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Annual Construction Law Conference 2023

Friday 5th May 2023 | 2.00pm - 5.30pm

Distillery Building,
Dublin 7

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2.00pm - 5.30pm | Registration 1.30pm
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2.00pm **Panel One: *Recessionary Times & the Construction Industry***
Chairperson: Sara Phelan SC - Chair of the Council of The Bar of Ireland


Inflation/Disruption/Prolongation & Delay
Martin Waldron BL


Termination of Construction Contracts – Contractual Pre-requisites
Imogen McGrath SC


Construction Insolvency
Jonathan FitzGerald BL

3.00pm **Panel Two: *Alternative Dispute Resolution in Construction***
Chairperson: Peggy O'Rourke SC


The Construction Contracts Act 10 Years On – the Adjudicator's Perspective
Gerard Meehan SC


Building Regulations & Judicial Review
Catherine Dunne BL


Bespoke Contracts and the Loss of the Arbitration Clause
Finola McCarthy, RDJ LLP

4.00pm Tea/Coffee Break

4.30pm **Panel Three: *The Case for a TCC in Ireland: Only a Matter of Time?***
Chairperson: The Hon. Mr. Justice Denis McDonald


John Trainor SC


Mr. Justice David Barniville, President of the High Court


Mrs Justice Finola O'Farrell DBE

5.30pm Drinks Reception in Sheds Bar

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Sara Phelan SC

Chair of the Council of The Bar of Ireland

Sara was called to the Bar in 1996, took silk in 2013, and has a broad breadth of practice areas, including personal injury/medical negligence law, crime, child/family law and judicial review, with further interests in probate and mental health matters. Sara is also a qualified Mediator (CEDR) and Arbitrator (FCIArb) and a former Mental Health Tribunal Chairperson. Sara is an elected member of the Bar Council of Ireland (since 2019) and was elected Chair of the Council of the Bar of Ireland in July 2022, commencing her term of office in September 2022. Prior to taking up office as Chair, Sara chaired the The Bar of Ireland Law & Women Mentoring Committee and the Professional Practices Committee. Extra-curricularly, Sara is a dog-lover and music-lover, a keen swimmer and fledgling white water kayaker and a confirmed 'foodie', with a love of all things travel-related.

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Martin Waldron BL

Martin is a Barrister and a Chartered Quantity Surveyor with over 28 years' experience in construction and property related disputes.

He has acted as arbitrator, mediator, adjudicator and conciliator as well as counsel in numerous construction disputes on some of the largest projects in the state.

He is the Treasurer of the Construction Bar Association, Chair of the SCSI Dispute Resolution Standing Committee, past Chairman of CIArb (Irish Branch), and also a member of the SCSI Standing Committee for Regulation and Standards.

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Construction Bar Association Annual Conference 2023

DELAY AND DISRUPTION PRINCIPLES AND REMEDIES

by

Martin Waldron BL

FCIArb MSCSI MRICS

May 2023

CONTENTS

General note:

The primary form of contract upon which this paper is based is the Public Works Contract for Building Works Designed by the Employer[1] (hereafter the PWC); the comments apply equally to the other Public Works forms of contract which have near identical provisions. Where appropriate there is additional commentary on the RIAI[2] and FIDIC[3] forms of contract.

[1] Public Works Contract for Building Works Designed by the Employer: PW-CF1 v2.6
[2] Royal Institute of Architects of Ireland Agreement and Schedule of Conditions of Building Contract (Yellow) 2017 Edition
[3] FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer First Edition

1.0 Introduction & Overview

1.1 This section.

1.2 Section 2 of this paper discusses the financial impact of delay and disruption on construction contracts. It explains the steps contractors take to arrive at their price, the differences between delay and disruption, and their effects on construction projects. The paper also covers additional factors such as concurrency, acceleration, and duty to mitigate, and how they can affect construction contracts.

