd* (2013) EWHC 1983 (TCC); and *Farrelly Building Services Ltd v Byrne Brothers (Formwork) Ltd* (2013) EWHC 1186 (TCC). See also the Scottish case of *Ardmore Construction Ltd v Taylor Woodrow Construction Limited* [2006] CSOH 03 (ScotCS) at paras 43-5 (Lord Clarke) (breach of natural justice occurring by reason of adjudicator’s failure to give an opportunity to party to address the basis for a central and substantial conclusion by the adjudicator as against that party, where such basis had not formed part of the parties’ submissions). For discussion and further case citations see generally Michael Stephens, ‘Brims Construction, Waiver and Breaches of Natural Justice’ (2014) 19(3) Bar Review 70; and *Hudson’s Building and Engineering Contracts* (12th edn, 2010) at 11.036. In considering UK precedents in this regard, however, one should note that there is no equivalent in the 2013 Act or proposed Code of Practice to be made under the Act of the following provision in the ‘Scheme for Construction Contracts (England and Wales) Regulations 1998’ (SI 1998/649) (as amended) at Schedule 1, para 17: ‘The adjudicator shall consider any relevant information submitted to him by any of the parties to the dispute and shall make available to them any information to be taken into account in reaching his decision.’ (emphasis added). For a more general caveat with respect to the precedential value of UK case law on construction adjudication see 3.1 below.

⁸⁶ [2005] IEHC 150 at pp 8-10, since cited in a score of High Court decisions of which the most recent is *I.G. v Sean Bellew (sitting as the Refugee Appeals Tribunal)* [2014] IEHC 207.

whether by evidence or argument by the competing parties. However the principles which have been developed by the courts since the decision of the Supreme Court in Re Haughey [1971] I.R. 217 are equally applicable, in principle, to inquisitorial bodies. The precise way in which those principles may be applied may, of course, differ. However the substantial obligation to afford a party whose rights may be affected an opportunity to know the case against them remains. In those circumstances it seems to me that whatever process or procedures may be engaged in by an inquisitorial body, they must be such as afford any person who may be affected by the decision of such body a reasonable opportunity to know the matters which may be likely to affect the judgment of that body against their interest. In the course of argument in this case it was suggested on behalf of the RAT that it would be inappropriate for the Tribunal either to direct the line of questioning which should be adopted on behalf of the Commissioner or to engage in questioning itself (on the grounds that such questioning might give rise to an appearance of bias). I am afraid I cannot agree.

If a matter is likely to be important to the determination of the RAT then that matter must be fairly put to the applicant so that the applicant will have an opportunity to answer it. If that means the matter being put by the Tribunal itself then an obligation so to do rests upon the Tribunal. Even if, subsequent to a hearing, while the Tribunal member is considering his or her determination an issue which was not raised, or raised to any significant extent, or sufficient [sic] at the hearing appears to the Tribunal member to be of significant importance to the determination of the Tribunal then there remains an obligation on the part of the Tribunal to bring that matter to the attention of the applicant so as to afford the applicant an opportunity to deal with it. This remains the case whether the issue is one concerning facts given in evidence by the applicant, questions concerning country of origin information which might be addressed either by the applicant or by the applicant's advisors or, indeed, legal issues which might be likely only to be addressed by the applicant's advisors.

In setting out the above I would wish to make clear that the obligation to fairly draw the attention of the applicant or the applicants advisors to issues which may be of concern to the Tribunal arises only in respect of matters which are of substance and significance in relation to the Tribunal's determination. ... I am also satisfied it is at least arguable that there must be some reasonable proportionality between the extent to which attention is drawn to an issue and the importance which the Tribunal is likely to attach to it. A mere casual reference to a matter which turns out to be central to the Tribunal's determination may be insufficient to meet a test of "drawing reasonable attention to factors which may to influence the Tribunal's determination".⁸⁷

⁸⁷ *Idiakheua v Minister for Justice, Equality and Law Reform* [2005] IEHC 150 at pp 8-10 (Clarke J) emphases added. See also *Nguedjdo v Refugee Applications Commissioner* (unreported, 23rd July

2.4.3 Decision to hold an oral hearing

The right to be heard does not necessarily give rise to a right to an oral hearing. The general position was usefully summarised in *Star Homes [Middleton] Ltd v The Pensions Ombudsman*⁸⁸ as follows:

The entitlement to an oral hearing varies depending on the circumstance of each case. There is no general right to an oral hearing. This is clear from the case of Galvin v The Chief Appeals Officer [1997] 3 I.R. 240. ... [where] Costello P. stated:-

“There are no hard and fast rules to guide the appeals officer or, on an application for judicial review, this Court, as to when the dictates of fairness require the holding of an oral hearing. The case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision maker is acting, and the subject matter with which he is dealing...”

