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Construction Contracts Act 2013 – Enforcement of Adjudicator’s Decision by High Court

The Construction Contracts Act 2013 (the **Act**) regulates payments under construction contracts and introduced adjudication as a fast track dispute resolution mechanism for dealing with payment disputes between the parties to construction contracts. The Act commenced in April 2016 and since then, take-up of adjudication has been relatively slow. In the recent case of **Gravity Construction Limited v Total Highway Maintenance Limited [2021] IEHC 19**, the High Court (Mr Justice Garrett Simons) enforced an adjudicator’s decision under section 6(11) of the Act for the first time.

Background

Adjudicator’s decisions are, pursuant to section 6(10) of the Act, binding pending the resolution of a payment dispute between the parties by way of arbitration or court proceedings.

This case involved an application by Gravity Construction Limited (**Gravity**) to the High Court to enforce an adjudication award made against Total Highway Maintenance Limited (**THML**) pursuant to the Act. Gravity had been awarded €135,458.92 by way of an adjudicator’s decision given on 28 April 2020. This sum was payable by THML within fourteen days of the date of the adjudicator’s decision. THML did not pay within this timeframe and so Gravity instituted the High Court Proceedings.

THML’s initial response to the application to enforce the adjudicator’s decision was to say that the matter should be referred to arbitration and the payment of the award stayed pending the determination of the arbitration. THML subsequently indicated that it was prepared to pay the award. This meant that THML were not pursuing their case that payment was to be stayed pending the outcome of arbitration. Accordingly, two questions remained to be determined by the High Court when the matter came before it. Firstly, whether the court should make an order against THML to enforce the adjudication award despite their solicitor indicating that they were prepared to give a formal undertaking to the court that the monies would be paid within two weeks of the date of the hearing.

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Secondly, although THML had made a settlement offer, whether Gravity was entitled to recover its costs of the High Court proceedings from THML.

Judgment

Mr. Justice Garrett Simons giving judgment on 26 January 2021, granted an order providing Gravity with leave to enforce the adjudicator's decision in the same manner as a judgment or order of the High Court *unless* the sum due was paid within 7 days of the date of the judgment. The order was made pursuant to section 6(11) of the Act which states; "*The decision of the adjudicator, if binding, shall be enforceable by action or, by leave of the High Court, in the same manner as a judgement or order of that Court with the same effect and, where leave is given, judgment may be entered in the terms of the decision.*"

The court considered that, while a solicitor's undertaking would obviate the need to make a formal court order, Gravity was nevertheless entitled to relief in circumstances where THML, by the time of the hearing, offered no opposition to the proceedings. The court felt that Gravity was entitled to have the matter ruled upon by the High Court "*having regard to the legislative intent underlying the Construction Contracts Act 2013, and, in particular the need for expedition,*"

In deciding on the costs order, the court took into account (i) the timing of the offer of settlement, (ii) ambiguity around the offer of settlement and (iii) the legislative intent underlying the Act.

As regards timing, while THML had made a settlement offer, the court considered that the offer was made at the "*eleventh hour*", being sent at lunchtime on 23 December 2020 when most offices would be closing for Christmas. Accordingly, the court proposed to treat the effective day of receipt as the first normal working day following the holiday period being 4 January 2021 – three weeks before the hearing date of 26 January 2021. The court considered that the reality was that most of the costs would already have been incurred well in advance of the date of the settlement offer and the hearing date.

The court found the wording of the offer letter to be "*at best ambiguous*" with THML having made an offer to make a "*reasonable contribution*" to Gravity's legal fees. The court considered that a better approach would be to indicate in the settlement offer that the settling party is prepared to pay the other side's costs but reserves the right to challenge specific fee items.

In referring to the legislative intent underlying the Act, the court stressed "*the need for expedition*". It is also worth quoting issues that informed this aspect of the court's decision on costs; "*The simple fact of the matter is that by raising grounds of opposition which it ultimately did not pursue, the respondent successfully delayed these proceedings for a period of some six months.*" And; "*In allocating costs, I am entitled to have some regard to the conduct of the respondent.*" The court was of the opinion that what could have been a straightforward application for enforcement under the Act was complicated by the introduction of the issue of a stay pending arbitration.

Due to the timing and ambiguity of THML's offer of settlement as well as the legislative intent underlying the Act, the court declined to exercise its discretion and depart from the

default position, which is that the applicant, Gravity, is entitled to its costs from THML having been entirely successful in obtaining the relief sought.

Comment

The key takeaway is the court's attitude to the conduct of THML which resulted in an eight month (or thereabouts) delay in payment. The legislative intent underlying the Act centres on prompt payment under construction contracts. That intent extends also to prompt payment of adjudicator's awards.

This decision may encourage parties to payment disputes under construction contracts to rely more readily on the Act and seek to resolve payment disputes by adjudication. Parties to construction contracts may now anticipate that the courts will be supportive of adjudicator's decisions, in particular regarding timely payment of adjudicator's awards in accordance with the Act.

In granting the "unless" order, the court recognised Gravity's statutory entitlement to relief under the Act, while affording THML a short period of time within which to make the payment without a judgment being formally entered against it.

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