APPROVED **[2025] IEHC 469**

THE HIGH COURT

2024 644 MCA

IN THE MATTER OF THE CONSTRUCTION CONTRACTS ACT 2013

BETWEEN

ALBERT CONNAUGHTON

APPLICANT

AND

TIMBER FRAME PROJECTS LTD
T/A TIMBER FRAME IRELAND

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 1 September 2025

INTRODUCTION

1. The Construction Contracts Act 2013 has put in place a scheme whereby payment disputes under construction contracts can be referred to mandatory statutory adjudication. An adjudicator's decision is *provisionally* binding on the parties and is subject to summary enforcement.

NO REDACTION REQUIRED

2. These proceedings take the form of an application for leave to enforce a decision of an adjudicator. Section 6(11) of the Construction Contracts Act 2013 provides that an adjudicator's decision can, with the leave of the court, be enforced in the same manner as a judgment or order of the High Court.

3. The default position is that the successful party is entitled to enforce an adjudicator's decision *pro tem*, with the unsuccessful party having a right to reargue the underlying merits of the payment dispute in subsequent arbitral or court proceedings. This approach is sometimes referred to informally as "*pay now, argue later*". The High Court does, however, enjoy a discretion to refuse leave to enforce an adjudicator's decision.

THE ISSUES

4. These proceedings present the following issue of principle. Does a claim by an employer/principal for damages, which claim is made consequent upon the termination of a construction contract for repudiatory breach, comprise a dispute "*relating to payment*". If not, then the claim is not one which may properly be referred for statutory adjudication under the Construction Contracts Act 2013.

5. These proceedings also raise the following two additional issues. First, whether the adjudication process complied with fair procedures. Second, whether the underlying construction contract should be regarded as tainted with illegality and hence void or unenforceable in circumstances where, or so it is alleged, the contract works would have entailed an element of unauthorised development, i.e. the demolition of part of an existing dwelling house without the benefit of planning permission.

DESCRIPTION OF THE PARTIES

6. The moving party in these proceedings will be described in this judgment as "*the employer*" or "*the referring party*", and the respondent as "*the contractor* or "*the respondent*", to reflect their status under the construction contract and in the adjudication process, respectively.

PROCEDURAL HISTORY

7. These proceedings were instituted on 20 December 2024. The originating notice of motion was first returnable before the court on 14 January 2025. On the return date, the moving party, i.e. the employer under the construction contract, was represented by solicitor and counsel. The contractor/respondent was not legally represented. However, a director of the company (Mr. Declan Bourke) sought an adjournment in order to allow the company to obtain legal representation. To facilitate this, a hearing date was fixed for 13 February 2025, with a direction that legal submissions and any replying affidavit on behalf of the contractor/respondent be filed by 4 February 2025. This is a longer lead time than is normal in the Construction Contracts List.

8. On the hearing date, Mr. Bourke applied for a further adjournment. Mr. Bourke indicated that he had arranged a consultation with a prospective solicitor for the following week. Mr. Bourke explained, separately, that he had an immovable commitment which would preclude him from attending a hearing until the following month (March 2025). I accepted this explanation as genuine and as justifying a longer adjournment than normal. The hearing was adjourned, on a peremptory basis, to 18 March 2025.

9. The application was part-heard on 18 March 2025. The application was then adjourned to allow the parties to file supplemental written legal submissions. The submissions were filed on 21 May and 27 May 2025, respectively. The hearing resumed on 30 June 2025 and judgment was reserved to today's date.

ADJUDICATOR'S JURISDICTION: "DISPUTE RELATING TO PAYMENT"

10. One of the first matters to be considered by the court, in determining an application to enforce an adjudicator's decision, is whether the adjudicator had jurisdiction over the underlying dispute. The legislation confers a special status upon an adjudicator's decision, and it would undermine the legislative intent were the "*pay now, argue later*" concept to be erroneously extended to disputes other than those identified in the Construction Contracts Act 2013. The court will not lend its authority to enforce an adjudicator's decision unless the underlying dispute is one which is properly amenable to statutory adjudication.

11. The point was put as follows in *Aakon Construction Services Ltd v. Pure Fitout Associated Ltd* [2021] IEHC 562 (at paragraphs 24 and 25):

> "The '*binding*' status is only conferred on an adjudication which meets the criteria prescribed under the Construction Contracts Act 2013. A court, in exercising its discretion to grant leave to enforce, must be entitled to consider whether a purported adjudication meets the statutory criteria. To take an obvious example, the provisions of the Construction Contracts Act 2013 only apply to construction contracts entered into after 25 July 2016. The court would need to be satisfied that this temporal criterion had been fulfilled before it would grant leave to enforce. See, by analogy, the judgment of the High Court (O'Moore J.) in *O'Donovan v. Bunni* [2021] IEHC 575.
>
> On the same logic, it would seem to follow that the court must also be satisfied that the adjudication has been made in respect of a '*payment dispute*'. Unlike the position obtaining under the equivalent UK legislation, the statutory scheme of adjudication is confined to payment disputes and does not

> extend to other types of dispute which might arise in the context of a construction contract."

12. In the present proceedings, the application to enforce the adjudicator's decision is opposed, principally, on the ground that the underlying dispute is not one which is amenable to statutory adjudication. It is contended that a dispute relating to payment must have its foundation in a particular term under the construction contract which allows for such a claim for payment to be made.

13. Before turning to consider this issue in detail, it is salutary to recall the principles governing the interpretation of legislation. The proper approach to statutory interpretation has recently been restated by the Supreme Court in *Heather Hill Management Company v. An Bord Pleanála* [2022] IESC 43, [2022] 2 ILRM 313 ("*Heather Hill*"). Murray J., writing for the Supreme Court, emphasised that the literal and purposive approaches to statutory interpretation are not hermetically sealed. In no case can the process of ascertaining the legislative intent be reduced to the reflexive rehearsal of the literal meaning of words, or the determination of the plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and purpose for which, it was enacted. Rather, it is necessary to consider the context of the legislative provision, including the pre-existing relevant legal framework, and the object of the legislation insofar as discernible.

14. The words of the section are the first port of call in its interpretation, and while the court must construe those words having regard to (i) the context of the section and of the Act in which the section appears, (ii) the pre-existing relevant legal framework and (iii) the object of the legislation insofar as discernible, the onus is on those contending that a statutory provision does not have the effect suggested by the plain meaning of the words chosen by the legislature to

establish this. The "*context*" that is deployed to that end, and "*object*" so identified, must be clear and specific, and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language.

15. I turn now to apply these principles to the interpretation of the Construction Contracts Act 2013.

16. The right to refer a dispute to statutory adjudication is created under section 6(1) of the Construction Contracts Act 2013 as follows:

> "A party to a construction contract has the right to refer for adjudication in accordance with this section any dispute relating to payment arising under the construction contract (in this Act referred to as a 'payment dispute')."