Arguably the most useful precedents for the question of when a construction adjudicator is required by constitutional justice to hold an oral hearing are those which address the same point in the analogous context of the informal and inquisitorial process by which the Financial Services Ombudsman investigates and adjudicates complaints made by consumers about regulated financial service providers. The point has been considered in quite a number of cases⁸⁹ but a long story is cut short by the following helpful passage from the latest judgment in this line of authorities:⁹⁰

21. ... Where ... the conflict of fact is a stark one and the resolution of this conflict is central to the fair disposition of the complaint, then it is impossible to avoid the conclusion that some form of oral hearing is objectively necessary in order to give effect to this constitutional guarantee.

2003, High Court, White J, *ex tempore*) which was cited with approval by Clarke J in *Idiakheua*. A similar question may arise with respect to the granting of reliefs not formally sought or opposed by the parties. See *Galway Mayo Institute of Technology v Employment Appeals Tribunal* [2007] IEHC 210 at paras 24-28 (Charleton J) (discussing the point in context of a more adversarial process).

⁸⁸ [2010] IEHC 463 (Hedigan J) at para 7.1.

⁸⁹ For example:-

Oral hearing deemed necessary for fair procedures: *J&E Davy (T/a Davy) v Financial Services Ombudsman* [2010] 3 IR 324; *Hyde v Financial Services Ombudsman* [2011] IEHC 422; *Lyons v Financial Services Ombudsman* [2011] IEHC 454; *Murphy v Financial Services Ombudsman* [2012] IEHC 92; *Smith v Financial Services Ombudsman* [2014] IEHC 40.

Oral hearing not deemed necessary for fair procedures: *Cagney v Financial Services Ombudsman* (unreported, 25th February 2011, High Court); *Molloy v Financial Services Ombudsman* (unreported, 15th April 2011, High Court); *Caffrey v Financial Services Ombudsman* [2011] IEHC 285; and *Carr v Financial Services Ombudsman* [2013] IEHC 182.

⁹⁰ *O'Neill v Financial Services Ombudsman* [2014] IEHC 282 (Hogan J).

...

24. ... While it may be true that not all of the decisions of this Court on the question of whether the FSO should have held an oral hearing can be perfectly reconciled, nevertheless the underlying theme which emerges from this corpus of case-law is that an oral hearing is necessary where there is a manifest conflict of fact, the resolution of which is critical to the outcome of the appeal.⁹¹

2.4.4 Decision to admit hearsay evidence

The law relating to hearsay evidence is as involved as it is fundamental.⁹² For present purposes, however, I propose only to offer a working definition of hearsay and a few points on the admissibility of such evidence in less formal decision-making processes.

Perhaps the most useful and relatively straightforward definition of hearsay evidence is that approved by the Supreme Court in the leading case of *Eastern Health Board v MK*⁹³

Testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of an out of court asserter.

A practical example from the field of construction adjudication is where (a) an architect reports to the adjudicator a statement made to the architect by a foreman about some matter now in dispute between the contractor and employer and (b) the employer is relying on the architect's report of the conversation to prove (as against the contractor) the truth of what was stated by the foreman.⁹⁴

The scope and purpose of the traditional common law rule against hearsay evidence was addressed in *Eastern Health Board*.⁹⁵ The case primarily concerned the applicability of the rule to wardship proceedings. In overturning the High Court decision to allow the hearsay evidence, the Supreme Court ruled that while in principle hearsay evidence was admissible in wardship proceedings a court would always be required to determine if it was necessary in the circumstances of each individual case to adduce such evidence and if so in what circumstances.⁹⁶ The same can be said of proceedings before informal or quasi-judicial tribunals for

⁹¹ Emphases added.

⁹² It takes up nearly 100 pages of the approximately 700 pages in Declan McGrath, *Evidence* (Thomson Round Hall, Dublin 2005). See *ibid.* at Chapter 5.

⁹³ [1999] 2 IR 99 at 123 (Keane J).

⁹⁴ Note: It would not be hearsay to offer the architect's report of the conversation as proof that the foreman had actually made the statement.

⁹⁵ See, in particular, [1999] 2 IR 99 at 108-110 and 114-5 (Denham J), 119 (Barrington J) and 123-5 (Keane J).

⁹⁶ [1999] 2 IR 99 at 114-5 (Denham J).

it is well established that the general rule against admitting hearsay evidence does not necessarily apply to hearings before such bodies,⁹⁷ nor indeed are the complex common law exceptions to the rule of direct relevance to the workings of such tribunals. Rather, as Hogan & Gwynn Morgan have put it:⁹⁸

The long-established evidential rule excluding hearsay (save where an exception applies) is obviously grounded on the same policy as the constitutional justice rule requiring an oral hearing in certain circumstances. But it is probably correct to take the law, in regard to (say) tribunals,⁹⁹ to be that hearsay evidence is not as such excluded; but rather that, where the circumstances are that the absence of this opportunity would be unfair, a person adversely affected by evidence must be allowed an opportunity to test it by cross-examination. In other words, the cash value in the difference lies in the fact that the common law rule operates inflexibly; whereas, where an applicant is relying on the constitutional justice principle, they must be able to demonstrate that, in the circumstances, the lack of an opportunity to cross-examine would produce unfairness.

