THE CONSTRUCTION DISPUTES LAW REVIEW

Second Edition

Editor
Hamish Lal

THE LAWREVIEWS

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CONTENTS

Chapter 3

IRELAND

John Delaney[1]

I INTRODUCTION

Ireland is a common law jurisdiction, developing its laws both from within the jurisdiction and from other similar jurisdictions, principally England and Wales. The Constitution, Acts of Parliament, statutory instruments, regulations and European Union legislation all have legal validity.

Standard construction contracts in Ireland normally provide alternative forms of dispute resolution procedures, such as mediation, conciliation and arbitration, etc., rather than more formal litigation proceedings, with the natural consequence that there is a relatively small pool of decisions relating to construction disputes emanating from the Irish courts. Consequently, the decisions arising in the courts of England and Wales, particularly the Technology and Construction Court, are closely followed in Ireland. However, with the advent of statutory adjudication in the jurisdiction, a developing body of case law is emerging in relation to issues of enforcement and interpretation of the Construction Contracts Act 2013 (CCA 2013).

II YEAR IN REVIEW

The Irish construction law sector noted further significant rulings in the past year in respect of the enforcement of an adjudicator's decision delivered under the ambit of the CCA 2013.

Although the Act is dated 2013, it did not provide for the advent of adjudication in Ireland until 25 July 2016, with the passing into legislation of certain statutory instruments. This is in contrast to the UK experience and two frequently mentioned cases, *Macob Civil Engineering Ltd v. Morrision Construction Ltd* and *Bouygues (UK) Limited v. Dahl-Jensen (UK) Limited*.[2] These cases were both decided within 26 months of the implementation of the Housing Grants, Construction and Regeneration Act 1996, and are regarded as the seminal cases in respect of the UK judiciary giving unequivocal support to both the Act itself and the adjudication process. It took Ireland almost five years to reach a similar position. The experience in the United Kingdom also stands in contrast to Ireland's in that it has been noted that, within four years of the Act becoming law, an estimated 100 or so published judgments of the English courts related to adjudication matters.[3]

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1 John Delaney is a principal at HKA.

2 *Macob Civil Engineering Ltd v. Morrision Construction Ltd* [1999] EWHC Tech 254; *Bouygues (UK) Limited v. Dahl-Jensen* (UK) Limited [2000] EWCA Civ 50.

3 Riches, J and Dancaster, C (2004) *Construction Adjudication*, 2nd Edition, Blackwell Publishing.

However, the past year may well be seen as the one in which adjudication in Ireland gained further support in the courts following the previous year's decisions[4] and particularly in light of the following two prominent decisions.

i Aakon Construction Services Ltd v. Pure Fitout Associated Ltd (No. 1) [2021] IEHC 562

Mr Justice Garrett Simons' decision, which was delivered in three parts, addressed:

a the legislative context and an overview of the statutory adjudication process;
b the adjudicator's decision on the referral; and
c whether the payment dispute was validly referred to adjudication.

Part 1: overview of the CCA 2013

Simons J adopts Meenan J's summation of the purpose and aim of the CCA 2013:

> *The purpose and aim of the Act of 2013 is to provide for a summary procedure to enforce the payment of moneys from one party to another in a building contract, notwithstanding that it may ultimately transpire that such moneys are, in fact, not owed. This ensures that moneys are paid without having to await the outcome of arbitration or litigation, which, more often than not, involves delay. The necessary timelines for payment in the building and construction industry are very different to the timelines in arbitration and litigation. It is clear that the provisions of the Act of 2013 enable a speedy payment of moneys. Firstly, as referred to above, s. 2(5)(b) makes clear that the Act applies irrespective of the terms of the construction contract agreed between the parties. Thus, there is a statutory right to refer a payment dispute to adjudication. Secondly, the decision of the adjudicator is binding until the payment dispute is finally settled by the parties, or until a decision arises from arbitration or litigation. Thirdly, there is a summary procedure for enforcing a decision of the adjudicator.*[5]

He points out that the qualifying words 'if binding', as used in Section 6(11) of the Act, are merely intended to address the contingency of the adjudicator's decision having been superseded by a subsequent decision of an arbitrator or a court.

