Christmas 2021 NEWSLETTER

THE CHARTERED INSTITUTE OF ARBITRATORS – IRELAND BRANCH

THE HOME OF DISPUTE RESOLUTION

December 2021

CIArb
evolving to resolve

Dear Colleagues,

Around the country people dealing with storms, school closures, event restrictions and (heya!) Omicron are expressing the desire to call it quits for another year. But the good news is that the shortest day of the year, December 21st is upon us so let's all raise a glass to the bright months coming our way. There may be some turbulence ahead, but we are in a better place now to face it. The economy performed well this year; and good predictions for next year are most welcome. All in all, we haven't fared too badly as a sector.

But like others, we too must get on with the 'new normal' as they call it and adapt to new ways of working, particularly remote and hybrid working, and the use of technology to communicate, learn and work. Indeed, globally the Institute has embraced this change very successfully to the extent that it has vastly increased its training programme online with the result that its membership has climbed to over 1,8000 members with branches now in 149 countries and the financials back in Bloomsbury Square in ship shape.

Remote Working and New Technology:

Quite simply, none of us will be going back to the old ways of working in the ADR space and it is incumbent on all of us to embrace technology and new ways of hybrid working, learning and communication as well as providing more climate friendly services relating to the conduct of arbitrations and other processes. We must embed the use of technology as an integral part of the dispute practitioner's toolkit. Indeed, as a Branch, this past year we had to hold all our committee, subcommittee meetings and AGM on the Zoom platform and we had a very successful and high level of engagement with members with our online lectures, conferences and CPD events. So, as technology has become ubiquitous with our work as ADR practitioners the Institute has published a useful 'CIarb Framework Guideline on the Use of Technology in International Arbitration,' which offers pragmatic guidance on how practitioners can proactively use technology to best effect in the course of their work. **This Guideline can be downloaded free *here*.** As a Branch we are planning to roll out specific training on the use of technology for ADR practitioners sometime in 2022.

> **"We must embed the use of technology as an integral part of the dispute practitioner's toolkit**

Equality, Diversity, and Inclusion:

Equality, Diversity, and Inclusion (EDI) is an area where this Branch has fallen well behind. Sorting this is a key objective of the global organisation; Let's face it, we can do better, we must do better in Ireland and level the EDI playing field without delay. This is an extremely broad multi- faceted area. We set up a Special Interest Group on EDI under the leadership of Paula Murphy FCIArb, to address EDI issues in CIArb and ADR and Education related issues. All members who responded were invited to participate in the EDI Subgroup. Members will be made aware of developments as they occur and may be asked to participate in targeted surveys in the coming months on this important issue.

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Northern Ireland and Expert Witness Training:

In the Northern Chapter of the Irish Branch the committee continue to provide key training for those involved in or interested in providing Expert evidence in courts or tribunals. To date there have been eight such training events that conclude on the last day with a cross-examination session in front of a sitting judge in the High Court, -- not for the faint-hearted! There was one such event held in Dublin in 2021 organised by committee member Pauline Taffe and there was great feedback. It is planned to hold similar training events in Dublin in 2022.

Introduction to ADR Courses:
How many times have you looked for introductory training in ADR, Alternative Dispute Resolution? I am glad to announce that the Branch has finally prepared and got approval for a reasonably priced Introduction to ADR Course which will take place in February 2022.

It is expected that this will also be of interest to a wider audience who have heard of ADR and want to broaden their knowledge. The course is largely set in the context of legislation and guidance in the Republic of Ireland, but being an all-Ireland Branch, the course will also refer to legislation in Northern Ireland.

The course will be delivered virtually over two-half days, mid-week with an optional on-line assessment to be taken by the candidates in their own time after the course delivery if they so wish. The successful completion of the online course assessment for a small fee will enable the candidates to apply for Associate Membership status of CIArb, which could be an appropriate first step for many. The ***digital flyer*** and ***booking form*** for this course is available on the righthand column of this page.