17. On their plain meaning, the words "*relating to payment*" read as qualifying words, delimiting the range of matters which may be referred to adjudication. The qualifying words indicate that not every dispute arising under the construction contract is amenable to adjudication. Rather, the dispute must be one relating to payment. It is necessary, therefore, to consider what "*payment*" signifies in this context.

18. The term "*payment*" is not separately defined under the Construction Contracts Act 2013. There is, however, a definition of the term "*payment claim*". This is defined, under section 1, as meaning a claim to be paid an amount under a construction contract. This has to be read in conjunction with section 3. In brief, this section stipulates that a construction contract shall make provision for the amount of, and timing of, each interim payment and the final payment under the construction contract. Section 4 addresses the mechanics of making, and responding to, a payment claim notice.

19. It is apparent from the statutory scheme that the concept of "*payment*" under the Act bears a specific meaning and describes a payment which is provided for under a construction contract. The concept of a "*payment*" captures not only an interim or final payment but extends to any other payment stipulated under the construction contract. Relevantly, it would capture a payment provided for under a clause addressing the termination of the construction contract. Clauses of this type are to be found, for example, in the RIAI Construction Contract (Blue Form). However, the concept of a "*payment*" is not apt to embrace common law damages for breach of contract.

20. It follows, therefore, that the *right to refer* a dispute to statutory adjudication is confined to circumstances where the dispute relates to a payment which is provided for under contract. The referring party must either be asserting or resisting a claim to be paid an amount which is provided for under the construction contract, i.e. a payment which is expressed or stipulated in the terms of the contract. This element is a prerequisite to a valid referral to statutory adjudication. Once present, however, the parameters of the dispute are not necessarily confined to this issue. This is because the responding party is entitled to raise any defence or set-off which would reduce or exclude the liability to make the contractual payment. For example, the responding party would be entitled to assert that its liability is reduced or excluded by reason of the defective nature of the works.

21. The right to resist a claim in adjudication, by raising any defence or set-off which would reduce or exclude the liability to make the contractual payment, follows as a corollary of the paying party's entitlement under section 4 to raise a claim

for loss or damage or any other claim against the executing party in response to a payment claim notice.

22. To elaborate: the scheme of the Construction Contracts Act 2013 is to enhance the position of the party executing the contract works by regulating the timing and enforcement of payment claims. This is achieved, first, by stipulating that a construction contract must make provision for the amount of each payment, the payment claim date, and the date upon which payment is due. The Act then regulates the making of, and response to, payment claims. The paying party may seek to resist a payment claim by raising any defence or set-off which would reduce or exclude the liability to make the contractual payment. The paying party should, in the first instance, provide particulars of the asserted defence or set-off in its response to a payment claim notice. Thereafter, the Act puts in place a mandatory dispute resolution mechanism whereby, in the event of a payment dispute between the parties, these matters can be agitated by way of adjudication.

23. There is an organic link between the provisions of section 4 which regulate the making of, and response to, a payment claim notice; and those of section 6 which provide for adjudication in the event of a payment dispute. The legislative intent in obliging the paying party to particularise its reasons for not discharging a payment claim notice (in full or at all) is two-fold. First, it allows the executing party to understand the rationale upon which its payment claim is being resisted. If the executing party accepts the rationale and does not pursue the payment claim, then there will be no payment dispute between the parties. Second, in the event that the executing party does not accept the rationale, the parameters of the

payment dispute between the parties will have been delineated in the exchange of notices and this will assist in the formulation of a referral to adjudication.

24. The purpose of the analysis above is to illustrate the organic link between the provisions regulating payment claim notices and those establishing a dispute resolution mechanism by way of statutory adjudication. This reflects the principle of statutory interpretation that regard must be had to the context of the section and of the Act in which the section appears, and to the object of the legislation insofar as discernible. Adopting this approach, it is apparent that the term "*payment*" has a specific meaning under the Construction Contracts Act 2013 and contemplates a payment provided for under a construction contract. The object of the Act is to enhance the protections available to the party executing works under a construction contract, i.e. the contractor or sub-contractor, by putting in place an expedited procedure for the resolution of payment disputes by way of statutory adjudication. The term "*payment*" bears the same meaning throughout sections 3, 4, 5 and 6.

25. The focus of the legislation is directed to the position of the contractor or sub-contractor. Of course, the right to refer to statutory adjudication is available to any "*party*" to a construction contract (section 6(1)). In practice, most referrals tend to be made by the executing party, i.e. the contractor who is executing the works, and seek to recover payment from the employer. As a matter of law, however, it is equally open to an employer, i.e. the paying party, to make a referral to adjudication. An employer might, for example, make a referral seeking a declaration that they are not obliged to discharge a payment claim notice in full or at all.

26. In summary, the *right to refer* a dispute to statutory adjudication is confined to circumstances where the dispute relates to a payment which is provided for under a construction contract. The right to refer does not extend to a dispute in relation to a claim for common law damages for breach of contract.

Alternative interpretation not correct

27. For completeness, it is necessary to address the arguments advanced in support of an alternative, much broader, interpretation of the concept of a "*dispute relating to payment*". It is submitted, on behalf of the employer, that the concept comprises any dispute the outcome of which will have a bearing on the amount of money to be paid by one party to another under a construction contract.

28. In support of this submission, counsel has cited extensively from Hussey, *Construction Adjudication in Ireland* (Routledge, 2017) (pages 51 to 53). The author suggests that there is a "*disconnect*" between the provision made for payment under section 4 and the entitlement to refer a payment dispute to statutory adjudication under section 6. It is further suggested that the phrase "*any dispute relating to payment*" will likely be interpreted as including claims of any nature provided that a resolution is necessary to ascertain a financial consequence.

29. The author also makes reference, in very general terms, to the approach taken to adjudication in the Australian States and Territories. It is suggested that if the Irish Legislature had intended to confine the nature of the dispute that could be referred to adjudication strictly to those arising out of progress payment claims, the precedents were there for the legislature to follow in the form of the Australian East Coast Model or that adopted in Singapore under the Building and Construction Industry Security of Payment Act 2004.

30. For the reasons explained in *Aakon Construction Services Ltd v. Pure Fitout Associated Ltd* [2021] IEHC 562 (at paragraphs 39 to 46), case law from foreign jurisdictions must be approached with a degree of caution and cannot simply be "*read across*" to the Construction Contracts Act 2013. Those observations were made in the context of the UK legislation but apply with even greater force to the foreign legislation cited in *Construction Adjudication in Ireland*. The starting point for the exercise of statutory interpretation must be the language of the Act itself. In certain limited circumstances, it may be instructive to have regard to how foreign courts have interpreted similar statutory language under their domestic law. It should be emphasised that the decisions of foreign courts are, at the very most, of persuasive value only. In having regard to such foreign judgments, it is essential to understand the overall legislative context against which the decision had been reached. A foreign judgment will be of little persuasive value unless the overall scheme of the foreign legislation is broadly similar to the Irish legislation being interpreted. It is not enough that the subject-matter of the legislation is the same nor that a particular phrase under the foreign legislation coincides with one used under our domestic law.

