

Aakon Construction Services Ltd v. Pure Fitout Associated Ltd

A step forward for adjudication in Ireland

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On 13 September 2021 the Irish High Court handed down its judgment on the matter of *Aakon Construction Services Ltd v. Pure Fitout Associated Ltd*. This decision enforced a €242,225.09 ‘smash and grab’ adjudication award. This is a very significant judgment for the Irish construction sector as not only is it one of very few enforcement decisions since the Construction Contracts Act 2013 (“the Act”) came into effect in 2016, but the decision also addresses how valid reliance placed on UK adjudication law decisions are in the Republic of Ireland.

Background

A payment dispute arose from a subcontract between Aakon and Pure Fitout. They agreed that the sub-contract represented a “*construction contract*” for the purposes of the Construction Contracts Act 2013. The dispute was referred to adjudication following a purported termination of the sub-contract as Pure Fitout purported to invoke a clause which allowed, *inter alia*, termination without fault.

The notice of termination was served on 12 November 2020. Aakon issued a payment claim notice prior to the termination notice, dated 27 October 2020. Pure Fitout paid the certified amount between 26 January 2021 and 09 February 2021. Aakon issued a further payment notice on 25 November 2020, after the termination notice. Aakon submitted to the adjudicator that they were entitled to submit the payment claim notice under clause 13 (payment) and clause 21 (termination of employment) of the sub-contract, and section 4 of the Construction Contracts Act 2013. They also said that Pure Fitout’s failure to issue a response to the payment claim notice within 21 days entitled Aakon to be paid the full invoiced amount. Pure Fitout alleged that the payment claim was deficient and did not comply with the sub-contract, thus clause 13.9 of the sub-contract did not become operational and no payment was due. The adjudicator decided that Aakon was entitled to a default payment of the total amount invoiced due to Pure Fitout’s failure to respond. Pure Fitout did not pay.

Aakon commenced proceedings to enforce the adjudicator’s award. Pure Fitout resisted the enforcement on the basis that the decision was “*invalid*”. Pure Fitout advanced two grounds for this, which the Court described as “*relatively narrow*”. Firstly, that the adjudicator did not have jurisdiction to reach his decision as his decision went beyond the terms of the payment dispute referred to him. The argument being that the adjudicator’s jurisdiction is defined by the notice of intention to refer. Secondly, that the adjudicator breached the rules of fair procedures and constitutional justice by failing to address a substantive defence raised by Pure Fitout in the written response to the referral.

Did the adjudicator exceed his jurisdiction?

The Court recognised that an adjudicator does not enjoy inherent jurisdiction. Jurisdiction is conferred by the parties and an objection to the scope of that jurisdiction can be analysed in terms of whether the adjudication process has complied with fair procedures and that the dispute has been decided on issues of which the responding party has notice. Whilst the Construction Contracts Act is silent on the interrelationship between the notice of adjudication and the subsequent referral of a payment dispute to the appointed adjudicator, the Act does stipulate that the referral should embellish the notice with extensive information and documentation. This means that the referring party is not limited to the information provided in the notice of intention to refer.

The evidence before the Court included a summary of the payment dispute, which was provided in the notice, which made it absolutely clear that the main issue to be decided via adjudication was whether the failure of Pure Fitout to respond to the payment claim resulted in Aakon being entitled to the full invoiced amount – the principal question was clearly whether a default payment had been triggered. Aakon expressly detailed the relevant provisions of the sub-contract and section 4 of the Act 2013 in the notice.

The adjudicator issued a detail decision on 25 June 2021. The decision engaged fully with the submissions regarding the alleged invalidity of the second payment claim notice. The notice was found to be valid in accordance with the sub-contract and the Act. Furthermore, the principal question, regarding the default payment, was precisely the dispute which the adjudicator ultimately decided – thus, the Court found that there was no basis for the claim that the adjudicator had exceeded his jurisdiction.

The respondent's reliance on UK legislation

Pure Fitout made several further objections to the enforcement, all of which were found to be groundless. One of these objections was that the notice of intention to refer did not specify the relief or redress sought by the applicant. The High Court deemed that this objection sought to introduce a requirement of UK legislation into the Irish domestic legislation. The UK "*adjudication notice*" requires the "*relief*" sought to be specified, but no such statutory requirement exists in Ireland and so no reliance could be placed on this argument.