2.4.5 Decision to permit cross examination

The right to cross-examine is an aspect of the right to fair procedures. It is not necessary that an opportunity to cross-examine always be made available,¹⁰⁰ but case law would seem to suggest that it must be permitted where:

- the inquiry in question may result in findings capable of interfering with a person's constitutional right to a good name;¹⁰¹ or
- there is a conflict of 'material'¹⁰² or 'essential'¹⁰³ fact on the face of the documents before the tribunal such that a 'fair determination'¹⁰⁴ or 'true

⁹⁷ See, e.g., *Kiely v Minister for Social Welfare* [1977] IR 267 at 281 (Henchy J); and *Borges v Fitness to Practise Committee* [2004] 1 IR 103 at 113 (Keane CJ).

⁹⁸ Hogan & Gwynn Morgan, *Administrative Law in Ireland* (4th edn, Round Hall, Dublin 2010) at 14.63 (emphasis added).

⁹⁹ Hogan & Gwynn Morgan use the term 'tribunal' in their text to refer to any quasi-judicial body created by statute.

¹⁰⁰ See, e.g., *Maguire v Ardagh* [2002] 1 IR 385 at 740 (Geoghegan J):

'There is ... no absolute right to cross-examine. As to whether there should be a right to cross-examine or not in any given instance depends on the circumstances. There was nothing wrong in principle with a ruling that permission had to be obtained to cross-examine. But such permission would have to be based on the significance of the witness to be cross-examined and the nature of the evidence of that witness which might be adverse to the interests of the cross-examiner's client. The granting or withholding of the permission could not normally be based on any kind of detailed inquiry as to the nature of the cross-examination itself because surprise can often be the essence of cross-examination.' (emphasis added).

¹⁰¹ *In Re Haughey* [1971] IR 217 at 263 (Ó Dálaigh CJ); *Maguire v Ardagh* [2002] 1 IR 385 at 550 (Keane CJ); *Borges v Fitness to Practise Committee* [2004] 1 IR 103 at 113 (Keane CJ).

¹⁰² *J&E Davy t/a Davy v Financial Services Ombudsman* [2010] 3 IR 324 at 364 (Finnegan J).

¹⁰³ *Kiely v Minister for Social Welfare* [1977] IR 267 at 281 (Henchy J):

judgment¹⁰⁵ or 'fair adjudication'¹⁰⁶ of the fact of the matter cannot be made without oral testimony tested by cross-examination.

Some further considerations in respect of the right to cross-examination are as follows:

- Decisions on the admissibility of hearsay evidence and the necessity for cross-examination will often be closely related. For, as the Supreme Court has stated, hearsay evidence is typically '*excluded in our law because the person is not present in court to give evidence on oath or affirmation and to be cross-examined and the court is thus deprived of the normal methods of testing the credibility of the witness.*'¹⁰⁷ Thus it seems doubtful whether hearsay evidence could ever be validly admitted or relied upon by an adjudicator in respect of an allegation against a party which reflects on that person's good name or reputation.
- It should be remembered that even in circumstances where the above principles would seem to require that an adjudicator allow some opportunity for cross-examination to take place, the adjudicator remains entitled to limit or curtail examination of witnesses to what is necessary and appropriate for the fair adjudication of the conflict at issue.¹⁰⁸

'Where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side but which is allowed to be based on written and, therefore, effectively unquestionable evidence on the other side has neither the semblance nor the substance of a fair hearing. It is contrary to natural justice.'

¹⁰⁴ *J&E Davy t/a Davy v Financial Services Ombudsman* [2010] 3 IR 324 at 365 (Finnegan J) approving passage from judgment of the High Court.

¹⁰⁵ *Galvin v Chief Appeals Officer* [1997] 3 IR 240 at 251 (Costello P) cited with approval in *J&E Davy t/a Davy v Financial Services Ombudsman* [2010] 3 IR 324 at 364 (Finnegan J)

¹⁰⁶ *J&E Davy Trading as Davy v Financial Services Ombudsman* [2008] 2 ILRM 507 at para 33 (Charleton J).

¹⁰⁷ *Eastern Health Board v MK* [1999] 2 IR 99 at 123 (Keane J). See also *Re Bovale Developments DCE v Bailey* [2011] IESC 24 (Hardiman J): '*I wish to make it clear that in my view the fundamental objection to the admissibility of hearsay evidence in proceedings before a court is that, to the extent that it is admitted it deprives the applicant of his right to cross-examine.*'

¹⁰⁸ See generally:

M v Refugee Appeals Tribunal [2009] IEHC 331 at para 15 (Clark J):

'The extent to which the Tribunal Member allows questioning must be a matter left to each Tribunal Member to ensure that order is maintained, that fairness and justice are applied and that the object of the appeal is achieved. The Tribunal is entitled to refuse irrelevant or repetitive questioning or, as occurred in this case, an attempt to cross examine a person who was not a witness.' (emphasis added).