Simon J further considers whether and when a court might stray from the literal meaning of 'binding', and sets out the two broad exceptions evident from the legal position in England and Wales: firstly, when an adjudicator exceeds the jurisdiction conferred on them by the parties and, secondly, when an adjudicator fails to comply with fair procedures.

He describes the relatively narrow grounds that enforcement was resisted on: firstly, that the adjudicator's decision goes beyond the dispute referred and, secondly, that the failure to consider all of the lines of defence amounted to a breach of fair procedures. He also remarks that 'As the case law evolves, it will be necessary to address more difficult questions, such as whether errors of law are similarly capable of examination in the context of an application for leave to enforce.'

Simons J describes the procedure to be followed on an application for leave to enforce an adjudicator's decision that is prescribed under Order 56B of the Rules of the Superior

4 *Gravity Construction Limited v. Total Highway Maintenance Limited* [2020 No. 153 MCA] and *Principal Construction Limited v. Beneavin Contractors Limited* [2020 No. 199 MCA].

5 *Principal Construction Ltd v. Beneavin Contractors Ltd* [2021] IEHC 578 (at Paragraph 12).

Courts and cites Practice Direction (HC 105), which came into effect on 26 April 2021. He helpfully describes the distinctions between the Irish jurisdiction and case law from England and Wales:

> *It is sufficient to the cause to identify the following. First and foremost, provision is made under the Construction Contracts Act 2013 for an adjudicator's decision to be enforced as if it were an order of court. An adjudicator's decision thus has an enhanced status under the domestic legislation. By contrast, the normal procedure for enforcing an adjudicator's decision under the UK legislation is to apply for summary judgment. Much of the case law is, therefore, concerned with whether the party resisting enforcement has been able to establish an arguable defence. In some instances, the party resisting enforcement will have brought a parallel application challenging the decision of the adjudicator, and seeking a final determination by way of court declarations (a so-called Part 8 CPR application) . . .*[6]

He considered that the failure of the respondent to appreciate the difference resulted in a mistaken reliance on the English case of *Hutton Construction Ltd v. Wilson Properties (London) Ltd*.[7] He also notes that Irish adjudication is statutory in origin (rather than implication of terms into a contract), which, practically, 'might, in principle, be amenable to judicial review. (This point does not yet appear to have been directly decided).'[8]

Furthermore, he comments on the fact that the Construction Act fails to stipulate what the consequences are in the event of a failure to respond to a payment claim notice, and notes that a notice of intention to refer to adjudication under Irish legislation is different from an adjudication notice under UK legislation.

Simons J then considers Sections 3 and 4 of the Act, which stipulate that a construction contract shall provide for (1) the amount of each interim payment to be made under the construction contract and (2) the amount of the final payment to be made under the construction contract, or for an adequate mechanism for determining those amounts (Section 3) and the payer's response (Section 4). He notes that Section 4 is silent on whether the amount claimed in a payment claim notice is payable by default where no response is delivered. Simons J did not grapple with this issue but rather the narrow issue of whether the alleged failure of the adjudicator to undertake a true valuation amounted to a breach of fair procedures.

Part 2: the adjudicator's decision on the referral

The applicant's case was that the respondent's failure to reply to the payment claim notice within 21 days entitled the full amount claimed to be payable, or in the alternative that the works be valued in accordance with the subcontract valuation mechanisms. The respondent contended that the payment claim notice was invalid and therefore no payment was due. The adjudicator decided that the payment claim notice was valid in accordance with the Act, resulting in the respondent's obligation to pay the whole sum claimed. The adjudicator further decided that he would not evaluate the sum due based on an assessment of measured

6 *Aakon Construction Services Ltd v. Pure Fitout Associated Ltd* (No. 1) [2021] IEHC 562 Paragraph 41.

7 *Hutton Construction Ltd v. Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC).