31. It is apparent from even a cursory consideration of same that the Australian East Coast Model and the Singaporean legislation are vastly different from the Construction Contracts Act 2013. In each instance, the foreign legislation is more elaborate and more prescriptive. It would be inappropriate, therefore, to rely on case law in relation to the interpretation of the foreign legislation as an aid in construing the Construction Contracts Act 2013. As it happens, no foreign case law was opened to this court.

32. More generally, an exercise of comparing-and-contrasting the wording of domestic legislation with that of foreign legislation and seeking to draw an inference from a supposed failure to follow the "*precedent*" of the foreign legislation is not a legitimate approach to statutory interpretation. The existence of foreign legislation in respect of the same subject-matter will rarely, if ever, form part of the "*context*" of the domestic legislation. One possible exception to this might be where the domestic legislation is obviously modelled on a piece of foreign legislation. For example, some of our older domestic legislation had been modelled on UK legislation. Another possible exception is where the domestic legislation and the foreign legislation are both intended to give effect to the same piece of EU legislation.

33. No such considerations pertain in the case of the foreign legislation which it is suggested might guide the interpretation of the Construction Contracts Act 2013. There is nothing to suggest that this foreign legislation had ever been considered as part of the legislative history, still less that it had formed a "*precedent*" which had been deliberately tailored in order to ensure that a broader range of disputes can be referred to statutory adjudication in this jurisdiction.

34. The employer makes a separate argument to the effect that, in the absence of clear words to the contrary, it is to be presumed that the legislature will have intended that all disputes arising out of a contractual relationship should be heard and determined by the same tribunal. This supposed presumption is said to support an interpretation of the Construction Contracts Act 2013 which would allow for a "*one stop*" adjudication. Counsel cites, by analogy, *Emden's Construction Law by Crown Office Chambers* (LexisNexis UK, 2024) (§24.23) and *K & J Townmore Construction Ltd v. Kildare and Wicklow Education and*

Training Board [2018] IEHC 770, [2019] 2 IR 688. This latter judgment had been delivered in the context of the interpretation of an arbitration agreement.

35. It is not necessary, for the purpose of resolving the present proceedings, to reach a concluded view on whether the contended-for presumption applies equally to the interpretation of legislation which imposes mandatory adjudication upon the parties, as it does to the interpretation of an arbitration agreement which has been entered into consensually. It is at least arguable that the obverse presumption pertains, i.e. that it should be presumed that legislation which limits freedom to contract and makes an adjudicator's decision provisionally binding should be interpreted narrowly. As I say, it is not necessary to decide this point by reason of the fact that even if the contended-for presumption does pertain, same is displaced by the clear words of section 6 of the Construction Contracts Act 2013. The words "*relating to payment*" cannot be treated as mere surplusage. The words clearly narrow the type of "*dispute*" which may be referred to adjudication. It follows, therefore, that case law which interprets the unqualified phrase "*any dispute*" cannot simply be read across.

36. The gravamen of the employer's case is that the phrase "*dispute relating to payment*" should be interpreted as encompassing any dispute the outcome of which will have a bearing on the amount of money to be paid by one party to another under a construction contract. With respect, this contended-for interpretation necessitates construing the term "*payment*" in a manner which is both contrary to its ordinary/natural meaning and to the meaning which the term bears in the preceding sections. The concept of a "*payment*" under a contract is not synonymous with "*monetary damages*" or "*financial consequences*". The legislative context indicates that "*payment*" refers to a payment provided for

under a construction contract, i.e. a payment which is expressed or stipulated in the terms of the contract. As stated in *Heather Hill*, the onus is on those contending that a statutory provision does not have the effect suggested by the plain meaning of the words chosen by the legislature to establish this. Here, the employer has failed to put forward any convincing explanation as to why the phrase "*dispute relating to payment*" should be interpreted as all-embracing notwithstanding that such an interpretation is contrary to the plain meaning and the legislative context. If the legislature had intended statutory adjudication to capture disputes in addition to those relating to contractual payments, then it would have omitted the qualifying words "*relating to payment*" from section 6 of the Construction Contracts Act 2013.

37. Finally and to avoid the precedent value of same being overstated, it is important to emphasise the limits of the findings in this judgment. In particular, it has not been necessary, for the purpose of resolving the present proceedings, to determine the following two issues of principle.

38. The first issue of principle is whether a referral to statutory adjudication may only be made following the service of a payment claim notice pursuant to section 4. This judgment goes no further than saying that there must be a payment dispute, i.e. the parties must be in disagreement as to whether the party executing the works is entitled to be a paid a particular payment under the construction contract. On the facts of the present case, the employer/referring party's claim does not fulfil this criterion: see paragraphs 42 to 54 below. It is not necessary to go further and consider whether a payment claim notice must always be served as a *prerequisite* to a subsequent referral to adjudication.

39. It should be explained that this issue of principle has not been decided by *McGill Construction Ltd v. Blue Whisp Ltd* [2024] IEHC 205. There, an argument that there is a legislative requirement that there must be *separate* referrals in respect of individual "*payment claim notices*" was rejected by reference to the use of the broader concept of a "*payment dispute*" under section 6. That judgment is not authority for any wider proposition that a referral to adjudication may only be made following the service of a payment claim notice.

40. The second issue of principle which has not been decided by the within judgment is the extent to which the paying party under a construction contract can pursue an independent claim for a monetary award against the executing party, i.e. the contractor or subcontractor. The conventional wisdom is that an employer may only rely on a defence or set-off to extinguish the contractor or subcontractor's claim (in whole or in part). Put otherwise, the most that the employer can hope to achieve is to reduce the claim against it to zero; it cannot obtain a monetary award in its favour. This conventional wisdom would appear to make sense in circumstances where the paying party is the *respondent* to an adjudication pursued by a contractor or a subcontractor. The logic may be less compelling, however, in a case where it is the paying party who made the referral to statutory adjudication.

41. (Different considerations pertain where the construction contract itself expressly provides for payments to be made *to the employer* in certain circumstances, e.g. the termination of the construction contract. The employer would be entitled to a monetary award in its favour in such circumstances, assuming that its claim is well founded).

NATURE OF THE DISPUTE IN THIS CASE

42. As discussed under the previous heading, the *right to refer* a dispute to statutory adjudication is confined to circumstances where the dispute relates to a payment which is provided for under a construction contract. It is next necessary to examine the nature of the *dispute* in the present case, with a view to determining whether it fulfils this criterion and is, accordingly, of a type amenable to statutory adjudication.

43. The construction contract was for the design, supply and erection of a timber frame structure. The structure was to be erected at the site of an existing dwelling house. The terms and conditions of the construction contract are to be found in the quotation issued on 28 April 2023 and the revised quotation of 26 September 2023. The payment terms are set out as follows: (a) booking deposit to commence design stage: 10 per cent; (b) on signed drawings to commence production: 40 per cent; (c) prior to delivery: 40 per cent; and (d) on completion: 10 per cent.