Construction Contract Adjudication:
It's no secret that the Irish Branch has a strong membership in the property, construction and built environment professions. Many of you will be aware that Adjudication of construction contract payment disputes in accordance with the Construction Contracts Act 2013 has seen significant development for these members in 2021 with a growing jurisprudence emerging. While Conciliation and the recent role of Standing Conciliator are still quietly very popular in the industry and preferable for continuing business relationships, Adjudication has established its own niche in the construction ADR space particularly with subcontractors. I am delighted to report that the Branch is currently at an advanced stage in the process of gaining accreditation with head office for a CIArb qualification course in Adjudication specifically tailored to the Irish Act. This will be rolled out later in 2022 and has involved a lot of work by members of the Branch.

Peter O' Malley FCIArb has also prepared a short report which is included in this Newsletter on the Branch's extraordinarily successful annual and now online Adjudication Conference organised by the Young Members Group held in July this year. I chaired the event, with a keynote presentation from the new Chair of the Construction Contracts Adjudication Service (CCAS), Bernard Gogarty. Bernard is a past Chair of this Branch, and I congratulate him on his appointment by the Minister.

Given the movement and the interest in this area, Branch Committee Member, **Peter McCarthy** has authored an article on the how the Courts are supporting the Act.

CIArb Ireland Branch List of Adjudicators:
The Branch Committee will make a Call to members who are qualified under the 2013 Act to be Adjudicators and / or have special qualifications with respect to construction contract adjudication to be placed on the Ireland CIArb Adjudicators List which will be published and can made available to be used by parties who wish to agree on an Adjudicator. This is in response to the emerging trend for parties in dispute wishing to agree on an Adjudicator to decide on their payment dispute. Parties will be able to select their Adjudicator from the List. The Call will issue from the Branch in January / February 2022.

Conflict of Interest Update:
While Conflict of Interest for Experts is a critical area and a hot topic in ADR and litigation once again Tom Wren has come up with an up to date and very interesting article on the topic.

Environmental Community & Climate Related ADR:
Many of you will be familiar with the Branch's training some years ago for Environmental / Community Mediators. The requirement for such ADR mediators and facilitators in stakeholder engagement is needed more than ever now with the continuing spate of objections and disputes regarding all kinds of projects ranging from transport to housing, greenways to industrial facilities, data centres and recently even dairy plants.

It's a fact of life now that the transition to a low carbon economy requires unprecedented investment. This together with climate mitigation is going to amount to trillions of dollars of investment in energy and infrastructure and will become society's main challenge over the coming decades. Our members can play a key role in facilitating this necessary change and investment, locally and globally. We as professionals now need to equip ourselves with the tools and skills to play an active role, as climate related ADR will be the biggest opportunity and challenge facing our profession as dispute practitioners. We need to be able to utilise ADR to resolve climate related disputes and underwrite investments in green infrastructure, this is a huge opportunity and challenge for our members, particularly younger members of our profession to play a key role. I will be making a formal Call in January for members to participate with me in a Special Interest Group to take up where we left off on Environmental /Community mediation, take it to the next stage and explore how our profession can play a key role in meeting the defining climate related transition challenges of our time. This is the future for the aspiring or current disputes practitioner. Anyone interested in this topic can contact me in the interim on billy@projectadr.com.

UPCOMING EVENTS

Introduction to ADR Course
8/9th February 2022
Click ***here*** to view flyer.
Click ***here*** to book now.

40th Anniversary Dinner
Westbury Hotel
11th March 2022 *(Provisional)*

CPD (CIArb / SCSI)
Construction Dispute Avoidance and Minimisation
Spring 2022

"We need to be able to utilise ADR to resolve climate related disputes and underwrite investments in green infrastructure, this is a huge opportunity and challenge for our members, particularly younger members of our profession to play a key role

Archive Initiative:
I am happy to report that the archive initiative for the Irish Branch is now complete, thanks to Peter O Malley, where agreement has been reached for a permanent home for the archive at the Irish Architectural Archive (IAA) at Merrion Square. The archive consists of many of the old library books where these have all been indexed together with a volume of branch papers and documents donated by Bill McLaughlin and the family of the late John O'Reilly. In addition, the archive contains a signature book from early past branch events including the inaugural branch luncheon held in January 1981 and subsequent following events. If anyone has rediscovered papers or material during lockdown that are appropriate to the archive, please contact Peter O'Malley who will coordinate their inclusion.