8 *Aakon Construction Services Ltd v. Pure Fitout Associated Ltd (No. 1)* [2021] IEHC 562 Paragraph 42.

works, variations and dayworks. He noted that for a 'true value' adjudication to commence, the respondent must first comply with his decision, and cited the judgment of the Court of Appeal in England and Wales in *Grove Developments Ltd v. S & T (UK) Ltd*.[9]

Simons J described the approach adopted by the adjudicator to determine, firstly, whether the applicant was entitled to a default payment, which he decided it was, and, secondly, whether the principles in *Grove Developments Ltd* were applicable as not in breach of fair procedures: 'Rather, the adjudicator made a reasoned decision that a valuation could not be commenced until the adjusted amount had been paid.' He considered the adjudicators approach as 'tenable' and for the purposes of summary application for leave to enforce the adjudicator's approach did not 'entail and breach of fair procedures'.[10]

Part 3: whether the payment dispute was validly referred to adjudication

It was alleged that the notice was ambiguous and it was not apparent whether the claim was for an interim payment of a termination payment, that several claims were unlawfully advanced under the one notice and, furthermore, that the fact that two attempts to apply for a construction contracts adjudication appointment rendered the appointment invalid.

Simons J found the issues regarding ambiguity and several claims to be unlawful as groundless and unfounded, noting that 'The respondent unashamedly seeks to resist the application for leave to enforce on the ground that the adjudicator did not have jurisdiction to make his decision, yet, in the next breath, criticises the adjudicator for failing to exhaust his jurisdiction.'[11] He also found that, under the legislation, there is no restriction of a party referring more than one dispute to an adjudicator. In respect of the issue of two applications for appointment, he found any difference in the wording of each to be legally irrelevant. The second application supersedes the first.

ii John Paul Construction Limited v. Tipperary Co-Operative Creamery Limited 2021 [No. 262 MCA]

Simons J again considered the issue of an adjudicator's alleged failure to comply with the requirements of fair procedures and natural justice and also whether the adjudicator reopened an issue previously decided in an earlier adjudication between the parties. The judgment notes that the High Court will not enforce an adjudicator's decision where there has been an obvious breach of fair procedures, but clearly sets out that the court is not interested in a detailed examination of the underlying merits of the decision but rather the issue of procedural unfairness.

He describes the importance of distinguishing between (1) the rejection of a line of defence as inadmissible and (2) the failure to consider a line of defence that was illustrated by the facts of *Aakon Construction Services Ltd*. The parties made particular reference to Paragraph 22 of *Pilon Ltd v. Breyer Group plc*,[12] while Simons J described how the High Court adopts a pragmatic approach, considering the decision in the round rather than carrying out

9 *Grove Developments Ltd v. S & T (UK) Ltd* [2018] EWCA Civ 2448; (2018) 181 ConLR 66.

10 *Aakon Construction Services Ltd v. Pure Fitout Associated Ltd (No. 1)* [2021] IEHC 562 Paragraphs 122 to 125.

11 *Aakon Construction Services Ltd v. Pure Fitout Associated Ltd (No. 1)* [2021] IEHC 562 Paragraph 90.

12 *Pilon Ltd v. Breyer Group plc* [2010] EWHC 837 (TCC); (2010) 130 ConLR 90.

a line-by-line analysis. Once again, Simons J found that the adjudicator did comply with the requirements of fair procedures. He also commented on the fact that an allegation that by not convening an oral hearing the adjudicator acted unfairly was 'sensibly withdrawn'.[13]

The issue regarding the reopening of a previously decided matter is related to the first adjudication decision valuing a variation, whereas the second values the delay costs associated with the variation itself. Simons J found that the distinction between the valuation of a variation in the first adjudication was not the same issue as that decided in the second, as no claim for an extension of time or prolongation costs was sought in the first.

III COURTS AND PROCEDURE

i Fora

The Irish civil court system is tiered by monetary value, as follows:

a district court – €2,000 in small claims or claims of up to €15,000;

b circuit court – claims of between €15,000 and €75,000 (€60,000 in personal injury claims); and

c High Court – claims above €75,000 with no upper limit.

There is no specialist construction component in the mould of the United Kingdom's Technology and Construction Court. However, the Irish High Court does operate a distinct division, the Commercial Court, which deals with all types of business disputes, including breach of contract, tort, property, trust and probate, IT disputes, judicial review, corporate mergers, global restructuring, insurance portfolio transfers, international swaps and derivatives or other investment disputes, and intellectual property disputes. This Court now includes the recently introduced (22 October 2021) specialist sub-list called the Intellectual Property (IP) and Technology List, which, under the amended Order 63A, includes any IP proceedings or those relating to issues of 'technological complexity on any field of industry'. There are also related specialist lists dealing with competition cases, arbitration matters, strategic infrastructure developments and insolvency.