44. It was expressly provided that the making of the initial payment of ten per cent of the price signified acceptance of the terms and conditions. The employer paid a booking deposit of €10,000 on 5 October 2023. The employer asserts that he made two further payments as follows: €59,434 on 27 October 2023 and €55,547 on 8 January 2024. On this analysis, the employer made aggregate payments of €124,981.

45. The employer purported to terminate the construction contract for repudiatory breach. It appears that, as of the date of termination, works had only been completed to ground floor level. Most, if not all, of the timber frame has not been erected.

46. The terms and conditions of the construction contract, the subject-matter of the present proceedings, are remarkably spare and are in marked contrast with the detailed terms and conditions found in standard form construction contracts. Relevantly, there is no provision made under the subject construction contract for termination payments.

47. The parameters of any particular dispute are typically defined by the exchange of pleadings. It is necessary to consider both the content of the referral to adjudication and the response, if any, submitted in reply. The response may, for example, assert a right of set-off which extends the compass of the dispute beyond that outlined in the referral to adjudication. Here, the contractor/respondent did not actively participate in the adjudication process. The parameters of the dispute are identified in the referral to adjudication including the appendices thereto. The appendices included the earlier exchange of correspondence between the parties leading up to the termination of the construction contract.

48. The essence of the dispute centred on whether the contractor/responding party had committed a repudiatory breach of the construction contract by failing to erect the timber frame house by the extended deadline of 16 August 2024. The employer asserts that he had an entitlement to treat the construction contract as terminated by accepting the repudiatory breach. The dispute extended to the ancillary issue of the type of remedy, if any, to which the employer would be entitled to in the event that the right to terminate was held to be well founded.

49. The monetary value of the claim is summarised as follows in the referral to adjudication:

Refund of sums paid to Timber Frames Ireland	124,981.00
Increased costs for project manager (excl. VAT)	10,200.00
Abortive costs for scaffolding (excl. VAT)	17,545.00
Construction inflation (excl. VAT)	54,171.22
Rental and electricity costs	5,246.32
Window storage costs	3,300.00
Holiday costs	9,136.14
TOTAL	224,579.68

50. As appears, the employer sought not only to recover the purchase price paid but also sought compensation for consequential losses said to have been incurred. The claim was not advanced as one in restitution alone: such a claim would have been confined to putting the employer back in the position he would have been in had the contract not been entered into, i.e. by the return of the purchase price. Rather, the claim went further and sought compensation for reliance loss and for loss of bargain.

51. Counsel for the employer submits that in the event of the termination of a construction contract, it is open to the innocent party to combine a claim for restitution, reliance loss, and loss of bargain. Counsel cites, in particular, Peel, *Treitel: The Law of Contract* (15th edn, Sweet & Maxwell, 2020) (at §18-018 to §18-022). It is further submitted that an adjudicator has jurisdiction to grant such combined relief, citing *ISG Retail Ltd v. Castletech Construction Ltd* [2015] EWHC 1443 (TCC).

52. The crucial point for present purposes is that the dispute, which had purportedly been referred to adjudication, did not relate to a payment provided for under the construction contract. There was no clause under the construction contract which made provision for payment to the employer in the event of wrongful termination by the contractor.

53. Rather, the employer had purported to exercise his common law right to terminate the construction contract for repudiatory breach. The employer asserted that having accepted the repudiatory breach on the part of the contractor, he was entitled to a combination of reliefs. The dispute was one relating to a claim for monetary compensation at common law (and, possibly, at equity if and insofar as the claim for the return of the monies paid had been framed in restitution). This is not a dispute of a type amenable to statutory adjudication.

54. Having regard to the wording of section 6 of the Construction Contracts Act 2013, the distinction between termination of a construction contract by way of the acceptance of a repudiatory breach at common law, on the one hand, and by way of the exercise of a contractual right to terminate, on the other, is of crucial importance. The right to refer a dispute to statutory adjudication only arises in the case of the latter. The dispute in the present case is not a payment dispute. It follows that the adjudicator did not have jurisdiction under the Construction Contracts Act 2013 to entertain the claim and that the adjudicator's decision is a nullity and cannot be the subject of an enforcement order under section 6(11) of the Act.

55. For completeness, the position of the parties under the subject construction contract should be contrasted with that typically found under standard form contracts. Standard form contracts often provide for the making of a payment to

an employer of expenses properly incurred by them in engaging another person to carry out and complete the contract works in the event of wrongful termination by the original contractor. (See, for example, clause 33 of the RIAI Contract or clause 15.4 of the FIDIC RED 2017 Contract). In the event of a dispute in relation to a clause of this type, an employer would be entitled to refer the matter to statutory adjudication. This is because such a dispute comprises a dispute relating to payment provided for under a construction contract.

ALLEGED BREACH OF FAIR PROCEDURES

56. The default position is that an adjudicator shall reach a decision within twenty-eight days beginning with the day on which the referral is made. To achieve this expedition, the adjudication process will, of necessity, be less elaborate than conventional arbitration or litigation. This is not an accident: rather this is the precise purpose of the legislation. The Oireachtas has put in place a special dispute resolution mechanism, at first instance, for construction contracts which is intended to fulfil the need for prompt payments in the construction industry. This does not affect the right of either party to pursue arbitration or litigation thereafter. The dispute will be heard *de novo* with no deference required to be shown to the outcome of the adjudication process.

57. It would undermine the legislative policy of "*pay now, argue later*" were the court to refuse to enforce an adjudicator's decision merely because the adjudicative process failed to replicate that of conventional arbitration or litigation. An adjudication is intended to be more streamlined: it will, for example, be rare for there to have been an oral hearing.

58. Leave to enforce an adjudicator's decision will generally be allowed once the formal proofs, as prescribed under the Construction Contracts Act 2013 and Order 56B of the Rules of the Superior Courts, have been established. The logic of the "*pay now, argue later*" principle is that the appropriate remedy for a party, who is aggrieved by an adjudicator's decision, will normally be to pursue the issue in subsequent arbitral or court proceedings. In the interim, the party is expected to discharge the sums awarded in the adjudicator's decision: these payments can be recouped if the arbitral or court proceedings are ultimately successful. The High Court will only refuse leave to enforce an adjudicator's decision on the grounds of procedural unfairness where there has been a blatant or obvious breach such that it would be unjust to enforce the immediate payment obligation.

