

APPROVED

[2023] IEHC 355



THE HIGH COURT

2023 No. 142 MCA
2023 No. 150 MCA

IN THE MATTER OF THE CONSTRUCTION CONTRACTS ACT 2013

BETWEEN

MCGURRAN CIVILS ROI LIMITED

APPLICANT

AND

K & J TOWNMORE CONSTRUCTION LIMITED

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 23 June 2023

INTRODUCTION

1. This judgment is delivered in respect of an application for leave to enforce two awards made in respect of adjudications under the Construction Contracts Act 2013. The awards involve the same parties but relate to two different construction projects.

NO REDACTION REQUIRED

2. The unusual feature of the case is that whereas the respondent is formally opposing the application for leave to enforce, it does not challenge the validity of either of the awards. Rather, the respondent seeks minor reductions in the amounts claimed by the applicant. These reductions relate, principally, to the calculation of interest and the recoverability of VAT. The respondent also makes an overarching complaint that the applicant did not send a formal solicitor's letter prior to the institution of the proceedings.

LEGISLATIVE FRAMEWORK

3. The Construction Contracts Act 2013 has put in place a statutory scheme of adjudication whereby payment disputes under construction contracts can be heard and determined in a very short period of time. The adjudication process is designed to be far more expeditious than conventional litigation or arbitration. The default position is that the adjudicator shall reach a decision within 28 days beginning with the day on which the referral is made. This period can be extended by up to 14 days, with the consent of the party by whom the payment dispute was referred. Both parties may agree to a longer period.
4. To assist in achieving compliance with the tight timeframe, the legislation allows an adjudicator to take the initiative in ascertaining the facts and the law in relation to the payment dispute. The role of an adjudicator is thus more inquisitorial than that of a court.
5. The fact that an adjudication will be heard and determined within a matter of weeks has the consequence that the legal costs incurred by the parties will be much less than those of conventional litigation or arbitration. Moreover, the losing party is not liable to pay the costs of the successful party: Section 6(15)

of the Act provides that each party shall bear his or her own legal and other costs incurred in connection with the adjudication.

6. Of course, the fast-track process will be of limited practical benefit if the outcome of the process, i.e. the adjudicator's decision, cannot be enforced promptly. There is little point in putting the adjudicator under the cosh to produce a decision within a matter of weeks, only for there to be a delay of months, or even years, thereafter in the enforcement of that decision. The Act seeks to ensure that an adjudicator's decision may be enforced promptly by making it binding upon the parties on a provisional basis. This is the so-called "pay now, argue later" principle: see, generally, *Aakon Construction Services Ltd v. Pure Fitout Associated Ltd (No. 1)* [2021] IEHC 562 (at paragraphs 31 to 34).
7. The innovative feature of the legislation is that it provides that an adjudicator's decision shall be enforceable, by leave of the High Court, in the same manner as a judgment or order of that court with the same effect. Where leave is given, judgment may be entered in the terms of the adjudicator's decision.
8. Applications for leave to enforce are subject to an expedited procedure as prescribed in Practice Direction HC105. The underlying imperative for expedition has implications for the type of order which a court will make in cases where, as in the present, the responding party indicates that they will eventually pay the sums due under the adjudicator's award. For example, in *Gravity Construction Ltd v. Total Highway Maintenance* [2021] IEHC 19, this court declined to adjourn the proceedings to allow the payment to be made but made an "unless order" instead.