40th Anniversary Celebration:
Party is not a popular word these omicron days, but it is a celebration time for the Branch. The Branch is 40 years old. Due to the pandemic of course, for the safety of our members and supporters, we could not hold an annual dinner in 2020 and 2021. However, The Westbury Hotel has been booked for a 40th Anniversary celebration on Friday 11th March 2022. Given pandemic, tickets will not be made available until we are surer of our footing as the event may need to be rescheduled to a later time in these changing circumstances. Either way, happy birthday to the Branch and we will certainly be celebrating as soon as possible in the New Year with a face-to-face event and all members will be welcome and notified in time.

At committee level our special interest groups are progressing with developments in education, where we will issue a survey to members in January. The Branch Committee has tasked another Special Interest Group headed up by Adrian Kearney FCIArb to report to the Branch Committee on how it can deliver a standard of excellence to existing panels and rules surrounding their membership that require updating to ensure compliance, adequacy of candidates and inclusivity in order to renew its position of being the premier appointing body. This lies closely with the development of the new Arbitration Rules for the island of Ireland, positioning the Branch and its geo location as a potential centre or hub for both domestic and International Arbitration.

> "The Branch is 40 years old

Our website clearly needs urgent improvement and investment, which is ongoing now as part of the centralised ICT improvements at the Institute headquarters in London. We will keep you updated with developments in these areas. As a result of our successful Springtime Lecture Series earlier this year we will resume again early in the new year with more interesting speakers. I hope you enjoy the articles hereunder.

May I take this opportunity to wish you all a happy and a safe Christmas and a great New Year. Many thanks to the Branch Committee, Jennifer Crowther, Branch Administrator, and all of you who have supported me and the Branch in these unusual times.

I look forward to meeting many of you face to face in 2022.

Billy Morrissey
Chair - Irish Branch CIArb

Expert Witness: Conflicts of Interest & Fiduciary Duty of Loyalty

Tom Wren BCL LLM FCIArb

In advising and representing clients, legal and all other professionals have certain standards to maintain. The standard expected of the expert witness ('EW') has been and remains Creswell J.'s seven points in National Justice Compania Naviera v Prudential Assurance ('The Ikarian Reefer') [1993] 2 Lloyd's Rep. 68, at 81. This piece considers a recent decision of the UK Court of Appeal concerning the obligations of those who provide litigation and arbitration support services, the EW in particular. All need to be alert to a conflict of interest personally and in terms of her or his colleagues/employer.

Secretariat Consulting v A Company [2021] EWCA Civ 6 re-examined the duties and obligations of experts as included a reference to the CIArb's Expert Witness Protocol. Not all authorities cited in the decision, available at ***www.bailii.org***, are referred to and only the key points are considered below.

Secretariat ('S') comprises a group of companies under the one label with the one e-mail address. Its Singapore operation ('S1') was retained to provide EW services for a petrochemical plant owner in an arbitration between it and the EPC contractor. The services included a confidentiality agreement and an undertaking by S1 not to place itself in a conflict of interest. A sister company ('S2') later entered into contract with the owner's project managers ('PM') for EW services in a second arbitration concerning the same project where the owner had not paid its PM in full due to alleged breaches. The owner said S was conflicted and obtained an interim injunction to restrain S2 on grounds of breach of fiduciary duty.