Menolly Homes Ltd v Appeal Commissioners & Revenue Commissioners [2010] IEHC 49 at para 41 (Charleton J):

'Administrative bodies, tribunals and courts are entitled to make decisions: there is no issue of fact that cannot be decided fairly on the papers; this issue is not relevant to the point under adjudication; this cross-examination is not helping to elucidate the truth, rather it is causing confusion; the pursuit of this issue will not assist in my adjudication. They should be open to persuasion in the other direction, but that does not remove their responsibility to control a hearing fairly. A reasonable level of trust should be reposed in the decision-maker to act sensibly and judicially.' (emphasis added).

- Where a right to an oral hearing and to cross-examine witnesses is established then there is authority to suggest that a party is ‘*entitled to be furnished in advance of the hearing with a list of the names of the witnesses, their qualifications and functions, which the*¹⁰⁹ other party may call in evidence.
- In deciding whether to permit cross-examination adjudicators should be alive to the unfairness which can result where, for whatever reason (including perhaps voluntary non-attendance) only one side of the dispute has its evidence tested orally. This was addressed in emphatic terms in *Kiely v Minister for Social Welfare*¹¹⁰ as follows:

Audi alteram partem means that both sides must be fairly heard. That is not done if one party is allowed to send in his evidence in writing, free from the truth-eliciting processes of a confrontation which are inherent in an oral hearing, while his opponent is compelled to run the gauntlet of oral examination and cross-examination. ... Any lawyer of experience could readily recall cases where injustice would certainly have been done if a party or a witness who had committed his evidence to writing had been allowed to stay away from the hearing, and the opposing party had been confined to controverting him simply by adducing his own evidence. In such cases it would be cold comfort to the party who had been thus unjustly vanquished to be told that the tribunal's conduct was beyond review because it had acted on logically probative evidence and had not stooped to the level of spinning a coin or consulting an astrologer. Where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side but which is allowed to be based on written and, therefore, effectively unquestionable evidence on the other side has neither the semblance nor the substance of a fair hearing. It is contrary to natural justice.

2.4.6 Nature of the duty to give reasons

The evolution and nuances of the jurisprudence of the Irish courts as to when a duty to give reasons may arise and the rationale behind that duty is beyond the

J&E Davy Trading as Davy v Financial Services Ombudsman [2008] 2 ILRM 507 at para 70 (Charleton J):

‘The process of examination and cross-examination should not be allowed to get out of control. ... Those cross-examining can be expected to be concise, to be polite and to be professionally efficient. Cross-examination may be curtailed by reason of prolixity; it may be corrected where it oversteps the mark of a good advocate in terms of politeness and instead becomes rude; it may be restricted on matters of credit to those issues which bear a real relationship to the matter in issue; and it should be controlled so that it assists in the exercise of finding the truth.’

¹⁰⁹ *Curtin v The Irish Coursing Club* [2009] IEHC 175 at p 20 (Herbert J).

¹¹⁰ [1977] IR 267 at 281 (Henchy J).

scope of this paper.¹¹¹ It is sufficient here to note that recent judgments of the Supreme Court show a marked intolerance for the failure of decision-making bodies (whether administrative or quasi-judicial) to provide affected persons with at least a basic statement of the material reasons for the decision.

In *Meadows v Minister for Justice*¹¹² Murray CJ stated:

An administrative decision affecting the rights and obligations of persons should at least disclose the essential rationale on foot of which the decision is taken. That rationale should be patent from the terms of the decision or capable of being inferred from its terms and its context.

Unless that is so then the constitutional right of access to the courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective.

This point was developed by the Supreme Court in *Mallak v Minister for Justice*¹¹³ as follows:

66. In the present state of evolution of our law, it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.

67. Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them.

Finally, in *EMI Records (Irl) Ltd v Data Protection Commissioner*¹¹⁴ the point was emphasised again by the Court that:

¹¹¹ In that regard, see the review of Irish, English and European authorities in *Mallak v Minister for Justice* [2012] 3 IR 297 at 316-324 (Fennelly J).

¹¹² [2010] 2 IR 701 at 732 (Murray CJ).

¹¹³ [2012] 3 IR 297 at 322 (Fennelly J). See also at 316 (Fennelly J):

'The general principles of natural and constitutional justice comprise a number of individual aspects of the protection of due process. The obligation to give fair notice and, possibly, to provide access to information or, in some cases, to have a hearing are intimately interrelated and the obligation to give reasons is sometimes merely one part of the process. The overarching principle is that persons affected by administrative decisions should have access to justice, that they should have the right to seek the protection of the courts in order to see that the rule of law has been observed, that fair procedures have been applied and that their rights are not unfairly infringed.'