Proceedings dealt with by the Commercial Court must have a commercial dimension and generally a value of no less than €1 million.

In response to the advent of construction adjudication, the High Court issued Practice Direction HC 105 in April 2021.

ii Jurisdiction

Construction contracts commonly include multi-tier dispute resolution clauses, yet there is scant authority regarding the enforceability of such clauses, except for matters addressing ambiguous clauses rather than the substance of the clauses' principles themselves. A well-drafted multi-tiered dispute resolution clause is therefore likely to be enforced in Ireland.

Irish courts are keen to encourage parties to explore alternative dispute resolution (ADR) options, particularly mediation and arbitration.

13 *John Paul Construction Limited v. Tipperary Co-Operative Creamery Limited* 2021 [No. 262 MCA] Paragraph 28.

In *John G Burns v. Grange Construction and Roofing Co Ltd*,[14] Ms Justice Laffoy observed that 'it would be infinitely preferable if the dispute between the applicant and the respondent was resolved by some process of alternative dispute resolution, rather than by litigation'.

In Ireland, the Mediation Act 2017 is a statutory framework designed to 'facilitate the settlement of disputes by mediation, to specify the principles applicable to mediation [and] to specify arrangements for mediation as an alternative to the institution of civil proceedings'. Section 16 of the Act provides that a court may, on its own initiative or on the initiative of the parties, invite the parties to consider mediation as a means of resolving the dispute.

iii Procedure rules

It is common that construction disputes are contractually restricted from litigation under most Irish standard forms of contract, which typically provide for disputes to be referred to conciliation or arbitration (the CCA 2013 introduced a statutory right to adjudication). As mentioned above, the courts prefer ADR and will invoke the Mediation Act 2017 if deemed appropriate. However, if a party desires its day in court, the High Court, or particularly the Commercial Court, is the most likely venue, subject to the monetary thresholds described above.

iv Evidence

Discovery of documents occurs once the pleadings have closed. The rules governing this process are set out in Order 31 of the Rules of the Superior Courts. The parties issue written requests for voluntary discovery of specific categories of documents currently or previously in their possession, power or procurement that are relevant to the dispute. This request must comply with the following requirements:

a parties must stipulate the exact categories of documents that they require;
b requests must be confined to documents that are material to the issues in dispute and necessary for the fair disposal of the proceedings or for saving costs; and
c a reasonable amount of time must be provided for discovery to be made.

The Commercial Court rules provide that the parties serve factual and expert witnesses evidence in signed and dated statements, which is considered to be their evidence-in-chief at the hearing. Witnesses undertake examination-in-chief and cross-examination. Although cross-examination can be by affidavit evidence, a notice to cross-examine must be served in advance.

Statutory Instrument 254/2016 gives High Court judges power to regulate experts' duties and how expert evidence can be adduced. These rules also provide for 'hot tubbing', where experts are cross-examined concurrently. The court can also request that the experts meet privately (without the presence of any party or legal representative), with a view to providing a joint statement setting out points of agreement and, more importantly, areas of disagreement.

14 *John G Burns v. Grange Construction and Roofing Co Ltd* [2013] IEHC 284.

IV ALTERNATIVE DISPUTE RESOLUTION

i Statutory adjudication

Statutory adjudication is provided for under the CCA 2013. Although the Act is dated 2013, it did not provide for the advent of adjudication in Ireland until 25 July 2016, with the passing into legislation of certain statutory instruments. As discussed above, the adjudication process has been endorsed in the Irish courts and its presence in the construction disputes sector continues to grow.

ii Arbitration

The Arbitration Act 2010 (the 2010 Act) confers on parties the freedom to choose the governing law of their contract, the law of the arbitration agreement, the seat of the arbitration, the arbitral rules, the choice of arbitrators, and the language of the contract and arbitration.

If the parties do not agree the number of arbitrators or the appointing body in their arbitration clause, the 2010 Act provides that the arbitral tribunal will consist of one arbitrator, and the High Court has the power to appoint the arbitrator in the absence of an alternative agreement.