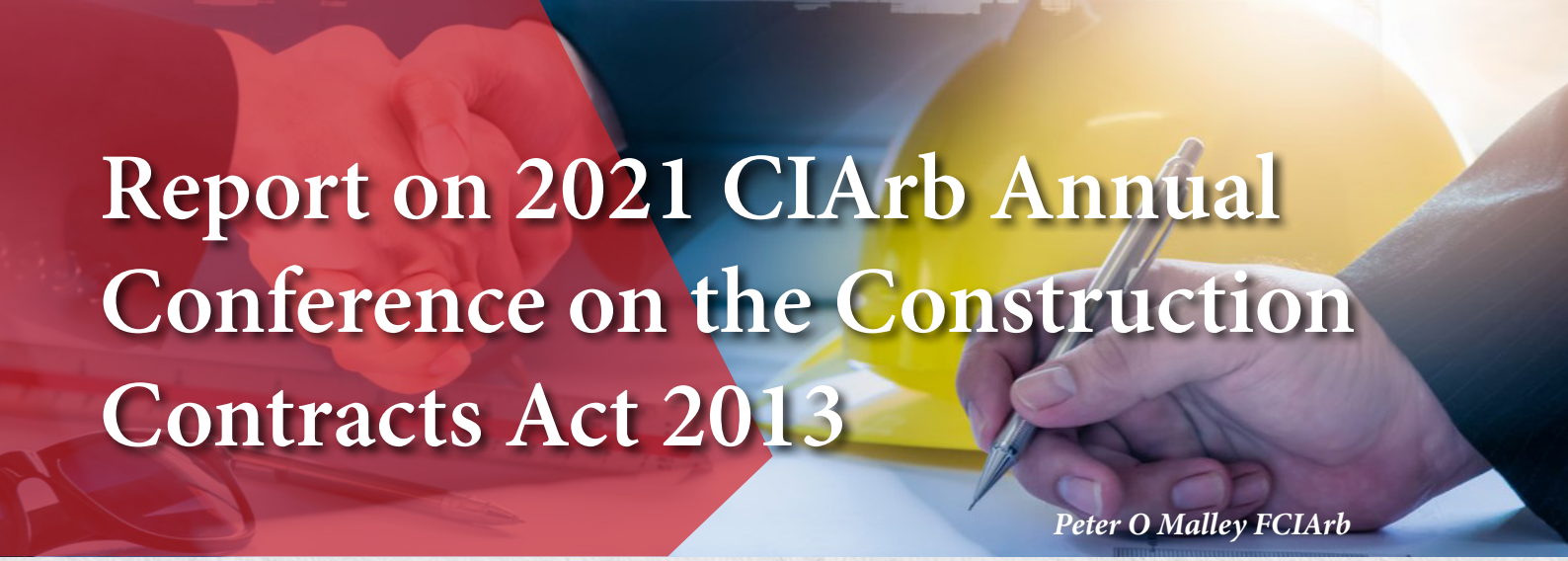
The UK High Court continued the injunction against S2 on grounds S1 and S2 were all part of the one group and were in breach of the fiduciary duty of loyalty where one's duty and interest may conflict. It noted that such services could give rise to a relationship of trust and confidence and where it arises it is not limited to the individual EW; it extends to the firm or company and may extend to the wider group as in Marks & Spencer v Freshfields [2004] EWCA Civ 721 et al. S appealed.

The UK Court of Appeal noted fiduciary obligations may exist outside established categories citing Sheikh Al Nehayan v Kent [2018] EWHC 333 (Comm) which drew upon Smith, Fiduciary Relationships (2014) 130 LQR 608. Smith, at 619, notes a court will inquire whether the advisor has effective power over the advisee's decision-making, per the Canadian Supreme Court in Hodgkinson v Simms [1994] 3 SCR 377 at 409-410: "…the cases suggest that the distinguishing characteristic between advice simpliciter and advice-giving rise to a fiduciary duty is the ceding by one party of effective power to the other. It is this mutual conferring and acceptance of power to the knowledge of both parties that creates the special and onerous trust obligation".

Sweeney v VHI [2020] IECA 150 was referred to as a decision where an EW was found to owe a fiduciary duty tangentially. The Court disagreed with the Sweeney court where it said the EW was torn between his obligations to the client on the one hand and the court on the other, an approach contrary to Jones v Kaney [2011] UKSC 13 which settled that an EW has a paramount duty to the court or tribunal. [Aside: Of note in this jurisdiction (the Republic) is S.I. No. 254/2016, Part XI, at 57(1): "It is the duty of an expert to assist the Court as to matters within his or her field of expertise. This duty overrides any obligation to any party paying the fee of the expert."]