1.3 Section 3 of this paper discusses the importance of notice requirements and time restrictions in Public Works Contracts (PWC). It explains that both parties must adhere to these provisions exactly, as demonstrated in various court cases. The text also addresses the issue of ambiguous wording and its implications on interpretation, noting that the PWC's clause 1.2.4 prevents the use of the *contra proferentum* rule. Ultimately, it emphasizes the importance of complying with notice requirements in practice to avoid disputes

1.4 Section 4 of this paper discusses processes and requirements for contractors to apply for an extension of time, as well as the entitlement to compensation in certain situations. It also addresses the issue of liquidated and ascertained damages.

1.5 Section 5 of this paper discusses heads of loss in construction contracts and their treatment by courts. Key points include differentiating between preliminaries and overheads, examining eligibility for claiming expenses, and addressing various claims such as loss of contribution, profit, productivity, additional resources, loss of chance, and inflation. Cumulative claims, which emerge at the end of a project, reveal the combined effect of individual claims, and are considered. There is also a section on proofs required in relation to the heads of loss.

1.6 Section 6 summarises up the issues covered in the paper.

2.0 Delay and Disruption

Construction Contracts and Time

2.1 In most contracts, the contractor works according to a program for the project, an agreed-upon contract sum or contract rates, and a set of tender documents. However, when delays and disruptions occur, the financial impact on these fundamental elements can be significant..

2.2 This paper analyzes the financial effect of delay and disruption on construction contracts. To prepare or defend a claim, it is crucial to understand how contractors compile the main elements of a contract. Typically, contractors follow these steps when arriving at their price:

- Divide the documents into work packages.
- Obtain net prices for work packages from subcontractors.
- Develop a work schedule based on the packages, identifying a critical path for overall project duration.
- Compile a list of preliminary requirements to complete the project within the specified timeframe.
- Aggregate the information into a net tender price.
- Calculate overhead costs and allocate them to the tender, either as a percentage of the project value or a monthly rate based on the schedule.
- Assess the project's risk factors (e.g., contract type client reputation, design team competence, etc.).
- Add a profit margin based on the risk assessment.

2.3 It is not uncommon for a contractor to enter a negative profit figure due to various reasons, such as anticipating lower package prices due to market conditions or successfully submitting claims for variations, delay, and/or disruption.

2.4 Experienced contractors may adjust rates for items they expect to increase while discounting rates for items unlikely to change or decrease. This approach often involves examining preliminaries and overheads to provide a basis for future claims or to adjust rates according to project constraints.

2.5 Representatives of the parties must approach any claim brought to them for consideration with this reality in mind.

Delay and Disruption

2.6 Delay and disruption are distinct concepts that can occur simultaneously. Contractors who are prevented from claiming for delay under a contract or limited in the damages they may claim for delay may attempt to present what is essentially a delay claim as a disruption claim. Practitioners must be alert to this approach and know how to frame such an argument or argue against such an attempt.

2.7 The distinction between delay and disruption is straightforward. When an item of work is unable to finish at an anticipated date due to some event/s, and this item of work is on the critical path of a project program, the project is delayed. When the item of work is not on the critical path, but the timing of the work has to be altered, the works are disrupted.

2.8 In practice, it is rarely this straightforward. There is often a mix of critical path items and non-critical path items delayed and/or disrupted throughout a project. These delays and/or disruptions may arise from multiple events, some of which may be contractor-caused. Additionally, there can be a multitude of events without any disruption and/or delay attributable to them in isolation; however, due to the number and nature of these events, a delay and/or disruption claim arises therefrom.

2.9 These problems are real for contractors. When the program is disrupted and/or delayed, this can have serious financial consequences, and submitting a claim on this basis is not indicative of a "claims conscious" contractor but rather a contractor protecting their interests.

2.10 Delay and disruption effects include:

- Additional site management for rescheduling disrupted works.
- Increased head office management for overseeing disrupted works.
- Additional costs if the completion date is delayed.
- Staff diverted from other profitable projects.

- Claims from affected subcontractors.
- Reduced project profitability.

