



THE PUBLIC SECTOR MAGAZINE

THE JOURNAL FOR PUBLIC SECTOR PROVIDERS & DECISION MAKERS

CONSTRUCTION LEADERSHIP

RIAI President,
Ciarán O'Connor



MORLEY
SAFETY CONSULTANTS

HOUSING FOR ALL

New action plan
for housing

www.thepublicsector.org



NBI CHAIRMAN DAVID MCCOURT
ON THE BIGGEST INVESTMENT IN RURAL
IRELAND SINCE RURAL ELECTRIFICATION



THE TROUBLE WITH ASBESTOS



INNOVATION IN CONSTRUCTION

CONSTRUCTION ADJUDICATION & COUNTERCLAIMS

Adjudication and the High Court: the right to counterclaim and the binding nature of an adjudicator's decision, by Kimberley Masuda and Emmet Byrne, leading Irish construction lawyers and members of Matheson's Construction and Engineering Law Group.



Following on from the *Gravity Construction Limited v Total Highway Maintenance Limited*¹ case, the High Court has again confirmed the enforceability of an adjudicator's decision in the recent case of *Principal Construction Limited v Beneavin Contractors Limited*². In this latest case, Principal Construction Limited (PCL) brought an action to enforce an adjudicator's decision relating to the value of variations that PCL had carried out under its contract. Beneavin Contractors Limited (BCL) argued against the enforceability of the adjudicator's decision on the basis that the decision was not binding, the adjudicator did not have jurisdiction to hear the claim and the adjudicator materially breached natural justice by refusing to allow BCL to prosecute its counterclaim.

¹ *Gravity Construction Limited v Total Highway Maintenance Limited* [2021] IEHC 19

² *Principal Construction Limited v Beneavin Contractors Limited* [2020 No. 199 MCA]

The Court determined that:

1. the adjudicator's decision is binding and enforceable;
2. the right to refer a payment dispute to adjudication overrides the contractual provisions including any provisions to limit a claim contained in the contract; and
3. although the adjudicator can consider a full defence including abatement and set-off, it does not have jurisdiction to hear a counterclaim which is a separate action and, unless otherwise agreed by the parties, must be heard in a separate adjudication.

BINDING DECISION

BCL argued that the words "if binding" in section 6(11) of the Construction Contracts Act, 2013 (CCA) meant the adjudicator's decision is not binding and therefore should not be enforced. The Court followed the earlier *Gravity Construction* case and

BCL ALSO ARGUED THAT THE ADJUDICATOR DID NOT HAVE JURISDICTION TO HEAR THE PAYMENT DISPUTE AS THE FINAL CERTIFICATE HAD ISSUED AND THE CONTRACT PROVIDED THAT UNLESS ADJUDICATION PROCEEDINGS ARE COMMENCED WITHIN THE TIME ALLOWED UNDER THE CONTRACT THE FINAL CERTIFICATE BECOMES CONCLUSIVE.

confirmed that the purpose of the CCA was to provide a “summary procedure to enforce the payment of moneys from one party to another in a building contract” and confirmed that section 6(10) provides that the adjudicator’s decision “shall be binding” until the payment dispute is finally settled or a different decision is made at arbitration or in Court. On that basis, the words “if binding” should be narrowly construed and the decision is therefore enforceable.

Early this year in *Construgomes & Carlos Gomes SA v Dragados Ireland Limited, BAM Civil Engineering & Banco*³, the High Court stated that the effect of section 6(10) – (12) of the CCA is that an adjudicator’s decision is presumptively binding but the parties to a contract may seek to resolve the dispute through the other dispute resolution mechanisms provided for in the contract - such as arbitration or litigation.

Jurisdiction: BCL also argued that the adjudicator did not have jurisdiction to hear the payment dispute as the final certificate had issued and the contract provided that unless adjudication proceedings are commenced within the time allowed under the contract the final certificate becomes conclusive. PCL referred the dispute to adjudication nearly six months following the issue of the final certificate. The Court however determined that the adjudicator derives its jurisdiction from the CCA and not the contract and the CCA provides a “clear and unfettered right” to refer a payment dispute to adjudication at any time. However, once the dispute has been referred, the adjudicator may then have regard to the terms of the contract. In this case, the adjudicator had decided the final certificate may have been invalid.

Counterclaim: BCL had claimed PCL was liable to pay liquidated and ascertained damages to BCL under the contract. The adjudicator determined that he did not have jurisdiction to hear this counterclaim as this was, at law, a separate claim. The adjudicator cited the UK case of *Bresco Electrical Services Ltd v Michael J Londale (Electrical) Ltd*⁴ when he confirmed that while he could consider a full defence including abatement

Contributors



Rhona Henry
Partner
Head of Construction and Engineering
T +353 1 232 2110
E rhona.henry@matheson.com



Kimberley Masuda
Partner
Construction and Engineering
T +353 1 232 2798
E kimberley.masuda@matheson.com



Emmet Byrne
Associate
Construction Disputes
T +353 1 232 2049
E emmet.byrne@matheson.com

Meet Our Team



Nicola Dunleavy
Partner
Construction Disputes
T +353 1 232 2033
E nicola.dunleavy@matheson.com



Ruadhán Kenny
Senior Associate
Construction Disputes
T +353 1 232 2411
E ruadhan.kenny@matheson.com



Siomha Connolly
Solicitor
Construction and Engineering
T +353 1 232 2383
E siomha.connolly@matheson.com

and set-off he could not consider a claim for a monetary award in favour of the respondent. The Court agreed (but without specifically citing the UK case) and also found that the adjudicator did in fact deal with the issue of delay and determined that PCL was not responsible for the delay.

This case reinforces the binding nature of an adjudicator’s decision and demonstrates the judicial support for the CCA as well as the Court’s reluctance to interfere with the adjudication process. It is telling that, in its judgment, the High Court expressly emphasised the purpose and aim of the CCA to “provide for a summary procedure to enforce the payment of moneys from one party to another in a building contract, notwithstanding that it may ultimately transpire that such moneys are, in fact, not owed. This ensures that moneys are paid without having to await the outcome of arbitration or litigation, which, more often than not, involves delay”.

This demonstrates that the adjudication process in the CCA is intended as an alternative to court proceedings. Examples such as the High Court allowing an adjudicator to take its power from the CCA regardless of the contractual provisions, and confirming the

right to adjudicate at any time, are evidence of the Court’s firm efforts to facilitate and strengthen the adjudication process.

This judicial support is further evidenced in another recent High Court decision concerning an adjudication relating to works carried out at Páirc Uí Chaoimh⁵.

In that case, Cork GAA argued that the adjudicator had no jurisdiction in relation to the dispute because the construction contract governing the works was a letter of intent entered into before the CCA was commenced. The High Court initially stayed the adjudication process and confirmed that adjudicators’ decisions may be subject to judicial review proceedings. However, in its judgment in the substantive proceedings, the High Court confirmed that the adjudicator did have jurisdiction to determine the dispute by finding that the parties entered into a construction contract in 2017 which was in fact governing the works. This case again demonstrates the Court’s openness to facilitating the adjudication process.

³ *Construgomes & Carlos Gomes SA v Dragados Ireland Limited, BAM Civil Engineering & Banco BPI SA* [2021] IEHC 79.

⁴ *Bresco Electrical Services Ltd v Michael J Londale (Electrical) Ltd* [2020] UKSC 25.

⁵ *Kevin O’Donovan and Cork GAA v Dr. Bunni, James Bridgeman, and OCS One Complete Solution Ltd* [2021] IEHC 575