59. The nature and extent of this discretion has been described as follows in *John Paul Construction Ltd v. Tipperary Co-Operative Creamery Ltd* [2022] IEHC 3 (at paragraphs 9 to 12):

> "Importantly, the High Court retains a discretion to refuse leave to enforce an adjudicator's decision. This is so notwithstanding that, on a narrow literal interpretation of section 6 of the Construction Contracts Act 2013, there might appear to be an automatic right to enforce once the formal proofs have been met.
>
> The High Court will not lend its authority to the enforcement of an adjudicator's decision, even on a temporary basis, where there has been an obvious breach of fair procedures. This restraint is necessary to prevent an abuse of process and to uphold the integrity of the statutory scheme of adjudication. It would, for example, be inappropriate to enforce a decision in circumstances where an adjudicator had refused even to consider a right of set-off which had been legitimately asserted by the respondent. It would be unjust to enforce such a lopsided decision.
>
> The existence of this judicial discretion represents an important safeguard which ensures confidence in the

> statutory scheme of adjudication. It should be reiterated, however, that once the formal proofs as prescribed under the Construction Contracts Act 2013 and Order 56B of the Rules of the Superior Courts have been established, then leave to enforce will generally be allowed. The default position remains that the successful party is entitled to enforce an adjudicator's decision *pro tem*, with the unsuccessful party having a right to reargue the underlying merits of the payment dispute in subsequent arbitral or court proceedings. The onus is upon the party resisting the application for leave to demonstrate that there has been an obvious breach of fair procedures such that it would be unjust to enforce the adjudicator's decision, even on a temporary basis. The breach must be material in the sense of having had a potentially significant effect on the overall outcome of the adjudication.
>
> One inevitable consequence of the existence of this judicial discretion is that parties, in an attempt to evade enforcement, will seek to conjure up breaches of fair procedures where, in truth, there are none. At the risk of belabouring the point, the discretion to refuse to enforce is a narrow one. The High Court will only refuse to enforce an adjudicator's decision on the grounds of procedural unfairness where there has been a blatant or obvious breach such that it would be unjust to enforce the immediate payment obligation. The court will not be drawn into a detailed examination of the *underlying merits* of an adjudicator's decision under the guise of identifying a breach of fair procedures."

60. The contractor/respondent contends that leave to enforce the adjudicator's decision should be refused by reason of an alleged breach of fair procedures. This submission falls into two parts as follows. First, it is said that the adjudicator should not have proceeded with the adjudication in circumstances where the employer/referring party had refused to consent to an extension of time. Second, it is said that the adjudicator acted in breach of fair procedures in failing to have regard to potential matters of defence which had been flagged in correspondence.

61. The default position is that an adjudicator must make his or her decision within twenty-eight days of the referral having been made. The only circumstances in

which this time period can be extended, in the absence of the joint agreement of the parties, is where the party by whom the payment dispute had been referred consents to an extension of time. Even then, the extension of time can only be for a period of fourteen days. See sections 6(6) and 6(7) of the Construction Contracts Act 2013.

62. The adjudicator had given directions as to the exchange of submissions. The contractor/respondent did not comply with this timetable. Instead, on 7 November 2024, that is, at a time *after* the date stipulated for the filing of the written response had already expired, the contractor/respondent sought an extension of time. The reason for the extension was related to the supposed unavailability of the contractor/respondent's then solicitors. (It should be explained that a *different* firm of solicitors has acted for the contractor/respondent in these proceedings).

63. The adjudicator replied by stating, correctly, that an extension of time could only be granted by the consent of the referring party. No such consent was forthcoming and, accordingly, it was necessary for the adjudicator to make his decision on 12 November 2024.

64. The contractor/respondent contends that once it became apparent that no consent to an extension of time would be forthcoming, the adjudicator should have brought the adjudication to an end. The only way in which this could have been done would be for the adjudicator to resign his appointment.

65. There was no breach of fair procedures. The adjudicator had laid down a timetable which was fair and reasonable. The contractor/respondent had been allowed a period of one week within which to make its response, with a further

week thereafter to the employer/referring party. This allowed the adjudicator himself a mere two weeks within which to prepare his written decision.

66. The reason for which an adjournment had been sought had been the non-availability of the contractor/respondent's then solicitor. With respect, this is not a compelling reason and certainly not one the refusal to act upon which would produce an unfairness. The reality is that compliance with the statutory twenty-eight day period will require all parties and the adjudicator to work to very tight timelines.

67. It is not necessary for a respondent to engage formal legal representation in order to contest a claim in adjudication. The response may be prepared by an individual or company themselves or through an architect or other professional. If, however, a respondent chooses to engage legal representation, then they must instruct a solicitor who has capacity to comply with the tight timelines. If a solicitor is unable to do so, then they should decline to act and should instead advise the respondent to instruct another solicitor who has capacity to take on and complete the work within time. It would render the twenty-eight day period prescribed by statute unworkable if all that a party had to do to obtain an extension of time was to say that their preferred legal representative was unavailable.

68. For completeness, it should be noted that in the affidavits filed in opposition to the application to enforce the adjudicator's decision, the director of the respondent company has referred to two family bereavements. Importantly, however, this was not the basis upon which the extension of time had been sought from the adjudicator: the stated reason was the unavailability of the contractor/respondent's solicitor. It is not open to a party to introduce, *ex post*

facto, a different reason for seeking an extension of time than that which was put up to the adjudicator.

69. It is also alleged that the employer/referring party acted unfairly in not agreeing to an extension of time. With respect, there is no obligation on a referring party to do so. The default position is that the adjudication process is to be completed within twenty-eight days. A referring party is entitled to insist on compliance with this timescale.

70. There was also some suggestion that the employer/referring party's side may have indicated, initially, that they might be open to consenting to an extension of time. This appears to be a reference to earlier correspondence wherein, prior to the fixing of directions, the employer/referring party's solicitors had indicated that they would be prepared to agree to a reasonable timetable. This cannot sensibly be interpreted as suggesting that the employer/referring party was agreeing to an extension of time nor as involving a waiver. Moreover, these points were made prior to the fixing of the timetable and the contractor/respondent, through its director, raised no objection to the timetable. Indeed, the application for an extension of time only came about *after* the time scheduled for the filing of the response had already expired.

71. The second plank of the argument in relation to an alleged breach of fair procedures is in respect of a supposed failure on the part of the adjudicator to have regard to "*matters raised by way of defence by*" the contractor/respondent. With respect, this argument is based on a false premise, namely, that the contractor/respondent had submitted a defence to the claim. In truth, the contractor/respondent failed to submit a response to the claim within the time period specified by the adjudicator.

72. The argument now seems to be that the adjudicator should have treated, *as a formal response*, an email sent to the adjudicator on 16 October 2024 by Mr. Bourke on behalf of the contractor/respondent. With respect, there is no reality to this argument. The email had been sent to the adjudicator alone and had not been copied to the employer/referring party. This was entirely improper in the context of an *inter partes* adjudication. The email consisted of a misconceived objection that the contractor/respondent had not "*agreed*" to adjudication, followed by a number of bullet points summarising the contractor/respondent's version of events.

73. The adjudicator in his reply to the email of 16 October 2024 had stated, in express terms, that he did not intend to address the matters raised in the email as these were matters which the contractor/respondent "*may wish to deal with*" in any response. The contractor/respondent failed to submit a response. It cannot seriously be contended that the contractor/respondent had any legitimate expectation that the adjudicator would have regard to the content of the email of 16 October 2024 in circumstances where Mr. Bourke had been told precisely the opposite.