As is the norm internationally for three member tribunals, each party appoints one arbitrator, and the two appointed arbitrators will appoint the third arbitrator. If a party fails to appoint an arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment will be made by the High Court. The 2010 Act incorporates the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the UNCITRAL Model Law) and so its provisions will apply to arbitration proceedings under the 2010 Act unless the parties agree to use another set of ad hoc or institutional rules. As Ireland is a signatory to the 1958 New York Convention, an arbitral award, irrespective of the country in which it was made (provided that the country is a signatory of the New York Convention), must be recognised and enforced in Ireland unless one of the grounds set out in the Model Law exists.

In *Achill Sheltered Housing Association CLG v. Dooniver Plant Hire Ltd*,[15] the High Court granted an order determining that the appointment of an arbitrator had been invalid, as the matters referred to arbitration had not previously been referred to conciliation as is required under the contract.

In *XPL Engineering v. K & J Townmore Construction Ltd*,[16] the High Court stayed proceedings and ordered that the matter be referred for arbitration. This is consistent with Article 8(1) of the UNCITRAL Model Law, whereby, in circumstances where there is a valid and binding arbitration agreement and one of the parties so requests, the court must refer the dispute between the parties to arbitration.

In *K & J Townmore Construction Ltd v. Kildare and Wicklow Education and Training Board*,[17] the High Court found that the conditions of Article 8(1) were not met because a later agreement between the parties to refer the dispute for expert determination had rendered the conciliation and arbitration clauses in the original building contract void.

All arbitration in Ireland, both domestic and international, is governed by the 2010 Act.

15 *Achill Sheltered Housing Association CLG v. Dooniver Plant Hire Ltd* [2018] IEHC 6.

16 *XPL Engineering v. K & J Townmore Construction Ltd* [2019] IEHC 665.

17 *K & J Townmore Construction Ltd v. Kildare and Wicklow Education and Training Board* [2019] IEHC 666.

iii Mediation

The Mediation Act 2017 encourages parties to settle their disputes at mediation, as opposed to in lengthy and costly litigation proceedings. Although the Mediation Act is not associated with the Arbitration Act 2010, it can bear on the arbitral process – up to the point when expert reports have been presented and a range of outcomes that could arise from the dispute resolution proceedings have been determined. Instigating mediation at this point, rather than continuing with the arbitration hearing (or hearings), can allow parties to resolve their disputes in a more time-efficient and cost-friendly manner.

iv Other ADR methods

In Ireland, conciliation is primarily used for the resolution of disputes in the construction industry and continues to play an important role in ADR. The local construction disputes sector is intimately familiar with the process – a familiarity garnered over many years of experience.

Conciliation is a voluntary process, entirely dependent on the parties agreeing to adopt it. It allows the parties to a dispute to determine a mutually agreeable solution without a requirement for a third party to determine and enforce a decision, such as in adjudication and arbitration. As it is a voluntary process (unless contractually mandated), the parties are able to withdraw at any time prior to an agreement being signed.

During the process, the conciliator is not able to pass information between the parties unless instructed to do so. The conciliator will issue a recommendation on the settlement only if the parties cannot reach an agreement. This advice will contain the conciliator's opinion on how the dispute should be resolved (although ordinarily without reasoning), which will not be limited in its scope, unless the parties' contracts specify otherwise (and they often do).

Most standard forms of Irish construction contract require the parties to engage in conciliation before referring a dispute to arbitration, litigation or another form of dispute resolution. Traditionally, the majority of construction disputes are settled at this stage of the process. However, with the advent of statutory adjudication, and if the Irish experience is to be similar to that in the United Kingdom, the use of conciliation may diminish in the years ahead while adjudication grows.