2.11 Successful claim formulation depends on the accessibility of relevant records, including untouched project components that serve as reference points for evaluating delays or disruptions. Representatives must encourage clients to gather extensive information as an initial priority.

2.12 Familiarity with contractual remedies, entitlements, and obligations is crucial. Contractors occasionally help employers address project issues not caused by the contractor, only to later discover they are not eligible for compensation. In such cases, if the contractor had refrained from providing assistance and left the issue to the employer to resolve, they may have an entitlement. Conversely, employers may sometimes expose themselves to liability through their actions, although this occurs less frequently.

Delay

2.13 The completion date is vital for both Employers and Contractors in construction projects. Employers focus on funding costs and subsequent building usage (e.g., business operations, leasing, or selling). For Contractors, key factors related to delays include project duration costs, the project's contribution to company profit and overheads, and workload management capabilities.

2.14 Employers typically require Contractors to develop a contract program, detailing the duration and schedule of each work element. This program specifies the necessary sequence of work elements. In larger projects, the program can be complex, with multiple layers and sub-programs. Regardless, they all serve the same purpose: to display the work schedule, duration, and interdependence of work elements.

2.15 A critical path can be, if the programme is of any use, derived from the project programme, representing the shortest duration from start to finish based on sequentially completed work elements. In a simple example, the critical path might include foundations, walls, roofs, fenestration, internal works, services, and finishes. This example illustrates the method for extracting the critical path from a programme.

2.16 A delay in any item on the critical path will cause subsequent items to be delayed, resulting in late project delivery. It is essential to note that non-critical items may become critical due to other events, creating the complexity in delay analysis discussed elsewhere in this paper.

2.17 Contractors must maintain an up-to-date program and adjust the critical path accordingly. This ensures both the Contractor and Employer are aware of critical dates and relevant information.

Disruption

2.18 Disruption, unlike delay, affects programmed works without impacting the critical path. However, a severely disrupted non-critical path item may eventually become part of the critical path as noted above.

2.19 While delay and disruption are separate, they often occur together. Disruption may not cause delay but could impact work through personnel relocation, productivity loss, or additional management. Contractors, unable to claim delay under a contract or limited in potential damages, may attempt to present delay claims as disruption claims.

2.20 Ideally, a contractor should account for disruption within each variation as it arises. However, this is not always possible, as the disruption may only become fully apparent later.

2.21 A common method of assessing disruption effects is the measured mile approach, which compares the expected work completed within a given time to the actual work completed. The use of this method goes some way to explain the rationale behind disruption; however, rarely do parties agree as to what could have been achieved versus what was achieved.

<u>Additional factors – concurrency, acceleration, duty to mitigate</u>

2.22 Concurrency, or two events causing delay at the same or overlapping period, adds complexity to delay claims and is further addressed in the section on proofs. The

best way to manage the complexity in delay claims where concurrency is present is to raise and address the issues at the time.

2.23 Acceleration claims are closely related to delay and disruption claims. In its simplest form, acceleration involves an instruction from the Employer's representative to expedite the works, usually by increasing site operatives and/or management. This scenario rarely causes controversy; an order has been given, and costs must be agreed upon.

2.24 Where the issues arise is where a contractor elects to accelerate the works of his own volition. In the first instance a project is running behind schedule due to a variety of factors, the Contractor has a duty to mitigate the delay; and he does so by increasing the resources on the project and he finishes on time. The second instance where this arises and poses problems is where a variety of Employer's change orders are issued, the value is agreed based on contract rates, the Contractor is aware that EOT's may not carry costs with them and so he increases resources and finishes the additional works within the original contract framework.

2.25 A contractor needs to be very aware of the distinction between mitigation and acceleration. Acceleration costs are often not payable without an explicit or implicit instruction from the Employer; in any event acceleration costs are not permitted under the PWC contract at all, see clause 10.7.4[4]; this does raise the question as to how an Employer or Contractor deals with a scenario requiring acceleration.