¹¹⁴ [2013] IESC 34 (Clarke J).

... a party is entitled to sufficient information to enable it to assess whether the decision is lawful and, if there be a right of appeal, to enable it to assess the chances of success and to adequately present its case on the appeal. The reasons given must be sufficient to meet those ends.

In sum, the underlying principle or purpose which has been identified by the Irish Supreme Court for determining the presence and scope of a duty to give reasons is that any person affected should be in a position to ‘understand’¹¹⁵ the reason for the decision so that there is no ‘deficit of ready information’¹¹⁶ and ‘that effective judicial review is not precluded.’¹¹⁷

The matter is helpfully put beyond doubt by the draft code of practice which states:

DECISION OF ADJUDICATOR

*23. The decision of the adjudicator shall be in writing and signed and dated by the adjudicator. Unless the parties agree otherwise in writing, the decision shall include the reasons for the decision.*¹¹⁸

¹¹⁵ *Mallak v Minister for Justice* [2012] 3 IR 297 at 322 (Fennelly J).

¹¹⁶ *Rawson v The Minister for Defence* [2012] IESC 26 at para 6.9 (Clarke J).

¹¹⁷ *Mallak v Minister for Justice* [2012] 3 IR 297 at 322 (Fennelly J).

¹¹⁸ It is interesting to contrast this approach with the reversed burden adopted in the equivalent provision in the English and Welsh regulations which states: ‘*If requested by one of the parties, the adjudicator shall provide reasons for his decision.*’ ‘Scheme for Construction Contracts (England and Wales) Regulations 1998’ (SI 1998/649) at Schedule 1, para 22. This provision was relied upon in *Multiplex Constructions (UK) Ltd v West India Quay Development Company (Eastern) Ltd* [2006] EWHC 1569 (TCC) at para 36 (Ramsey J) for the conclusion that ‘*in the absence of any other provision or a request the adjudicator does not have a duty to give reasons.*’

3. Further practical guidance regarding fair procedures

*Neither natural justice nor constitutional justice requires perfect or the best possible justice; it requires reasonable fairness in all of the circumstances; often it is a matter of impression as to whether or not there was unfairness.*¹¹⁹

The last section set out various principled considerations on a variety of common topics which should hopefully assist adjudicators in determining how Irish courts are likely to conceive of ‘reasonable fairness in all of the circumstances’ in the particular context of construction adjudication. In this final section, and with an eye to UK precedents and materials, I draw on these principles to offer some additional guidance to minimise the risk of successful challenges based on breaches of constitutional justice or fair procedures.

3.1 A general caveat with respect to reliance on UK materials

Given the many broad similarities between the 2013 Act and the equivalent UK scheme, it is natural that the large volume of case law dealing with the latter will and should be of interest to Irish lawyers if and when our new Act comes into effect.¹²⁰ The Adjudication Society and Chartered Institute of Arbitrators have also collaborated in the preparation of a number of guidance notes, including a valuable one on the topic of natural justice, in ‘an attempt to establish best practice’ for adjudication in England, Wales and Scotland.¹²¹ The stated purpose of the notes is ‘not debate all of the legal issues in an attempt to find a philosophical answer to the many problems that could be encountered’, but instead ‘to identify a sensible or practical approach to some of the everyday problems encountered in adjudication.’¹²²

It hardly need saying perhaps, but care should be exercised when relying upon UK case law and other materials as a guide to what, in the eyes of an Irish court, fair procedures may require of adjudication under the 2013 Act. This is so for several reasons. The most obvious is that the UK courts are operating without any direct equivalent to the entrenched constitutional rights and doctrines which prevail in Irish law over the acts of the legislature and pervade virtually all aspects of judicial review by the Irish Courts. The very different constitutional arrangement in the UK is particularly evident in two aspects of its jurisprudence on construction adjudication. The first is the great weight which the English courts attached to the choice by parliament for an informal and expeditious system of construction

¹¹⁹ *International Vessels Ltd v Minister for Marine (No. 2)* [1991] 2 IR 93 at 102 (McCarthy J).

¹²⁰ A useful database of such cases is available without charge on-line at <www.adjudication.org> (last accessed 26th June 2014).

¹²¹ ‘Guidance Note: Natural Justice (1st edn, April 2013) prepared by the Adjudication Society and Chartered Institute of Arbitrators <[http://www.adjudication.org/sites/default/files/4163-1049-6768%20v%205.%20Natural%20Justice%20Guidance%20Note%20\(1\).pdf](http://www.adjudication.org/sites/default/files/4163-1049-6768%20v%205.%20Natural%20Justice%20Guidance%20Note%20(1).pdf)> (last accessed 26th June 2014).