V CONSTRUCTION CONTRACTS

i Public procurement

The substantive procedural rules that apply to public procurement in excess of EU thresholds are contained in four pieces of legislation:

a the Public Contracts Regulations,[18] which implement Directive 2014/24/EU into Irish law;

b the Utilities Regulations,[19] which implement Directive 2014/25/EU into Irish law;

c the Concessions Regulations,[20] which implement Directive 2014/23/EU into Irish law; and

18 SI No. 284/2016 – the European Union (Award of Public Authority Contracts) Regulations 2016.

19 SI No. 286/2016 – the European Union (Award of Contracts by Utility Undertakings) Regulations 2016.

20 SI No. 203/2017 – the European Union (Award of Concession Contracts) Regulations 2017.

d the Defence Regulations[21] (as amended), which implement Directive 2009/81/EC into Irish law.

The guidelines setting out the remedies for a breach of the substantive procurement rules are governed by several regulations (collectively, the Remedies Regulations).

The Capital Works Management Framework includes standard procurement documents, model forms and works contracts, as well as guidance notes, which apply to the conduct of public sector capital works projects in Ireland, with a number of different award procedures. Under the Public Contracts Regulations, open and restricted procedures may be relied on. The competitive procedure with negotiation and the competitive dialogue procedure are available only in the circumstances prescribed in the Public Contracts Regulations. The open procedure is the most common procedure for public sector bodies, and the negotiated procedure is the most commonly used procedure in Ireland for utilities.

For above-threshold contracts, there are three principal sets of remedies regulations applicable to the public sector, to the utilities sector and to the award of concessions contracts, respectively:

a the Public Contracts Remedies Regulations;[22]
b the Utilities Remedies Regulations;[23] and
c the Concessions Remedies Regulations.[24]

Contracting authorities are obliged to undertake a standstill period between giving notice of the contract award decision and the reasons for the decision to the unsuccessful bidders and entering into the contract. A minimum standstill of 14 days commences on the day after the notice is sent electronically.

For an application for remedies, the Remedies Regulations apply a strict 30 calendar days after the applicant was notified of the decision. A declaration that the contract is ineffective must be applied for within six months of the conclusion of the relevant contract. Although the High Court has the power to extend the limitation period, it takes a restrictive approach and is disinclined to use its power to grant applications for time extensions.

For ordinary judicial review proceedings, applications to set aside the decision must be made within three months of the date when the grounds for an application occurred. The High Court can extend this duration for good reason; however, again, the courts take a restrictive approach to granting time extensions.

Although the normal limitation period for an application for a declaration of ineffectiveness is six months under the Remedies Regulations, it can be reduced to 30 calendar days under specific circumstances.

The High Court has the power to set aside a decision or declare a reviewable public contract ineffective, and it can impose alternative penalties on a contracting authority or may make any necessary consequential order. It may also make interlocutory orders either to

21 SI No. 62/2012 – the European Union (Award of Contracts Relating to Defence and Security) Regulations 2012.

22 SI No. 130/2010 – the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 as amended.

23 SI No. 131/2010 – the European Communities (Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010 as amended.

24 SI No. 326 of 2017 – the European Union (Award of Concession Contracts) (Review Procedures) Regulations.

correct an infringement, prevent any further damage or suspend the operation of a decision or a contract, and may award damages as compensation for resulting loss. Although it is possible for a review application to be heard within six months, the more likely time frame is 12 months or more, depending on complexities.

ii Contract interpretation

Irish case law stresses that contract interpretation involves broad principles rather than strict rules. When interpreting the meaning of a contract, the court's first step will be to consider the natural and ordinary meaning of words (textualism), but if the natural meaning remains unclear, a court may consider the commercial context (contextualism) to determine the meaning.

Irish case law suggests that a court in Ireland would not solely consider the words in isolation but would weigh the factual matrix and the circumstances in which a contract was negotiated and drafted, although care must be taken against placing too much emphasis on giving effect to commercial efficacy. As Robert Clark, an expert in contract law and the author of *Contract Law in Ireland*,[25] has warned, it is not the job of the court to impose contractual terms that were not intended and 'there can be a fine line between interpreting a contract in a way that fixes a meaning that is commercially sensible and adjusting the meaning to improve the contract'.