74. The code of practice governing the conduct of adjudications provides, at paragraph 32, that if a party to the adjudication, without showing sufficient cause, fails to comply with any directions or produce a written statement requested by the adjudicator, the adjudicator may continue the adjudication in the absence of the party and may continue the adjudication without the document or written statement requested. It should be explained that a code of practice published under section 6(8) of the Construction Contracts Act 2013 does not represent a definitive statement of what fair procedures will require in any

particular case: this is ultimately a matter for the court. However, this court is satisfied that the guidance stated at paragraph 32 of the current version of the code of practice is an accurate summary of the correct legal position pertaining where a party fails to participate in an adjudication without showing sufficient cause.

75. Here, the contractor/respondent failed to make a response notwithstanding having been afforded a reasonable opportunity to do so. The adjudicator was entitled to continue with the adjudication process. The adjudicator did consider potential arguments on behalf of the contractor/respondent, albeit through the lens of documentary evidence which had been put before the adjudicator by the employer/referring party (in circumstances where the contractor/respondent had not participated). The adjudicator carefully considered, *inter alia*, whether the intervention of the holiday period (described as the "*construction break*") or the non-availability of a named fitter justified the delay. This was done by reference to the contemporaneous correspondence. The adjudicator also considered the question of the condition of the timber delivered to the site. See, in particular, §3.53 to §3.54, and §4.37 to §4.50, of the adjudicator's decision.

76. It is apparent from the written legal submissions of 11 March 2025 (in particular, paragraph 33) that all of the supposed "*fair procedures*" points are, in truth, ones which go to the underlying merits of the adjudicator's decision. For example, it is alleged that the adjudicator erred in finding that the contractor/respondent's failure to agree to complete the installation works by 16 August 2024 constituted a repudiatory breach of contract. This is a direct attack on the merits of the adjudicator's decision. As explained in *John Paul Construction Ltd* (cited above), the court will not be drawn into a detailed examination of the underlying

merits of an adjudicator's decision under the guise of identifying a breach of fair procedures.

77. In summary, the adjudicator acted in accordance with fair procedures in continuing with the adjudication notwithstanding the non-participation of the contractor/respondent. A party who fails to comply with the reasonable directions of an adjudicator cannot subsequently rely on their own default in an attempt to resist an application to enforce the adjudicator's decision.

WHETHER CONSTRUCTION CONTRACT TAINTED BY ILLEGALITY

78. The High Court may refuse to enforce an adjudicator's decision on the grounds that to do so would be contrary to public policy. This discretion is analogous to that exercisable in respect of the enforcement of arbitration awards.

79. It is contended on behalf of the contractor that the construction contract is tainted by illegality. It is alleged that the proposed erection of the timber structure does not conform with the extant planning permission. More specifically, it is alleged that the planning permission relied upon by the employer does not authorise the "*demolition and revised rebuild*" of the existing dwelling house.

80. It seems that at the time of the making of the planning application, it had been intended that the existing dwelling house was to be retained and the new timber structure incorporated into same. The employer has averred that this proposal subsequently proved unsafe due to the condition of the walls of the existing dwelling house. It is further averred that the planning authority (informally) consented to the demolition of the walls of the existing dwelling house in circumstances where the finished structure would be of the same floor area, height and external appearance as provided for in the planning permission.

81. It is not possible, on the basis of the limited evidence before the court on the application to enforce the adjudicator's decision, to determine whether or not the carrying out of the demolition works can properly be characterised as an "*immaterial deviation*" from the terms of the existing planning permission. As to the meaning of an "*immaterial deviation*", see, generally, Browne, *Simons on Planning Law* (3rd edn, Round Hall, 2021) (at §5-74 to §5-92). The fact, if fact it be, that an official within the local planning authority may have expressed a favourable view, i.e. that the demolition did not require a *further* planning permission provided always that the design of the building as erected was identical to the design for which planning permission had been granted, is not conclusive: see, by analogy, *Bailey v. Kilvinane Wind Farm Ltd* [2016] IECA 92.

82. It is not necessary, for the purpose of resolving the present proceedings, to determine the proper interpretation of the planning permission. This is because even on the *assumption* that the carrying out of the works would have involved a breach of planning permission, this would not justify the refusal of leave to enforce the adjudicator's decision. As explained below, the construction contract is not void or unenforceable.

83. The principal criteria for assessing whether public policy requires that contracts tainted with illegality under statute should be regarded as void or unenforceable are identified in *Quinn v. Irish Bank Resolution Corporation Ltd* [2015] IESC 29, [2016] 1 IR 1 ("*Quinn v. IBRC*"). The Supreme Court held that the proper approach is statute specific but is not case specific. A court is required to assess whether the requirements of public policy, in respect of a particular statutory provision rendering, as a matter of the public law of the State, a

particular type of activity illegal, require that contracts sufficiently connected with that particular type of illegality are to be regarded as void or unenforceable.

84. Once it is determined that public policy requires that contracts which are deemed unlawful by reference to a particular statutory provision are to be regarded as unenforceable, no assessment of the merits of the individual case arises. But where unenforceability arises, a further question may require to be determined as to just how closely connected to the relevant illegality a transaction may be required to be in order for it to be sufficiently tainted so as also to be treated as void or unenforceable. (*Quinn v. IBRC*, paragraphs 144 to 146).

85. Here, the allegation is that the *performance* of the contract would have constituted a criminal offence under the Planning and Development Act 2000 ("*PDA 2000*"). More specifically, it is alleged that the erection of the timber structure would have involved the demolition of part of the existing dwelling house and that this demolition was not authorised under the relevant planning permission.

86. In order for the contractor to succeed in its argument that the construction contract is void or unenforceable by reason of illegality, it is necessary for the contractor to establish that this *individual contract* comes within a category of contract which is deemed unlawful by reference to the Planning and Development Act 2000. This is because the assessment is statute specific, not case specific. It is necessary, first, to identify the characteristics of the particular contract, and second, to determine whether the legislative policy requires contracts with those characteristics to be treated as void or unenforceable.

87. Here, the construction contract is lawful on its face: the contract does not purport to do something which is prohibited by the planning legislation. Rather, the

contract is perfectly capable of being performed lawfully provided that the development works are carried out under and in accordance with a planning permission. If and insofar as the execution of the contract might have involved any illegality, it is in respect of the *performance* of the contract rather than the formation of same.

88. (In the event, no development works were ever carried out pursuant to the construction contract by reason of the fact that the employer purported to terminate the contract).

89. It follows that the contractor must establish that the legislative intent is that any contract, the performance of which would entail the carrying out of development works other than under and in accordance with a planning permission, should be treated as being void or unenforceable. Having regard to the criteria identified in *Quinn v. IBRC*, the Planning and Development Act 2000 discloses no such legislative intent. The applicable criteria are addressed, in turn, below.

90. The first criterion addressed is whether the contract in question was designed to carry out the very act that the relevant legislation, i.e. the Planning and Development Act 2000, was intended to prevent. Here, as discussed above, the construction contract is lawful on its face.