PROCEDURAL HISTORY

9. The application for leave to enforce relates to two adjudicators' awards. These will be described as the "*Eblana Avenue*" award and the "*Carr's Lane*" award, respectively.
10. The adjudicator's award in respect of Eblana Avenue is dated 19 December 2022. The respondent does not raise any issue as to the validity of the award and does not raise any objection as to the fairness of the procedures leading up to the making of the award. Insofar as relevant to the current application, the key elements of the adjudicator's award are as follows. These are set out at items (d) through to (g) and the same lettering is used in this judgment.
 - "d. That the Responding Party pay the balance due and owing of €238,649.41, less retention to the Referring party within 7 calendar days of the date of this decision.
 - e. The Responding party make a payment to the Referring Party for interest in the sum of €3,637.59 to the date of this decision and €18.37 per day thereafter until payment is made.
 - f. As between the parties and without affecting their joint and several liability the Responding party shall within 5 days of the date of this decision pay 100% of the Adjudicator's fees being €14,875 excluding VAT at 23%.
 - g. That the Responding Party shall therefore repay to the Referring party any fees paid on account to the Adjudicator, €5,000 plus VAT within 7 calendar days of the date of this decision."
11. The applicant first sought payment pursuant to the adjudicator's award on 20 December 2022. This request was followed by a second request for payment on 6 January 2023. This second request stated that if the payments were not made by 13 January 2023 the applicant would instruct solicitors to recover the amounts due.

12. The parties engaged in correspondence, by email, during the period January to February 2023 with a view to agreeing, if possible, a schedule of payments. It is apparent from this correspondence that it was always intended that what was described as a “*solicitors agreement*” was to be drawn up if an agreement in principle was reached between the parties. In the event, however, the parties were unable to reach agreement and the applicant indicated on 2 February 2023 that it intended to issue proceedings as a matter of urgency.
13. There was further engagement in March 2023 but, again, no formal agreement was ever executed between the parties.
14. The proceedings in respect of the Eblana Avenue award were instituted by originating notice of motion on 23 May 2023 (High Court 2023 No. 150 MCA). The principal sum sought in the motion had been €123,560.78 plus VAT. This sum reflected payments of €115,088.63 made by the respondent. It is now accepted by the applicant that the figure in the motion is incorrect in two respects. First, the figure does not make allowance for a retained sum of €11,932.47. Secondly, VAT is not chargeable as between subcontractors and principal contractors: accordingly there is no VAT payable on the principal sum. (The position is different in respect of the adjudicator’s fees). The applicant revised its claim in an affidavit filed on 15 June 2023. The revised claim also reflected a further payment which had been made by the respondent in the interim.
15. The motion also seeks interest to the date of the adjudicator’s award together with daily interest of €18.37 thereafter.
16. Turning to the Carr’s Lane award, proceedings were instituted on 17 May 2023 (High Court 2023 No. 142 MCA). The sum claimed is €5,402.90 (plus VAT).

17. The application in both cases was heard on 19 June and 21 June 2023.

DISCUSSION AND DECISION

18. The position adopted on behalf of the respondent has been to oppose the application for leave to enforce in both cases. The replying affidavits filed on its behalf request the court to refuse the applications. This is so notwithstanding that the respondent does not, in fact, put forward any defence to most of the claim. Rather, the respondent seeks to quibble in respect of minor matters concerning the calculation of interest and the recoverability of VAT.
19. The proper approach for the respondent to have adopted in the circumstances would have been either to discharge so much of the claim as it did not dispute or, alternatively, to consent to judgment in respect of so much of the claim as it did not dispute. The approach which it actually adopted resulted in a prolonged hearing and may have consequences in terms of its liability for legal costs. As of the date the proceedings were issued there would appear to have been a sum of approximately €80,000 outstanding pursuant to the adjudicators' awards; and as of the date of the hearing, a sum of approximately €40,000. It is no answer to these claims to suggest that there is a dispute at the margins in respect of a sum of approximately €3,000.
20. Before turning to consider the specific items in dispute, it is necessary to address the following two preliminary matters. The first is the allegation mooted at an earlier stage of the proceedings that some form of *binding agreement* had been reached between the parties in respect of a schedule of payments. Very sensibly, this allegation was not pursued at the hearing before me. For completeness, it should be recorded that there is no basis for suggesting that a binding agreement

had been reached. It is apparent from the email correspondence that it had always been intended that if an agreement in principle had been reached, same was subject to the execution of a formal agreement drawn up by the parties' respective solicitors.