Irish courts have an obligation to interpret the contract objectively, regardless of the subjective intention of the parties. The public policy behind this approach is readily understood, to avoid wholly different interpretations that could be given to two similar contracts where the parties to each contract had different subjective intentions. In explaining the objective approach that courts must take to contractual interpretation, Laffoy J put it succinctly in *UPM v. BWG*,[26] as follows:

> *The Court's task is to ascertain the intention of the parties and the intention must be ascertained from the language they have used considered in light of the surrounding circumstances and the object of the contract . . . in attempting to ascertain the presumed intention of the parties the Court should adopt an objective, rather than a subjective approach, and should consider what would have been the intention of reasonable persons in the position of the parties.*

Parol evidence may be admissible to explain the subject matter and construction or to correct a mistake in commercial contracts but not to prove the validity of a contract.

Ambiguous contract clauses should be construed strictly against the party who provided the wording, in accordance with the *contra proferentem* rule, and provided that there is an element of ambiguity in respect of the relevant clause for the rule to apply.

The courts may imply terms into a contract. Implied terms are provided for by case law and certain statutes, such as the Sale of Goods Acts of 1893 and 1980.

In a recent Court of Appeal decision, the Court held that terms implied into a commercial contract must:

a be necessary to give business efficacy;
b be so obvious that it is implied; and
c give effect to the parties' intentions.

25 Clark, R (2016) *Contract Law in Ireland*, 8th Edition, Round Hall.
26 High Court, Unreported, 11 June 1999 at p. 24.

This followed on from an earlier decision in which the Court of Appeal found that an agreement was so imprecise and lacking in substance that it fell short of business efficacy.

In respect of oral modifications, the UK Supreme Court decision in *Rock Advertising Limited v. MWB Business Exchange Centres Limited* declined to give effect to these types of amendments.

In upholding the no oral modification (NOM) clause, the Supreme Court noted that they provided similar benefits to an 'entire agreement' clause in a written contract. In particular, NOM clauses serve three important functions, namely:

a to reduce the risk of disputes arising as to whether the parties had intended to vary the terms of a contract and what the precise amendments were;

b to prevent written agreements from being eroded to the detriment of parties by informal means; and

c to provide increased certainty for internal governance as to what obligations the party was promising to satisfy.

Whether this decision will be followed in the Irish courts remains to be decided. Irish courts have previously interpreted contracts and thus determined entitlement on the basis of how the parties managed and operated the contract during the project. Where this occurs, a party may subsequently be barred from renouncing the common understanding of how the contract was to operate in circumstances in which the other party would be unfairly prejudiced. However, ensuring that amendments to NOM clauses are provided in writing abates the likelihood of contrary interpretation by the parties and therefore reduces their commercial risk. This also becomes beneficial to funders as it prevents parties from modifying approved contractual terms without funder agreement.

VI COMMON SUBSTANTIVE ISSUES AND REMEDIES

i Time bars as condition precedent to entitlement

The courts will generally implement conditions precedent if they are unambiguous, even if doing so appears punitive.[27]

Courts have shown a willingness to enforce exclusion clauses. However, where a condition precedent is considered ambiguous, the court is likely to take the narrower interpretation and consider that a true condition precedent does not exist. It is unlikely that the Irish courts are going to diverge from the international practice of giving effect to condition precedent provisions where the parties have agreed the specific requirements of time limits and notice requirements.

ii Right to payment for variations and varied scope of work

The Irish courts will generally treat a contractor's right of payment according to the mechanisms for varied work and associated valuation according to the terms of the contract.

27 As in *CMA Assets Pty Ltd v. John Holland Pty Ltd* [No. 6] [2015] WASC 217.

iii Concurrent delay

Irish law has had no decision on the topic of concurrent delay since the UK case of *Walter Lily v. Mackay*.[28] Irish law more generally follows *Henry Boot Construction (UK) Ltd v. Malmaison Hotel (Manchester) Ltd*[29] regarding concurrency of delay. If there are two concurrent causes of delay, one of which is an employer's risk event and the other not, then the contractor is entitled to an extension of time for the period of delay caused by the employer's risk event notwithstanding the concurrent effect of the other.

Private sector standard forms of construction contract do not usually include a clause dealing with concurrent delay, but parties will generally include additional clauses in their construction contracts to address this issue. However, in the public sector, public works contracts expressly provide that a contractor is not entitled to recover delay costs for the period of concurrent delay.

iv Suspension and termination

There is no implied common law right to suspend the works, except for the express provision for an employer to suspend works because of the contractor's non-performance. However, there may be entitlement to terminate because of the contractor's breach of contract or if a repudiatory breach of contract can be evidenced.

