

# Adjudicator's decision enforced in Ireland



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*On 26 January 2021, a judgement was handed down in the Irish High Court to enforce an Adjudicator's decision made pursuant to the Construction Contracts Act 2013 ("the Act").*

*In this article, I briefly explain what Adjudication is before considering the significance of the decision in [Gravity Construction Limited v Total Highway Maintenance Limited \[2021\] IEHC 19](#) to the Irish construction industry.*

### What is Adjudication?

In short, Adjudication is a 28-day dispute resolution process which can be used to resolve disputes relating to payment under construction contracts. The key steps involved are as follows:

- A payment dispute crystallises (for example, a contractor refusing to pay a subcontractor);
- The aggrieved party gives the other a "notice of intention" to refer the payment dispute to Adjudication;
- An Adjudicator is appointed (this is normally a construction/legal professional and there are various different ways to appoint one);
- The aggrieved party "refers" the dispute to the Adjudicator within 7 days of the Adjudicator's appointment (this means giving them a copy of the contract and any other documents needed to prove the aggrieved party's case);
- Once the dispute has been referred, the Adjudicator must reach a decision within 28 days;
- During the 28-day period, the Adjudicator will consider all the documents referred to them, and will likely ask for further submissions from both parties (as there are always two sides of a story!); and
- The Adjudicator's decision is "binding" on the parties until the dispute is finally settled by the parties

or a different decision is reached in arbitration or court.

Adjudication is designed to be rapid and to promote cashflow in the construction industry by giving aggrieved parties a mechanism to get cash in the bank quickly without spending years (and lots of money) in arbitration or court. Flash to bang in 28-days. This rapid mechanism only works however if the courts are willing to enforce decisions made by Adjudicators, otherwise, unsuccessful parties would simply ignore decisions made against them.

This is where the recent decision on *Gravity Construction* comes in.

### *Gravity Construction v Total Highway Maintenance – The Facts*

This case is all about an Adjudicator's decision dated 28 April 2020. The Adjudicator's decision concerned a payment dispute between Gravity Construction Limited ("*Gravity*") and Total Highway Maintenance Limited ("*TMS*"). In short, TMS lost and was ordered by the Adjudicator to pay Gravity €135,458.92.

TMS did not comply with the Adjudicator's decision. Gravity then issued court proceedings to enforce the Adjudicator's decision in the High Court. Gravity relied upon s.6(11) of the Act which states:

*“The decision of the adjudicator, if binding, shall be enforceable either by action or, by leave of the High Court, in the same manner as a judgement or order of that Court with the same effect and, where leave is given, judgement may be entered in the terms of the decision”*

Just before the High Court hearing date, TMS indicated that it was prepared to comply the Adjudicator's decision. It did so by having its solicitors make an offer to settle the proceedings on the basis that (1) it would pay Gravity the full amount of €135,458.92; and (2) it would pay “a reasonable contribution” towards Gravity's legal fees for the enforcement proceedings.

### **Gravity Construction v Total Highway Maintenance – The Decision**

The High Court enforced the Adjudicator's decision by giving an “*unless order*”. Paragraph 37 of the judgement summarises it:

*“... the order of the court is as follows. An order that the applicant has leave to enforce the adjudicator's decision in the same manner as a judgement or order of the High Court, and that judgement is to be entered against the respondent in favour of the applicant in the sum claimed unless the said sum is paid to the solicitors acting on behalf of the applicant within seven days of today's date... This order is made pursuant to section 6(11) of the Construction Contracts Act 2013”*

In other words, the High Court ordered TMS to comply with the Adjudicator's decision. The High Court enforced the Adjudicator's decision.

### **Gravity Construction v Total Highway Maintenance – Commentary**

The “*unless order*” part of the judgement was based on the fact that TMS, just before the court hearing, made an offer to comply with the Adjudicator's decision. This part is not that important.

What is important is the High Court's clear reference to s.6 (11) of the Act. This is the first reported case in which the High Court has put its shoulder behind Adjudication by enforcing an Adjudicator's decision under s.6(11) of the Act. For the reasons set out previously, without support from the High Court, Adjudication awards would not be worth the paper they are written on. The decision in *Gravity* is therefore very significant indeed.

That said, the whole point of Adjudication is speed. Adjudication is about getting aggrieved parties paid quickly. In this regard, the timelines in *Gravity* give cause for concern. The Adjudicator's decision at the heart of the proceedings was dated 28 April 2020. It took almost nine months to enforce. So, does this protracted timeframe defeat the purpose of Adjudication entirely? Well... yes, it probably does.

There were a number of reasons why it took so long to enforce the Adjudicator's decision in *Gravity*. I have summarised these below:

- Firstly, TMS opposed the enforcement proceedings on a number of legal points (I touch on one of these later). This apparently delayed the proceedings by six months;

- Secondly, TMS also successfully objected to the fixing of an earlier hearing date on 17 September 2020 (the decision does not say why... covid perhaps?); and
- Thirdly, there is also the inertia within the High Court system itself. It can often take months to get a hearing date at the best of times.

The points summarised above might sound familiar to Adjudication practitioners and organisations who have experience in the UK. In the early days of adjudication in that jurisdiction, there were similar teething problems. Ultimately, these teething problems were resolved by way of reform within the court system. In the UK, the courts now enforce Adjudication decisions by way of summary judgement, with enforcement hearings taking place roughly 28 days after a procedural application (have a look at Section 9 of the “[TCC Guide](#)” for more details on that).

In my opinion, if Adjudication is going to become a mainstay in Irish construction, we will need to see reform within the court system to facilitate this. The courts need to rapidly enforce Adjudication awards if the process is to have a long-term future in Ireland.

Another barrier to the uptake of Adjudication in Ireland was also touched upon in *Gravity*. At paragraph 32 of the decision, the High Court briefly touched upon one of the legal arguments raised by TMS to resist enforcement. Put short, TMS put forward an argument that the enforcement proceedings should be “*stayed*” (i.e. put on hold) pending determination of arbitration proceedings. In this regard the High Court noted that:

*“...the propriety of the attempt to stay the enforcement of the adjudicator's award under the Construction Contracts Act 2013 pending the determination of arbitration proceedings is something that is open for debate given the express wording of section 6(10) of the Act.”*

The wording of s.6(10) of the Act is set out below for ease of reference:

*“The decision of the adjudicator shall be binding until the payment dispute is finally settled by the parties or a different decision is reached on the reference of the payment dispute to arbitration or in proceedings initiated in a court in relation to the adjudicator's decision”*

The UK Adjudication regime has a very similar provision to s.6(10) of the Act. In that jurisdiction, there is no debate as to what it means. It means pay first, argue later. Do what the Adjudicator says in the first instance, and if you are unhappy about it, start from afresh in arbitration or court. For constitutional reasons however, the position might not be as clear cut as that here in Ireland, so the judge in *Gravity* was absolutely correct that debate still needs to be had.

### **Conclusion**

The decision on *Gravity* is very significant. It is the first reported case in which an Adjudicator's decision was enforced in Ireland. That said, the timeline to enforce the decision gives cause for concern and there are more debates to be had regarding the interpretation of s.6(10) of the Act. Stay tuned for more updates in the very near future, as this will not be the last High Court case that touches upon Adjudication under the Act.