¹²² *Ibid.*

adjudication when first called upon to consider its compatibility with the general requirements of natural justice. From the outset the specialist division of the High Court known as the Technology and Construction Court showed a robust concern, when dealing with natural justice based challenges to the enforcement of adjudication decisions, to ensure the efficacy and successful functioning of the statutory scheme.¹²³ By contrast, such extra-curial comments as have been made by serving Irish judges about the still to be commenced 2013 Act suggest that a more ambivalent and less deferential attitude is likely from the Irish courts - such as one would expect in a constitutional order where legislation is subject to rights-based judicial scrutiny.

A second distinguishing aspect of UK law on construction adjudication is that the Human Rights Act 1998 has been held not to apply to adjudicators.¹²⁴ Hence, challenges to enforcement of their decisions on the grounds of alleged breaches of natural justice or fair procedures has not benefited from the additional (albeit soft) principles of human rights review specifically provided for under the 1998 Act.¹²⁵

Finally, one should also note the possibility that, even in respect of ostensibly common law principles of natural justice, Irish and UK courts may not always adopt the same formulations and may diverge on questions of application.¹²⁶

The flip side of these points, however, is that parties involved in construction adjudication under Irish law, and those advising them, should take account of those UK judgments where decisions by construction adjudicators have not been enforced for want of natural justice or fair procedures – since any conduct found to be unacceptable in such cases is, *a fortiori*, quite likely to fall foul of an Irish court also.¹²⁷

¹²³ See *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93 at 97 (Dyson J); *Balfour Beatty v Lambeth London Borough Council* [2002] BLR 228 at 301 (Lloyd QC); *Carillion Construction Ltd v Devenport Royal Dockyard Ltd* [2006] BLR 15 (CA) at 35 (Chadwick LJ) and other cases cited in *Keating on Construction Contracts* (9th edn, Sweet & Maxwell, London 2012) at 18.018 note 98.

¹²⁴ See *Keating on Construction Contracts* (9th edn, Sweet & Maxwell, London 2012) at 18.051 citing to *Austin Hall Building Ltd v Buckland Securities Ltd* (2001) BLR 272; and *Elanay Contracts Ltd v The Vestry* [2001] BLR 33.

¹²⁵ For a comparison of the UK and Irish statutory provisions incorporating the European Convention on Human Rights into domestic law (in particular the provisions requiring convention compatible interpretation of legislation) see Paul Brady, 'Convention Compatible Statutory Interpretation' (2012) 33(1) *Statute Law Review* 24.

¹²⁶ A good example of this is the different tests adopted by Irish and English courts in respect of objective or presumed bias. See Delaney, *Judicial Review of Administrative Action* (3rd edn, Round Hall, Dublin 2013) at pp 256-267. In some cases a disparity in approaches may be predicated on differences in the underlying statutory provisions. See, for example, note 118 above.

¹²⁷ For a very brief round-up of such cases see *Keating on Construction Contracts* (9th edn, Sweet & Maxwell, London 2012) at 18.050. For a more detailed treatment see Dominique Rawley et al, *Construction Adjudication and Payments Handbook* (Oxford University Press, Oxford 2012) at Chapters 10 and 11; and *Coulson on Construction Adjudication* (2nd edn, Oxford University Press, Oxford 2011) at Chapters 12 and 13.

3.2 Statutory guidance for adjudicators regarding fair procedures

Section 6(8) of the 2013 Act states:

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.

Paragraphs of the draft code of practice (not already discussed above¹²⁸) which are relevant to questions of fair procedures include (emphasis added):¹²⁹

GENERAL PRINCIPLES

Value for Money

- 1. The adjudicator shall use reasonable endeavours to process the payment dispute between the parties in the shortest time and at the lowest cost.*
- 2. The adjudicator shall ensure that the procedure adopted is commensurate with the nature and value¹³⁰ of the payment dispute and shall promptly notify the parties of any matter that will slow down or increase the cost of making a determination.*

Impartiality

- 3. The adjudicator shall observe the principles of procedural fairness and act impartially and independently and without bias.*

Conflict of Interest

- 4. A person requested to act as adjudicator shall notify the parties of any conflict of interest or external factors which would give rise to a reasonable apprehension of bias; such a person shall decline the appointment unless satisfied it would be appropriate to accept. After appointment, the adjudicator shall immediately notify the parties of any such conflict or factors that arise during the course of the adjudication. The adjudicator shall not act as conciliator, mediator, arbitrator or witness in any related action without the written agreement of the parties.*

...

Compliance

¹²⁸ See 2.4.1 and 2.4.6 above.

¹²⁹ It is instructive to read these in conjunction with the equivalent regulations for England & Wales (as amended) which are included at Appendix B in *Keating on Construction Contracts* (9th edn, Sweet & Maxwell, London 2012).

¹³⁰ In *The State (Healy) v Donoghue* [1976] IR 325 at 350 O'Higgins CJ noted that 'The requirements of fairness and of justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him.' However paragraph 2 of the draft code of practice seems only to address the cost implications of the procedures adopted.