There is no implied term allowing suspension by the contractor for non-payment, but most standard forms provide for an express right of suspension for non-payment, provided that prior notice is given. The CCA 2013 provides a contractor's statutory right of suspension of the works for non-payment by the employer on giving at least seven days' prior written notice.

v Penalties and liquidated damages

In a situation where the parties have agreed liquidated damages for delay, the employer is not entitled to claim any further damages in respect of the delay and will be entitled only to recover the delay damages even where these are higher (or lower) than the actual losses provided. The delay damages are a genuine pre-estimate of the employer's loss, assessed at the time the contract is entered into.

The High Court continued to apply the traditional test in relation to liquidated damages in *Sheehan v. Breccia*.[30] Although it considered the test applied in the 2015 UK Supreme Court decision in *Cavendish v. Makdessi*, that test was not preferred. Instead, it considered that it would be a matter for an appellate court to determine whether the '*Cavendish* test' should be adopted in Ireland in future cases. The Supreme Court was not persuaded that any change to the test was necessary, nor that the route taken by the UK Supreme Court was a superior one. The Court of Appeal[31] upheld the decision in *Sheehan v. Breccia* and no appellate court in Ireland has since overruled the traditional test.

28 *Walter Lily v. Mackay* [2012] 1773 (TCC).

29 *Henry Boot Construction (UK) Ltd v. Malmaison Hotel (Manchester) Ltd* [1999] 70 Con LR 32.

30 *Sheehan v. Breccia* [2016] IEHC 120.

31 [2018] IECA 273.

vi Defects correction and liabilities

Irish standard construction contracts do not usually include an express clause relating to latent defects or state the period for which a contractor shall be liable for latent defects. In the absence of express contractual provisions, the common law regulates these claims. A party may raise an action for defects either by suing in contract or tort (typically for negligence) or, alternatively and more commonly, by means of concurrent liability under both contract and negligence.

vii Bonds and guarantees

A guarantee is normally executed as a deed (as no consideration is passed) and must satisfy the same requirements as a contract. The Statute of Frauds Act (Ireland) 1695 renders an oral guarantor unenforceable.

The guarantor's liability will not be greater than that of the party to the underlying construction contract. However, it is commonplace for the guarantor to carry further obligations in the event of default in relation to performance or procuring an alternative contractor. In respect of on-demand bonds, the jurisdiction to make a call on a bond could be challenged where the applicable conditions triggering a call have not occurred, or where any procedural requirements have not been followed correctly.

viii Overall caps on liability

In addition to including a cap on liability, it is common to specify certain categories of loss that will not be recoverable by either party under the contract, such as:

a indirect loss;
b special loss, which may be considered the same as indirect or consequential loss;
c exemplary loss, which is awarded by a court by way of punishment in excess of a claimant's loss to punish the defendant for unreasonable behaviour and is required only in limited circumstances; and
d loss of profits – parties may only recover costs and expenses they actually incur as a result of the other party's breach of contract.

Irish contract law prohibits a contracting party from limiting its liability in respect of:

a death or personal injury arising from that party's negligence;
b fraud committed by that party; and
c failure by that party to give good title to goods.

It is also common practice for the liability of each party to be unlimited in respect of wilful default.

VII OUTLOOK

The future of construction disputes in Ireland will be largely determined by the industry's reaction to the judicial support bestowed on statutory adjudication. Although, traditionally, most construction and engineering disputes have been dealt with through the tried and tested conciliation process – which in a relatively small and local marketplace is eminently sensible – if parties consider the comparative speed and efficiency of adjudication to provide a sufficiently attractive forum in which to resolve their disputes, it may offer a serious challenge to conciliation's dominance. Recent decisions of the High Court suggest that, much like in

the UK, the 'pay now, argue later' principle that underpins the process of adjudication is wholly supported. It is also interesting to note that Simons J identified a number of important issues to be addressed by the High Court, including:

a errors of law made by adjudicators;

b whether adjudication under the CCA 2013 is amenable to judicial review under Order 8; and

c whether a payment claim notice is payable in full by default in the absence of a response.

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