21. The second preliminary matter is the respondent's objection that the applicant did not send a formal solicitor's letter in advance of the issuing of proceedings. It is suggested that had this been done then the dispute in relation to certain items could have been addressed. With respect, this objection is not well founded. Any supposed failure by a claimant to send a warning letter in advance of litigation will normally only ever be relevant if the responding party can say that it would have reacted to a warning letter, if sent, in such a way as to obviate the necessity for legal proceedings. If, for example, the respondent were to have been in a position to say that it would have promptly discharged the two adjudicators' awards without the necessity of litigation had it only received a warning letter, then this would have consequences in terms of legal costs. A court might well hold that the applicant had been precipitous in issuing proceedings in circumstances where a satisfactory outcome could have been achieved amicably. No such considerations arise on the facts of the present case. Even now, some four weeks after proceedings have been issued—and after the hearing has taken place—the respondent is still in default of payment. Moreover, the fact of the matter is that the applicant had given the respondent ample warning of its intention to pursue proceedings unless the adjudicators' awards were satisfied. As early as January 2023, the applicant had intimated that it intended to issue proceedings. There is no requirement for such a warning to be embodied in a formal solicitor's letter. More generally, any requirement

to issue a warning letter has to be seen in the context of the very tight timelines prescribed for adjudication. As noted in the introductory part of this judgment, there would be little practical benefit to an expeditious adjudication process if there were to be significant delays thereafter in the enforcement of an adjudicator's award. There is no obligation upon the party seeking to enforce an adjudicator's award to give repeated warning to the defaulting side of an intention to issue proceedings.

22. I turn next to consider the specific items disputed by the respondent. The first item in dispute is in relation to retention monies. It is apparent from paragraph (e) of the adjudicator's award that retention was to be set-off against the headline figure of €238,649.41. This set-off is not reflected in the originating notice of motion. This resulted in a (temporary) overstatement of the claim by the sum of €11,932.47. Importantly, this was corrected by way of an affidavit filed on behalf of the applicant on 15 June 2023. The initial error caused no prejudice to the respondent: as of that date it continued to be in arrears in the sum of approximately €40,000. This is not a case where, but for the overstatement, the respondent would have been in compliance.
23. The next item in dispute is in relation to the payment of interest. The adjudicator's award specified that interest be paid at the rate of €18.37 per day until payment is made. The basis upon which this figure is calculated is apparent from paragraphs 185 to 190 of the adjudicator's award. In effect, the adjudicator applied an annual rate of 8% interest to a principal sum of €83,820.80 and produced a daily rate of €18.37. It is argued on behalf of the respondent that, in circumstances where staged payments have since been made, and the sum of €83,820.80 has been paid off, the daily rate of interest should have abated

proportionately. The failure to do so is said to have resulted in an overstatement of the claim by approximately €2,300.

24. With respect, the adjudicator's award makes no provision for such abatement. The adjudicator did not allow for the making of staged payments but rather had directed that the full sum be paid within seven days. The adjudicator did not contemplate staggered payments and accordingly the possibility of same is not built into the daily rate of interest.
25. The next item in dispute is in relation to the tax treatment of certain payments. The adjudicator's fees are subject to VAT at a rate of 23%. The adjudicator has directed that the earlier payment made on account, as it were, by the applicant should now be refunded. The question which arises is as to whether this is confined to the net fee of €5,000 or whether it includes the gross payment of €5,000 plus VAT. The respondent submits that in circumstances where the applicant is itself registered for VAT, any VAT paid on the adjudicator's fees would be recoverable as a trading expense and cannot, therefore, be claimed as against the respondent. With respect, the adjudicator's award is clear on the point. It is the figure of €5,000 plus VAT that has to be paid. It is a matter for the applicant to ensure that its VAT returns reflect that it has been reimbursed, i.e. that there is no double recovery of the VAT element. This is a matter between the applicant and the Revenue Commissioners: it does not obviate the respondent's obligation to comply with the adjudicator's award. A similar logic applies in respect of the adjudicator's fees in Carr's Lane.
26. The final item in dispute is whether the initial payment of €75,000 should be credited exclusively to Eblana Avenue, or whether €5,402.90 thereof should be credited to Carr's Lane. The significance of this being that if the smaller sum is

allocated to Carr's Lane, then full payment pursuant to that adjudicator's award would have been made *prior* to the institution of the proceedings bearing the record number 2023 No. 142 MCA. This would have implications for any costs order to be made in those proceedings.