Pure Fitout also made an objection that several claims were unlawfully advanced under one notice of intention to refer. One basis for this objection was that it was impermissible to pursue more than a single dispute in an adjudication. This argument was found to be groundless as the respondent failed to distinguish between the requirements of the Construction Contracts Act in Ireland and the equivalent UK legislation. Section 6(9) of the Act expressly allows that several payment disputes can be dealt with by an adjudicator *at the same time* under the same construction contracts or related construction contracts. There is no restriction under Irish domestic legislation on a party referring more than one dispute to an adjudicator as there is in the UK where consent of all the parties is needed. Nevertheless, the High Court recognised that the practical effect of that statutory restriction in UK legislation is limited in practice. The Court found that it was entirely legitimate for Aakon to advance alternative arguments – the arguments were properly characterised as specific issues arising in the context of the single "*dispute*" over whether a default payment was triggered.



Appointment of adjudicator

Pure Fitout further attempted to resist enforcement by arguing that two attempts to apply for the appointment of an adjudicator via the Chairperson of the Construction Contracts Adjudication Panel somehow rendered the process invalid. The Act does not prescribe form or content for the application for the appointment of an adjudicator under domestic law other than, failing agreement of the parties, the adjudicator shall be appointed by chair of the panel.

The Court ultimately ruled that the jurisdiction objection raised by Pure Fitout was misconceived and ignored the difference in the wording between Irish and UK legislation.

Fair procedure

The second argument raised by the Pure Fitout to resist the leave of enforcement was the alleged failure of the adjudicator to comply with fair procedures – insofar as the adjudicator failed to consider a substantive defence advanced on behalf of the respondent. Pure Fitout claimed that the adjudicator's decision openly acknowledged an alternative line of defence based on the "*true*" value of the works under the November payment claim notice but failed to consider it or provide reasons. The Court found that Pure Fitout's criticisms did not accurately reflect the approach of the adjudicator. The adjudicator acknowledged that the respondent was entitled to adjudicate the true value of the payment claim, but before being able to commence such an adjudication, it must first comply with the adjudicator's decision in this adjudication. The adjudicator was found to have made a reasoned decision that a valuation could not be commenced until the adjusted amount had been paid. The adjudicator's approach to this defence was better characterised by the Court as deciding that the line of defence was inadmissible at the time, rather than the defence being ignored.

Decision

Leave to enforce was granted. The “proofs” for the application, as identified in the Construction Contracts Act and Order 56B of the Rules of the Superior Courts, were all satisfied. The adjudicator made his decision properly in respect of the dispute referred to him and acted in accordance with fair procedures of natural justice and did not exceed his jurisdiction.

Quigg Golden Comment

There are a few key takeaways from this decision:

- i. Failure to respond to a payment notice can trigger enforcement of a payment of the full amount invoiced where the contract provides for this.
- ii. The party obliged to satisfy a payment claim and who wants to adjudicate the “true” value of the payment must do so after complying with the original adjudication decision and can then recover an overpayment that has been made.
- iii. Whilst it is tempting for Irish legal professionals to read across UK principles to Irish adjudication, the law of adjudication in the British jurisdictions is not the same and cannot always be directly applied.

It should be reiterated that for the purpose of this application, the Court was concerned only with the allegation that the adjudicator’s jurisdiction had been exceeded and that there was a breach of fair procedures, and thus constitutional justice. The judgment does not address the broader question of whether principles similar to those in the UK in the likes of *Grove Developments Ltd v. S & T (UK) Ltd* should be reflected in Ireland. The UK has developed an impressive body of case law on adjudication since the enactment of the Housing Grants, Construction and Regeneration Act 1996. In contrast *Gravity Construction Limited (2021)* was the first enforcement decision in Ireland. Only time will tell if the legal framework in Ireland will allow adjudication to develop with the same statutory principles as we have seen in England, Wales, Scotland and Northern Ireland.

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