91. The following two criteria are related and might usefully be considered together. The first of the two is whether, having regard to the purpose of the Planning and Development Act 2000, the range of adverse consequences for which express provision has been made might be considered, in the absence of treating relevant contracts as void or unenforceable, to be adequate to secure those purposes. The second is whether the wording of the statute itself might be taken to strongly

imply that the remedies or consequences specified in the statute were sufficient to meet the statutory end.

92. The Supreme Court elaborated upon the first of these two criteria as follows in *Quinn v. IBRC* (at paragraph 182):

> "It may be that an elaborate, significant and proportionate scheme of adverse consequences may be much more likely to lead to the inference that those consequences are sufficient to deal with the relevant illegality. Limited or minor consequences will more readily lead to the opposite inference and, thus, to a conclusion that it is required by policy that relevant contracts should be regarded as unenforceable. In such an assessment, it may well be that a court will be required to be mindful to identify the purpose of the statute (as inferred from its general structure and terms) and to consider whether it should be inferred that the specific consequences, set out in the legislation and to be applied in the case of illegality arising under the statute concerned, are sufficient to meet that statutory purpose."

93. The planning legislation provides for a range of enforcement mechanisms to ensure compliance with the requirement to obtain planning permission. These include criminal sanctions. In particular, it is a criminal offence to carry out unauthorised development (the definition of which includes unauthorised works). The definition of "*unauthorised works*" includes, relevantly, development which is carried out other than in compliance with planning permission or any condition to which that permission is subject. A person who is guilty of such an offence is liable, on conviction on indictment, to a fine not exceeding €12,700,000, or to imprisonment for a term not exceeding two years, or to both.

94. The range of enforcement mechanisms includes civil remedies which can be exercised in conjunction with, or independently of, the criminal sanctions prescribed. The most significant civil remedy is the so-called "*planning injunction*" under section 160 of the PDA 2000. This allows for a broad sweep

of orders to be made in respect of unauthorised development. The potential orders include an order that the relevant land is restored to its condition prior to the commencement of any unauthorised development. A court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature.

95. Provision is made, separately, for the service of an enforcement notice in respect of unauthorised development. The failure to comply with an enforcement notice exposes the recipient, potentially, to both civil and criminal consequences. As to civil consequences, the local planning authority is empowered to enter on the land and to carry out the works specified in the enforcement notice, including the demolition of any structure and the restoration of land. The local planning authority may recover (from the person served with the enforcement notice) any expenses reasonably incurred by it in that behalf.

96. The legal test posited in *Quinn v. IBRC* requires a court to consider whether the "*package of consequences*" provided for under the relevant statute are sufficiently severe to meet the statutory purpose even in serious cases, i.e. without the additional sanction of treating contracts in breach of the statute as void or unenforceable.

97. Having regard to the elaborate, significant and proportionate enforcement mechanisms expressly provided for under the Planning and Development Act 2000, it is reasonable to infer that the legislative intent is that same constitutes a self-contained code which is designed to ensure compliance. The range of criminal and civil sanctions is ample to address even the most serious breach of the prohibition upon the carrying out of unauthorised development. At the extreme end, a transgressor is exposed to a potential fine in excess of twelve

million euro and a potential term of imprisonment of up to two years. Such a transgressor is also exposed, potentially, to the financial cost of the restoration of the relevant land to its condition prior to the commencement of any unauthorised development. Such financial cost may be incurred directly, in complying with court orders, or indirectly, by way of a requirement to reimburse the local planning authority for restoration works carried out by it in accordance with an enforcement notice.

98. There is nothing in the planning legislation which suggests that the Oireachtas intended that the suite of enforcement mechanisms should be supplemented by the additional sanction of treating as void or unenforceable contracts which are lawful on their face but the performance of which entails a breach of planning control.

99. The next criterion addressed is whether the policy of the legislation was designed to apply equally or substantially to both parties to a relevant contract, or whether, alternatively, that policy was exclusively or principally directed towards one party. This is largely a neutral factor in the context of the planning legislation. The prohibition on the carrying out of unauthorised development applies generally. It is not, for example, directed exclusively to the owner or occupier of the relevant land. It would seem to follow that in circumstances where the owner or occupier engages a third party under contract to carry out development works on their behalf, that third party is potentially exposed to criminal and civil sanctions in the event of a breach of planning control. In practice, the underlying construction contract will often expressly address the question of which party bears responsibility for ensuring that the development works are in compliance with the planning legislation. The employer under the contract might, for

example, have given a warranty that planning permission has been obtained and have agreed to indemnify the contractor.

100. For present purposes, the point is that—in contrast with, say, consumer protection legislation—the type of contract which it is alleged to be void or unenforceable is not one which is directed to one category of person over another.

101. The final two criteria identified in *Quinn v. IBRC* can conveniently be considered together. The first is whether it might be counterproductive to the statutory aim, as found in the statute itself, to treat the relevant type of contract as void or unenforceable. The second is whether the imposition of unenforceability might be disproportionate to the seriousness of the unlawful conduct in question in the context of the relevant statutory regime in general.

102. For the reasons which follow, an approach which treats as void or unenforceable all contracts which are lawful on their face but the performance of which entails a breach of planning control does not sit comfortably with the purpose of the planning legislation. In particular, the inflexible nature of such an approach is inconsistent with the more nuanced approach to breaches which is apparent from the provisions of the PDA 2000.

103. One of the hallmarks of the planning legislation is that enforcement action is intended to be proportionate. Whereas it is correct to say that the statutory enforcement mechanisms are capable of producing very severe sanctions—civil and criminal—for serious breaches of planning control, the legislative scheme envisages that the sanction should be commensurate to the transgression. This is evident from the following aspects of the planning legislation.

104. First, express provision is made for the possibility of regularising certain breaches of planning control by way of a *retrospective* application for planning permission. More specifically, it is open, in principle, to obtain a retention planning permission in certain circumstances. This is subject to a number of important exclusions, especially in the case of breaches of EU environmental law.

105. The existence of a regime for retention planning permission is a legislative recognition that, in certain circumstances, it might be disproportionate to require the removal of unauthorised works and the reinstatement of the relevant land.

106. Second, a court enjoys a limited discretion to withhold or mitigate the relief which might otherwise be granted by way of a so-called "*planning injunction*" under section 160 of the PDA 2000. One of the factors which may legitimately be considered is whether the relief would be disproportionate: Browne, *Simons on Planning Law* (3rd edn, Round Hall, 2021) (at §11-498 to §11-509).

107. The imposition of an additional form of sanction, i.e. the treatment of contracts of the relevant type as void or unenforceable and the adoption of a "*let the consequences lie where they fall*" approach, would be inconsistent with the proportionate approach under the PDA 2000. It might, for example, result in scenarios whereby a person, who had carried out a relatively minor breach of planning control, which has since been regularised by the grant of retention planning permission, incurring a significant financial cost by dint of the underlying construction contract being treated as void or unenforceable. Absent the reading into the legislation of an intention to invalidate contracts of the relevant type, the operation of the express provisions of the PDA 2000 might have been expected to eventuate in a modest fine only in such a scenario.