27. The respondent submits that the principle in Clayton's case applies in that it should be assumed that the payment should be applied, first, to the older debt pursuant to the adjudicator's award in Carr's Lane.

28. With respect, this does not follow. Leaving aside whether the rule, which relates to bank accounts, has any application at all in the context of the discharge of adjudication awards, the rule in Clayton's case creates a *presumption* only. Here the presumption is rebutted: there is evidence as to the actual intention of the parties to be found in the correspondence sent shortly prior to the making of the payment of €75,000 on 30 January 2023. Whereas no agreement was ultimately entered into between the parties as to the schedule of payments for the following months, it is apparent what the intention of the respondent was in respect of the first proposed payment. A figure of €80,402.90 would be paid on 30 January 2023 and this was described as being made up of €75,000 for Eblana Avenue plus €5,402.90 for Carr's Lane. In the event, only the €75,000 was paid. The applicant was entitled to credit this against the Eblana Avenue award.

29. The sum recoverable in respect of Eblana Avenue is as follows:

Sum awarded by the Adjudicator	€238,649.41
Retention	(€11,932.47)
Payment made to date by Respondent	(€200,668.79)
Interest per decision	€3,637.59

Interest at €18.37 per calendar day (182)	
(19 December 2022 - 19 June 2023)	€3,343.34
Adjudicator's fee (including VAT)	€6,150
TOTAL	€39,179.08

CONCLUSION AND FORM OF ORDER

30. For the reasons set out herein, the applicant is hereby granted leave, pursuant to Section 6(11) of the Construction Contracts Act 2013 and Order 56B of the Rules of the Superior Courts, to enforce the two adjudicators' decisions. Judgment will be entered against the respondent in the sum of €45,824.75. This is made up of a sum of €39,179.08 in respect of the Eblana Avenue award (2023 No. 150 MCA) and €6,645.67 in respect of the Carr's Lane award (2023 No. 142 MCA). Further interest will accrue from the date that the order of this court is perfected. The parties have liberty to apply.

POSTSCRIPT: LEGAL COSTS

31. Following the delivery of this judgment, the parties made submissions on the allocation of legal costs. For the following reasons, I ruled that the applicant is entitled to recover 90% of its costs of the Eblana Avenue proceedings (2023 No. 150 MCA), and all of its costs of the Carr's Lane proceedings (2023 No. 142 MCA). Such costs to be adjudicated in default of agreement. The starting point for the analysis is that the default position under Section 169 of the Legal Services Regulation Act 2015 is that the applicant, having been entirely successful in the proceedings, would be entitled to its costs. This is subject to the overarching discretion of the court. This requires the court to consider

matters such as the conduct of the litigation. As already explained, the applicant is not to be criticised for not having sent a formal solicitor's letter prior to the institution of the proceedings. However, some account has to be taken of the fact that the claim, as initially advanced in the notice of motion, overstated the amount. Whereas this error was innocent, was quickly corrected and did not cause any prejudice to the respondent, it is important that a party seeking to enforce an adjudicator's award should state their claim with precision. A discount of 10% will be applied to the legal costs to reflect the error.

32. The applicant is not to be criticised for having brought two separate sets of proceedings. Whereas the parties are the same, the adjudication involved different adjudicators and different properties. It was appropriate to issue two separate motions. Thereafter, the applicant very reasonably sought to have the proceedings linked and they were heard together. The applicant is therefore entitled to two sets of costs. However, in measuring costs, the Chief Legal Costs Adjudicator should have regard to the fact that the effective consolidation of the two sets of proceedings resulted in a saving and the costs would be lower than had the two cases been listed separately.

Appearances

Conor Duff for the applicant instructed by Byrne Wallace LLP
Eoin O'Shea for the respondent instructed by Tom Casey