On the facts, the UK Court of Appeal held no fiduciary relationship existed. As regards conflicts of interest, the Court found that S was in contract not to create a conflict of interest, that it bound all Secretariat entities and that S was in breach. A practical test, the Court suggested, is in Hollander and Salzedo, *Conflicts of Interest*, 6th Ed., Para. 1-005:

"It's not difficult to work out what a conflict is. You put yourself in the client's shoes, and you ask yourself, would you like you doing what the other client has asked you to do? If the answer is 'no', you've probably got a conflict."



Report on 2021 CIArb Annual Conference on the Construction Contracts Act 2013

Peter O Malley FCIArb

For what has now become our flagship event, the 'CCA 2013 Conference', organised by Maebh Gogarty and Danyal Ibrahim of our Young Members Group (YMG), was held on 14 July 2021, with over 100 delegates in attendance. The Conference was opened with an introduction from our Chair, Billy Morrissey, who talked about adjudication as an increasingly popular method of resolving disputes, where there are opportunities for those who are prepared to work hard. In summary, Billy advised that it is best to avoid adjudication if you can. However, if you do proceed to adjudication always try and agree an adjudicator and be prepared for a fast and adversarial process.

The introduction was followed by the keynote presentation from the new Chair of the Construction Contracts Adjudication Service (CCAS), Bernard Gogarty, who took up office on 1 July 2021. Bernard advised that there is a great debt owed to the outgoing Chair of the CCAS, Dr Nael Bunni, acknowledging his work as a leading ADR practitioner worldwide. Apart from elaborating on his role as the new Chair, Bernard took the opportunity to announce his intention to hold a forum later this year to discuss adjudication, together with possible amendments, additions to the Act and the supporting Code of Practice.

The first subject presentation was made by Dermot Durack, the Secretary of the Branch, with a discussion from the Referrer's perspective in the importance of assisting the adjudicator by preparing an easily comprehensible submission. Helping the adjudicator 'solve the puzzle' through clarity of documentation with a clear path of navigation and a sanity check before submission, were emphasised by Dermot as essential steps.

Mary Liz Mahony then followed with an interesting presentation from the Respondents point of view. Mary Liz advised that there was no longer any excuse for being surprised or failing to anticipate adjudication, as it is now established as part of the construction process. The Response should be carefully considered and before introducing any counter claim, it should be asked if it would be more effective to have this advanced through a separate adjudication. Mary Liz explained that any Response should be fully comprehensive, you cannot rely on having 'another bite of the cherry', take control and do not ignore any warning signs. Mary Liz closed by saying that the Response should be written with the overall objective of demonstrating why the Referral must fail.

Martin Waldron, the immediate past Chair of the Branch, provided a brief review of the most recent jurisprudence made through the handful of recent decisions that have been handed down, advising that whilst this provides some guidance, it equally also raises some questions.

After a short break, Fiona Egan made a presentation on the court rules, in particular the recent Practice Direction HC 105 which came into force on 26 April 2021, confirming the support of the High court for the interim, binding nature of adjudication decisions. Fiona advised that the announcement of Justice Simons, as the presiding judge for adjudication matters, will hopefully result in a consistency of adjudication enforcement decisions. In summarising, Fiona felt that these measures should make the enforcement of an adjudicator's decision more expedient, being in support of the objective of the Act, to provide early decisions and maintain cashflow.

David McCarthy then provided a presentation on the three most important steps for the Referrer, namely the Notice to Adjudicate, the Referral Notice and representations on challenges/observations. David explained that the Notice to Adjudicate will set out the jurisdiction of the adjudicator whilst also defining the dispute that the adjudicator must decide. In respect of the Referral Notice, David suggested that it should be clear, concise, logical, substantiated, and supported with witness statements as required. Finally, David advised that adjudication moves at a frenetic pace where you must be ready to make any jurisdictional challenges quickly, or otherwise risk losing the opportunity.

The final presentation of the day was from Jarlath Kearney, the Chair of the Northern Ireland Chapter of the Irish Branch. Jarlath provided some interesting insights based on the 22 years of experience since the enactment of the adjudication legislation in Northern Ireland, advising that even now there are many people who are unaware of the rights and protections provided by the Act. Jarlath spoke about the variety of nominating bodies in Northern Ireland and the resultant inconsistency of standards. Jarlath advised that these difficulties should not occur under the CCA 2013, which has the benefit of the CCAS in support.