108. Moreover, to allow a contractor to retain, as a windfall, monies already paid under the construction contract in respect of development works not yet carried out might well be counterproductive to the overarching purpose of the planning legislation, namely, to provide, in the interests of the common good, for proper planning and sustainable development. It might result in development projects, which have since been granted retention planning permission, not being completed. An employer, having lost monies to the first contractor, might not be able to afford to engage a second contractor.

109. For all of these reasons, then, the proper interpretation of the Planning and Development Act 2000 is that it is not intended that the suite of enforcement mechanisms provided for under Part VIII of the Act should be supplemented by the *additional* sanction of treating as void or unenforceable contracts which are lawful on their face but the performance of which entails a breach of planning control.

110. Finally, for completeness, it is important to highlight two points which have not had to be addressed in this judgment.

111. First, having regard to the conclusion that a contract of the type at issue in this case is not one which must be treated as void or unenforceable, it has not been necessary to consider the separate question of whether, even in the case of an illegal contract, any claim in restitution is ousted. It will be recalled that the logic of the contractor's submission is that the construction contract should be treated as void or unenforceable and that a "*let the consequences lie where they fall*" approach should be adopted. On the chronology of the present case, such an approach would have the result that the contractor would be entitled to retain, as a windfall, all of the monies transferred to it by the employer. This would be

so irrespective of the rights or wrongs of the allegation that the contractor had committed a repudiatory breach of contract.

112. It is sufficient for the purpose of the present proceedings to observe that it is doubtful whether the public policy considerations, which underpin the principle that certain contracts should be treated as void or unenforceable, necessarily support the further sanction that the parties to a contract, *which has not been performed*, should be excluded from recovering monies transferred pursuant to the contract. That the issue is not clear-cut is illustrated by the fact that the courts in the neighbouring jurisdiction have rejected such a principle: *Patel v. Mirza* [2016] UKSC 42, [2017] A.C. 467. It was suggested, there, that to forfeit the monies to the defendant would not be a just and proportionate response to the illegality.

113. Second, it has not been necessary to address the question of whether it might have been open to the employer to obtain an order of specific performance directing the contractor to carry out the construction contract. The discussion thus far has used the terms "*void*" or "*unenforceable*" to describe a contract which cannot be relied upon because the relevant legislation is intended to prohibit such contracts. In circumstances where, as in the present case, a contract tainted with illegality is not "*void*" or "*unenforceable*", the parties can rely upon same to the extent, for example, of recovering damages under the contract. It does not necessarily follow that one party could "*enforce*" the contract against the other in the sense of obtaining an order of specific performance. On the facts of the present case, had the employer sought an order directing the contractor to erect the timber structure, a court might well have refused relief on the grounds that it was an implied term of the construction contract that a planning

permission be in place which expressly authorised the demolition works. A court might have deferred the specific performance proceedings pending the making of an application for retention planning permission. Alternatively, the court might have found that the performance of the contract had been frustrated by the absence of planning permission which expressly authorised the demolition works. If it were the position that the construction contract could not be lawfully performed because the requisite planning permission could not be obtained, this would preclude an order of specific performance but would not render the contract unenforceable in the broader sense of being void. The parties could still rely on the contract for the purpose of, for example, a claim for damages or restitution.

CONCLUSION AND PROPOSED FORM OF ORDER

114. The right to refer a dispute to statutory adjudication is confined to circumstances where the dispute relates to a payment which is provided for under the construction contract. The referring party must either be asserting or resisting a claim to be paid an amount which is expressed or stipulated in the terms of the construction contract. This element is a prerequisite to a valid referral to statutory adjudication.

115. On the facts of the present case, the dispute, which had purportedly been referred to adjudication, did not relate to a payment provided for under the construction contract. There was no clause under the construction contract which made provision for payment to the employer in the event of wrongful termination by the contractor. Rather, the employer had purported to exercise his common law right to terminate the construction contract for repudiatory breach. The

employer asserted that having accepted the repudiatory breach on the part of the contractor, he was entitled to a combination of reliefs. The dispute was one relating to a claim for monetary compensation at common law (and, possibly, at equity if and insofar as the claim for the return of the monies paid had been framed in restitution).

116. Having regard to the wording of section 6 of the Construction Contracts Act 2013, the distinction between termination of a construction contract by way of the acceptance of a repudiatory breach at common law, on the one hand, and by way of the exercise of a contractual right to terminate, on the other, is of crucial importance. The right to refer a dispute to statutory adjudication only arises in the case of the latter. The dispute in the present case is not a payment dispute. It follows that the adjudicator did not have jurisdiction under the Construction Contracts Act 2013 to entertain the claim and that the adjudicator's decision is a nullity and cannot be the subject of an enforcement order under section 6(11) of the Act. Accordingly, the relief sought in these proceedings must be refused in its entirety.

117. For completeness, the two *additional* grounds of opposition advanced on behalf of the contractor have also been addressed in this judgment. The argument that leave to enforce the adjudicator's decision should be refused because of an alleged breach of fair procedures is rejected for the reasons explained at paragraphs 56 to 77 above. The argument that the construction contract is void or unenforceable because the performance of the contract might have been other than in accordance with a grant of planning permission is rejected for the reasons explained at paragraphs 78 to 113 above.

118. As to legal costs, this court's provisional view is as follows. Whereas the contractor has been successful in resisting the application to enforce the adjudicator's decision, it did not succeed on two of its three grounds of opposition. The argument in relation to the primary ground of opposition, i.e. the ground in respect of whether the dispute was amenable to statutory adjudication, occupied most of the time at the hearing and formed much of the content of the written legal submissions. The majority of the legal costs will have been incurred in relation to this ground of opposition, i.e. the ground upon which the contractor was successful. Nevertheless, the pursuit of the two additional grounds of objection will have had a material impact on the overall level of legal costs. It is proposed, therefore, to apply a discount of one-third to the overall legal costs, which would otherwise have been recoverable by the contractor, to reflect the fact that the other side had been successful on these two issues. This discount also reflects the fact that the original hearing date of 13 February 2025 had to be vacated on the day to allow the contractor further time within which to obtain legal representation. The employer is entitled to a set-off in respect of the wasted costs. Two-thirds is a realistic assessment of the notional balance remaining once the costs incurred by the employer in respect of the two subsidiary issues and the wasted costs have been set-off. It is further proposed that the costs be "*adjudicated*", i.e. measured, on the basis of a single two-hour hearing and that the aggregate amount recoverable in respect of the two sets of written legal submissions be capped at €3,500 (exclusive of VAT). These adjustments are intended to reflect this court's provisional view that it should have been possible to address all the legal issues in a single hearing.

119. If either party wishes to contend for a different form of costs order than that provisionally proposed, they will have an opportunity to do so at the next listing.

120. These proceedings will be listed, for submissions on the final form of order, on 9 October 2025 at 10.30 AM.

Appearances

Alan Philip Brady for the applicant instructed by Horwich Farrelly Ireland LLP
Patricia Hill for the respondent instructed by William Fry LLP

Approved
Garrett Simons