7. *The adjudicator and parties to the adjudication process shall comply with the Code of Practice.*¹³¹

...

CONDUCT OF ADJUDICATION

...

Flexibility

20. *For the purposes of the adjudication the adjudicator may*¹³²

a) *request any reasonable supporting or supplementing documents pertaining to the payment dispute detailed in the Referral Notice and Notice of Adjudication,*

b) *invite written submissions and evidence from both parties,*

c) *meet jointly with, and question, the parties and their representatives,*¹³³

d) *subject to obtaining any necessary consent from a third party or parties, make site visits and inspections or carry out tests ,*

e) *obtain and consider such representations and submissions as required, and provided that the parties have been notified, appoint experts, assessors or legal advisers,*

f) *give directions as to the timetable for the adjudication, any deadlines, or limits as to the length of written documents or oral representations,*

g) *issue other directions relating to the conduct of the adjudication.*

Compliance

21. *The parties shall comply with a request or direction of the adjudicator made in accordance with the adjudication process.*

*Non-Compliance*¹³⁴

...

3.3 *Some additional suggestions for good practice*

¹³¹ On its face paragraph 7's prescription of compliance with the code by '*parties to the adjudication*' seems to go beyond the terms of section 6(8) of the 2013 Act which states only that '*The adjudicator ... shall comply with the code of practice...*'

¹³² Paragraph 20 appears to be a shortened version of 'Scheme for Construction Contracts (England and Wales) Regulations 1998' (SI 1998/649) at Schedule 1, para 13.

¹³³ The stipulation that meetings are held with parties '*jointly*' is a valuable addition to the English and Welsh regulations on which this paragraph is based. The lacuna in those regulations has been filled by a series of recommendations in the Guidance Note (see note 120 above) elaborating various aspects of this requirement.

¹³⁴ For text see discussion at 2.4.1 above.

The UK Guidance Note on natural justice¹³⁵ deals with a number of other issues and practical scenarios not covered in the previous section and for the most part the advice given on such points seems equally applicable in an Irish context. To conclude I consider a few of these points here, perhaps the most important being the tension between the tight statutory deadlines and the duty to respect fair procedures.

3.3.1 Considerations relevant at the appointment stage

There are two matters in particular which an adjudicator ought to give careful thought to when initially approached and/or appointed:

- Whether he or she has any current or past link to either of the parties (or their representatives) or there is any other issue which may give rise to concerns of bias (real/subjective or apparent/objective). If in doubt, the best option is for an adjudicator is to promptly and fully disclose any possible cause of concern to both parties and so establish whether either has any objection to his or her proceeding with the adjudication. Where one party has been in contact with the adjudicator prior to appointment (e.g. to check availability) it seems wise that such communication should also be disclosed by the adjudicator at the outset.
- Whether it is likely to be possible to hear and determine the dispute in accordance with fair procedures within the timeframe permitted by the 2013 Act given:
 - the timing of the referral;¹³⁶
 - the nature or complexity of the dispute;
 - the time which the adjudicator has available personally to dedicate to the task during the permitted timeframe; and
 - any extension of the permitted timeframe pursuant to section 6(6) or 6(7) of the Act which can be sought and/or has been secured by the adjudicator.

With respect to the issues of fairness raised by the time limits imposed upon the process, it is interesting to contrast the observations of Mr Justice Frank Clarke,

¹³⁵ See note 120 above.

¹³⁶ The 2013 Act follows its UK counterpart in permitting a dispute to be referred to adjudication ‘at any time’ – section 6(2), 2013 Act. This has given rise in the UK to the notorious practice of parties carefully preparing their own claim before serving notices of referral at times calculated to put the responding party at a disadvantage, e.g. immediately prior to Christmas holidays. If the right to a reasonable opportunity to respond to the case being made against one is to be meaningfully upheld, adjudicators will need to be vigilant about such ‘ambush’ referrals and take such factors into consideration when deciding whether to seek extensions of time or, failing that, whether to accept the appointment or resign. See *Bovis Lend Lease Ltd v The Trustees of the London Clinic* [2009] EWHC 64 (TCC) at para 50-1 (Akenhead J).

speaking extra-judicially,¹³⁷ with the approach taken by the Guidance Note in the UK.¹³⁸ Noting the refusal of the High Court in *O’Briens Irish Sandwich Bar Ltd v Companies Acts*¹³⁹ to sacrifice the requirements of a fair hearing to the exigencies of the statutory deadlines imposed by the examinership process, Mr Justice Clarke opined:

I suppose what is relevant here is that the court took the view that it could not dispense with fair process. The consequence was that the examinership process came to an end and the company was liquidated. So it seems that the need to comply with fair process overrides practicality. One cannot simply say “I do not have time to do it properly, so I am going to do it a lesser way”. One either has to find a way [sic], otherwise the difficult question arises as to what a court is, or the parties are, to do, if an adjudicator comes back and simply says “I cannot do this in a fair way within the timeframe allowed”.¹⁴⁰

By contrast, the non-statutory UK Guidance Note makes the following points:¹⁴¹

2.6. It should be remembered that in the ordinary run of the events the parties to a construction contract are entitled to have any dispute resolved by adjudication on an interim basis and that the broad justice of an adjudication is likely to produce a fairer interim allocation of money than simply leaving it in the hands of the party who happens to presently be in possession of it.