The final session was a round table discussion, moderated by Peter O'Malley, involving a panel of four leading adjudication practitioners, Gerry Monaghan, Denise Kennedy, Keith Kelliher and Martin Cooney. The panel questions served to provoke some passionate responses particularly in relation to adjudication tactics, commercial considerations, scale of dispute and debate on seeking to have greater consistency and transparency for adjudicator fees.

The conference was closed with some final remarks from Billy Morrissey including thanks to the organisers, Maebh Gogarty, Danyal Ibrahim and Jennifer Crowther for their excellent work in delivering this years' conference.

COURTS SHOWING STRONG SUPPORT FOR THE CONSTRUCTION CONTRACTS ACT

Peter McCarthy LL.M., BSc., FRICS, FSCSI, FCIArb

Following the collapse of the construction industry in 2008, which resulted in many contractors becoming insolvent due to non-payment, the Government introduced the Construction Contracts Act 2013 (the Act), which came into force on 25 July 2016. The primary purpose of the Act was to create new legal rights and obligations on the parties to a relevant construction contract which included:

- an entitlement for contractors to be paid the total value of work completed every 30 days
- a right to suspend work for non-payment.
- a ban on the widely used 'pay-when-paid' clauses; and
- a new right for a party to a "construction contract" to refer a payment dispute to adjudication at 'any time'.

The key steps involved in the Adjudication process are:

- Once a payment dispute has crystallised, the claimant gives the respondent a notice of intention to refer the payment dispute to adjudication,
- An adjudicator is appointed, either by agreement or by the chair of the minister's panel of adjudicators,
- The claimant then refers the dispute to the adjudicator within seven days of the adjudicator's appointment,
- Once the dispute has been referred, the adjudicator must decide within 28 days, unless extended by the claimant or by agreement,
- During that period, the adjudicator will consider all documents, may ask for further submissions from both parties and may conduct a hearing,
- The adjudicator's decision is "binding" until the parties finally settle the dispute or a different decision is reached in arbitration or court.

The Act aims to safeguard cash flow on construction contracts by providing injured parties with the tools to get paid quickly without spending considerable time and money resolving disputes in arbitration or court.

The rapid nature of adjudication can only work if the courts are willing to enforce decisions made by adjudicators; otherwise, unsuccessful parties could ignore decisions made against them and therefore undermine the very purpose of the Act. This is the very reason why statutory adjudication has flourished in the UK to now become the most widely used form of dispute resolution since its introduction in 1996. From the get-go, the UK courts have been willing to enforce adjudicators decisions even where the adjudicator got it wrong. As a result, adjudication in the UK has been described as "pay now, argue later" and involves rough justice. The robust nature of adjudication in the UK is clear from the following remarks of Sir Murray Stuart Smith in the Court of Appeal in *C & B Scene Concept Design Ltd v Isobars Ltd* [2002] EWCA Civ 46 [para 27] where he said "*It is now well established that the purpose of adjudication is not to be thwarted by an overly sensitive concern for procedural niceties. …*"

Because of the constitutional differences between the UK and Ireland, there was some doubt that similar levels of support would be shown by Irish courts in enforcing adjudicators decisions, especially in situations where rough justice was served on the unsuccessful party. These concerns were discussed by Mr Justice Frank Clarke of the Supreme Court in a paper titled *Adjudication – The Role of the Courts* [29 January 2014], where he said on page 3, "*I do not think it can be assumed that the precise way in which the Irish courts will approach issues arising out of adjudication will be identical to the way in which similar questions might be approached in the UK*". Justice Clarke added on page 6 that "*the starting point is that the constitutional requirement of fair process necessarily applies in the adjudication process*" and on page 11 said, *"the court took the view that it could not dispense with fair process. … So, it seems that the need to comply with fair process overrides practicality…*"

Mr Anthony Hussey raised similar concerns in his book *Construction Adjudication in Ireland* [2017]. On page 3, he refers to "*the elephant in the room*" being that of compliance with the Irish Constitution of 1937. Mr Hussey says, "*it is likely that the Irish courts on constitutional grounds will balk at the prospect of enforcing adjudicators decisions that are clearly incorrect. The courts in the UK and elsewhere have robustly supported adjudication to the extent of enforcing decisions that were manifestly incorrect*". Mr Hussey says that if the courts are prepared to set aside a decision on that basis alone, the whole purpose of the Act could be defeated.