[4] 10.7.4 Except as provided in this sub-clause 10.7 [notwithstanding anything else in the Contract] losses or expenses arising from or in connection with delay, disruption, acceleration, loss of productivity or knock-on effect shall not be taken into account or included in any increase to the Contract Sum, and the Employer shall have no liability for such losses or expenses.

3.0 Contracts

Public Works Contracts

3.1 The Public Works Contract has explicit notice requirements and time restrictions, which mandate the contractor to inform the design team of any claims within specified timeframes. The design team must also respond within designated time limits.

3.2 Before examining the specific provisions of the time-bar clauses in the PWC forms of contract, it is crucial to recognize that a clause deemed to be a time-bar obligates both parties to adhere to these provisions exactly. In *Ener-G Holdings PLC v Philip Hormell*[5], the Court determined that leaving a notice at premises did not meet the personal delivery requirement stipulated in the contract terms. The claimant was deemed to have missed the deadline for submitting a warranty claim by one day. The contract terms were detailed in the judgment as follows:

> "*Clause 13 is headed "Notices", and it is in these terms:*
>
> > *"13.1 Notice in writing*
> > *Any notice or other communication under this Agreement shall be in writing and signed by or on behalf of the party giving it.*
> > *13.3 Service*
> > *Any such notice may be served by delivering it personally or by sending it by pre-paid recorded delivery post to each party (in the case of the Buyer, marked 'for the attention of directors') at or to the address referred in the Agreement or any other address in England and Wales which he or it may from time to time notify in writing to the other party.*
> > *13.3. Deemed service*
> > *Any notice delivered personally shall be deemed to be received when delivered (or if delivered otherwise than between 9.00am and 5.00pm on a Business Day, at 9.00am on the next Business Day), any notice sent by pre-paid recorded delivery post shall be deemed to be received two Business Days after posting and in proving the time of dispatch it*

[5] *Ener-G Holding PLC v Philip Hormell* [2011] EWHC 3290

shall be sufficient to show that the envelope containing such notice was properly addressed, stamped and posted.'"[6]

3.3 The court held that the notice had to be personally handed to the person[7] and this decision was upheld by the Court of Appeal[8].

3.4 Similarly, under clause 10.3.1[9] of the PWC, notice provisions are outlined in detail in relation to any claim for an adjustment to the contract sum:

> If the Contractor considers that under the Contract there should be an extension of time or an adjustment to the Contract Sum, or that it has any other entitlement under or in connection with the Contract, the Contractor shall, as soon as practicable and in any event within 20 working days after it became aware, or should have become aware, of something that could result in such an entitlement, give notice of this to the Employer's Representative…

3.5 Clause 10.3.2[10] entails the bar against any claim not satisfying the requirements:

> If the Contractor does not give notice and details in accordance with and within the time provided in this sub-clause 10.3 … the Contractor shall not be entitled to an increase to the Contract Sum…

3.6 In the Australian case *Décor Ceilings Pty Ltd v Cox Constructions Pty Ltd*[11] the court held that a time-bar clause is a condition precedent once defined time limits were included in the notification section. In support of this requirement, the English House of Lords in *Bremer v Vanden Avenne*[12] held that in order for a time-bar clause to be a condition precedent precise time limits must be stated and loss of rights for failure to comply must be clear. The PWC forms satisfy these requirements.

3.7 However, under the PWC, the Contractor must issue the notice if they consider they have an entitlement and only after becoming aware of it. This leaves room for the

[6] *Ener-G Holding PLC v Philip Hormell* [2011] EWHC 3290 at para 3
[7] *ibid* at para 3
[8] *Ener-G Holding PLC v Philip Hormell* [2012] EWCA Civ 1059
[9] PWC Clause 10.3.1
[10] PWC Clause 10.3.2
[11] *Décor Ceilings Pty Ltd v Cox Constructions Pty Ltd (No 2)* [2005] SASC 483, [2006] CILL 2311, Supreme Ct Sth Aus.
[12] *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109

Contractor to argue they only became aware of the entitlement at a late stage, such as in a cumulative claim. The counterargument is that the clause states 'or should have become aware,' which is an objective test assumed to be through the eyes of a competent Contractor.