...

2.8. The Courts recognise that adjudication is a swift form of dispute resolution which may provide only a very rough form of justice in certain instances. Hence, it can be legitimate to resolve large and factually complex disputes by means such as spot checks.

Perhaps all that can safely be said at this point is that it would be imprudent for parties or adjudicators to assume that the underlined conclusions from the UK Guidance Note will prove to be accurate as a matter of Irish law.

3.3.2 Considerations relevant to the conduct of the adjudication

Much of the substantive principles have already been discussed in section 2 above. However, there are a number of very concrete practical recommendations

¹³⁷ See note 1 above.

¹³⁸ See note 120 above.

¹³⁹ [2009] IEHC 465.

¹⁴⁰ See note 1 above, p 11. It is perhaps apposite to recall here that section 6(17) of the 2013 Act provides:

‘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.’

¹⁴¹ See note 120 above, p 7.

contained in the UK Guidance Note on natural justice which are worth mentioning here:¹⁴²

- The adjudicator should set down a timetable for the parties to serve submissions during the course of the adjudication.
- When preparing the initial timetable and considering any further requests for submissions, the adjudicator should consider whether additional time will be needed to reach, prepare and issue the decision. It is preferable that requests for additional time are dealt with at the outset of the adjudication if they can be foreseen at that time and in any event as soon as possible.
- At the outset of the adjudication, the adjudicator should direct that all communications by one party with the adjudicator should be copied to the other party. Similarly, the adjudicator should copy all correspondence to both parties. Forms of communication where this is not possible, such as phone calls, should be avoided.
- If one party contacts the adjudicator directly by telephone, ideally his administrator should deal with them and ask for the matter to be dealt with in writing. If this is not possible or does not occur, the adjudicator should take notes during the conversation, seek to terminate the call as soon as reasonably possible and inform the other party of the content of the call as soon as possible.
- Adjudicators should consider the need for a hearing at the outset of the process although in many cases it will not be possible to reach a final view on the need for a hearing until the Response has been received highlighting the matters in dispute between the parties.
- An adjudicator ought to give both parties adequate notice of site visits and should avoid a site visit where only one party will be present unless the other party has agreed to that approach or is deliberately seeking to obstruct the site visit.

3.3.3 Considerations relevant to the decision

Issues relating to decisions based on grounds not addressed by or put to the parties and the nature of the duty on adjudicators to state reasons for a decision have already been discussed.¹⁴³ It suffices to quote the following pragmatic advice from the UK Guidance Note:¹⁴⁴

4.2. It is recommended that an adjudicator should address separately in the decision each issue that has been raised by each party. If the parties' submissions are set out in an unclear or confusing manner, consideration

¹⁴² What follows is either a verbatim or close paraphrase of passages from note 120 above, pp 8-10.

¹⁴³ See 2.4.2 and 2.4.6 above.

¹⁴⁴ See note 120 above, p 10.

should be given to drafting a list of issues for the parties to comment upon prior to production of the decision.

4.3. It is, however, important to distinguish between the substantive legal or factual issues and the evidence which goes to those issues. It is not usually practicable for every aspect of the evidence to be meticulously considered, weighed up and rejected or accepted in whole or in part and an adjudicator need not do so.

Conclusion

Key aspects of the overview which this paper has attempted to provide are well summed up in the following remarks of McCarthy J *The State (Irish Pharmaceutical Union) v Employment Appeals Tribunal*.¹⁴⁵

Whether it be identified as a principle of natural justice derived from the common law and known as audi alteram partem or, preferably, as the right to fair procedures under the Constitution in all judicial or quasi-judicial proceedings, it is a fundamental requirement of justice that person or property should not be at risk without the party charged being given an adequate opportunity of meeting the claim, as identified and pursued.

If the proceedings derive from statute, then, in the absence of any set or fixed procedures, the relevant authority must create and carry out the necessary procedures and if the set of fixed procedure is not comprehensive, the authority must supplement it in such a fashion as to ensure compliance with constitutional justice ...

I hope that the material set out in sections 2 and 3 of this paper proves of some assistance to time-pressed adjudicators faced with this unvarying duty to operate and, as necessary, 'supplement' the procedures for construction adjudication under the 2013 Act in accordance with the various and variable requirements of constitutional justice.

¹⁴⁵ [1987] ILRM 36 at 40.