At the time of writing, there have been three cases of note before the courts where it had to decide on the enforcement of an adjudicator's decision. First up was *Gravity Construction Limited v Total Highway Maintenance Limited* [2020 No. 153 MCA]. This case involved an application by Gravity to seek enforcement of an adjudicator's decision for the sum of €135,458.92. *Totals* response to the application was that enforcement should be stayed pending the determination of the dispute in arbitration. Notwithstanding the fact that *Total* later gave a formal undertaking to pay the adjudicator's award within two weeks of the hearing, the court still saw it fit to make an order against *Total* and for the awarded sum to be paid within seven days. Even though this decision does not touch on the constitutional concerns raised by Justice Clarke and Mr Hussey, it shows the court's support for the "pay now argue later" intentions of the Act.

Next up was P*rincipal Construction Ltd v Beneavin Contractors Ltd* [2020 No. 199 MCA]. This case involved the enforcement of an adjudicator's decision to the sum of €643,635.98 by *Principal*. Although the issues, in this case, again did not touch on any constitutional matters, it confirmed the courts' full intent to enforce an adjudicators award unless the adjudicator lacked jurisdiction or breached natural justice rules. In delivering the judgement, Mr Justice Meenan provided us with a helpful reminder of the rationale underpinning statutory adjudication where he said

"The purpose and aim of the Act of 2013 is to provide for a summary procedure to enforce the payment of moneys from one party to another […] This ensures that moneys are paid without having to await the outcome of arbitration or litigation, which, more often than not, involves delay. The necessary timelines for payment in the building and construction industry are very different to the timelines in arbitration and litigation."

The third case is *Aakon Construction Services Limited v Pure Fitout Associated Limited* [2021 No. 161 MCA]. In this case, the respondent sought to resist paying the adjudicators decision for the sum of €242,225.09 on the basis that the adjudicator had breached the rules of fair procedure and constitutional justice by failing to address a substantive defence raised by the respondent.

The adjudicator held that a failure to respond to a payment claim notice issued by the claimant had the consequence of triggering a default requirement to pay the amount claimed. With that, the adjudicator then relied on a judgement of the Court of Appeal in England and Wales in *Grove Developments Ltd v. S&T (UK) Ltd* [2018] EWCA Civ 2448, which led the adjudicator not to consider the defence raised by the respondent where the respondent sought the 'true' value of the payment claim notice to be adjudicated upon.

In arriving at its decision, the court recognised the difference between UK legislation and domestic legislation and found that the adjudicator was wrong in deciding that a failure to respond to a payment claim notice triggered a requirement to pay the amount claimed. Notwithstanding this error, the court indicated it was not concerned with whether the adjudicators interpretation of the legal position was correct, but rather the narrow issue of whether failure by the adjudicator to embark on a 'true' valuation of the works constituted a breach of fair procedure. Finding that the adjudicator did address the respondents request for a 'true' valuation, albeit, in the wrong way, it found that the adjudicator did not breach the rules of fair procedure and constitutional justice because it addressed all the points put to him.

Aakon v Pure Fitout is the first decision where the courts could have baulked at enforcing the adjudicator's decision, the fact that the adjudicator arrived at the wrong answer. Instead, the courts stood squarely behind the objectives of the Act by beating the 'pay now argue later' drum loud and clear and enforced the adjudicator's decision. In doing so, the courts sounded a word of caution by indicating that an error of law made during an adjudication might be seen as outside the adjudicator's jurisdiction. The court indicated that "*As the case law evolves, it will be necessary to address more difficult questions, such as whether errors of law are similarly capable of examination in the context of an application for leave to enforce*".

It will be interesting to see how this particular aspect of the law develops in the future. The courts' light-touch approach in *Aakon v Pure Fitout* and its support in earlier cases bodes well for the Act thus far.

It looks like the white elephant is safe and well for now.