3.8 Clause 20.1 of the FIDIC[13] form of contract, considered in *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [14] is similar in its operative parts to clause 10.3.1 of the PWC, reading as follows:

> If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Employer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the contractor became aware, or should have become aware, of the event or circumstance.
>
> If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim...
>
> The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.

3.9 In *Multiplex* the court held that the wording was vague and that no definitive time limit could be imposed:

> The obligation set out in cl 11.1.3 as a condition precedent does not comprise or include any absolute obligation to serve notices or supporting information.

[13] FIDIC Clause 20.1
[14] *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC), para 82

> The obligation imposed upon the sub-contractor is an obligation to do his best as soon as he reasonably can.[15]

3.10 Whilst there can be no question that the 10.3 provisions constitute time-bars, it is arguable that the vague wording provisions noted above fall foul of the same issue which arose in this *Multiplex*; though it is likely that this would be a hard bridge to cross given the clear interpretive rules stated in the contract:

> The parties intend the Contract to be given purposeful meaning for efficiency and public benefit generally and as particularly identified in the Contract.[16]

3.11 An additional point to note from *Multiplex* is the affirmation of the *contra proferentum* approach to time-bar clauses from *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*[17]:

> *"[70] In Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd [1970] 1 BLR 111, Salmon LJ held:*
>
> > *'The liquidated damages and extension of time clauses and printed forms contract must be construed strictly contra preferentum. If the employer wishes to recover liquidated damages for failure by the contractors to complete on time in spite of the fact that some of the delay is due to the employer's own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the employer.'*
>
> ...
> *From this review of authority I derive three propositions:*
> ...
> *(iii)In so far as the extension of time clause is ambiguous, it should be construed in favour of the contractor.*"

3.12 He then proceeded to look at specific wording within the contract:

[15] *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC), para 82
[16] PWC Clause 1.2.1
[17] *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970] 1 BLR 111,

> "[*78] Clause 11.2.1 contains some important qualifications. Clause 11.2.1 does not require the sub-contractor to serve notices immediately when any delay is caused, but rather <u>to serve notices when such delay becomes or should have become "apparent"</u> [emphasis added]. The sub-contractor's obligation to notify the causes of a delay is not an absolute obligation but rather an obligation to do so "insofar as the sub-contractor is able".*"

3.13 The most comparable wording to the PWC notice provisions are underlined for clarity; he went on to comment on the effect of these provisions thus:

> "[*80] Standing back for a moment from the various sub-sub-clauses, I construe cl 11.2 as requiring the sub-contractor to do his best as soon as he reasonably can. I do not read cl 11.2 as requiring the sub-contractor to serve notices or to provide supporting details which go beyond the knowledge and information available to him.*"

3.14 Bearing in mind the wording, which is the subject of this section of the paper, the above ruling is particularly relevant and one would think it ought to be of concern to those representing employers under the PWC. However, in relation to the PWC, clause 1.2.4 prevents the use of the *contra proferentum* rule in interpreting the PWC forms of Contract:

> No rule of legal interpretation applies to the disadvantage of a party on the basis that the party provided the Contract or any of it or that a term of the Contract is for the party's benefit.

3.15 As a result of this provision the mitigation of the *contra proferentum* rule does not apply to the interpretation of the PWC. In the absence of the ability to rely on this rule, a dispute resolver may find some assistance in the aforementioned interpretative provisions in clause 1.2.1; though one will find varying views of how this provision ought to be applied depending on which party one talks to:

> The parties intend the Contract to be given purposeful meaning for efficiency and public benefit generally and as particularly identified in the Contract.

3.16 In practice, it is well accepted that the PWC provisions are conditions precedent and, accordingly, the best approach from all parties' perspectives is to ensure they satisfy the notice requirements.

Royal Institute of Architects form of Contract

3.17 The RIAI form of contract contains the following notification requirements:

- Clause 13: Any oral instructions … shall, if involving a variation, be confirmed in writing by the Contractor to the Architect within five working days…
- Clause 29(b): If any act or default of the Employer delays the progress of the works then the Contractor shall within five working days of the act or default give notice in writing to the Architect…
- Clause 30: Upon the happening of any such event causing the delay the Contractor shall immediately give notice thereof in writing to the Architect…

3.18 It has long been accepted in Ireland that these provisions are not conditions precedent. This understanding is in keeping with the jurisprudence examined above. In essence without a corresponding time-bar clause one would reasonably expect these not to be held as conditions precedent.

3.19 It is particularly important to note the clauses here do not specifically preclude claims at a later stage and this forms part of the basis upon which these have been held not to be conditions precedent. However, in *Steria Ltd v Sigma Wireless Communications Ltd* [2008] BLR 79 the Court held as follows:

> "*...in my judgment the phrase, 'provided that the sub-contractor shall have given within a reasonable period written notice to the contractor of the circumstances giving rise to the delay' is clear in its meaning. What the sub-contractor is required to do is give written notice within a reasonable period from when he is delayed, and the fact that there may be scope for argument in an individual case as to whether or not a notice was given within a reasonable period is not in itself any reason for arguing that it is unclear in its meaning and intent. In my opinion the real issue which is raised on the wording of this*

clause is whether those clear words by themselves suffice, or whether the clause also needs to include some express statement to the effect that unless written notice is given within a reasonable time the sub-contractor will not be entitled to an extension of time.

In my judgment a further express statement of that kind is not necessary. I consider that a notification requirement may, and in this case does, operate as a condition precedent even though it does not contain an express warning as to the consequence of non-compliance. It is true that in many cases (see for example the contract in the Multiplex Constructions (UK) case itself) careful drafters will include such an express statement, in order to put the matter beyond doubt. It does not however follow, in my opinion, that a clause – such as the one used here – which makes it clear in ordinary language that the right to an extension of time is conditional on notification being given should not be treated as a condition precedent."

3.20 Applying this to the wording of the RIAI; it is arguable that the wording of the RIAI clauses are conditions precedent, though given the absence of the words 'provided that' it is unlikely that such an argument would succeed. In *WW Gear Construction Ltd v McGee Group Ltd*[18] the court held that the wording "provided always that … is often the strongest sign that the parties intend there to be condition precedent".

3.21 The ruling in *London Borough of Merton v Stanley Hugh Leach Ltd*[19] shows that it will be necessary to look very carefully at the exact wording of the clause in question. The clause from the JCT Standard Form of Building Contract read as follows:

> Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice of the delay to the Architect/ Supervising Officer, and if in the opinion of the Architect … the completion of the works is likely to or has been delayed … then the Architect shall so soon as he is able to estimate the length of the delay … make in writing a fair and reasonable extension of the time for the completion of the Works…

[18] *WW Gear Construction Ltd v McGee Group Ltd* [2010] EWHC 1460 (TCC)
[19] *London Borough of Merton v Stanley Hugh Leach Ltd* [1985] BLR 32

3.22 The court in this instance held that the clause did not prevent the Architect granting an extension of time where the contractor had not complied with the provisions of the clause.

Bespoke Contracts – a word of warning

3.23 Advisors, employers and contractors alike need to be very cautious about inserting bespoke notice provisions in contracts. In the PWC suite of contracts, there are a series of notices and time bars: 10.3 notice, ER determination or deemed determination, notice of dispute and referral to a project board, minuting of the meeting, referral to conciliation, conciliator's recommendation, referral to arbitration. Taking an individual set of notices without the remaining provisions can prove very problematic.

3.24 In addition, it is worth noting that a failure by either party to comply with one of the time requirements along the chain will in all likelihood render the following time bars inoperable, from the initial 10.3 notice right up to resolution of a dispute at arbitration.

Exclusion clauses:

3.25 In looking at potential delay and construction claims and the heads of loss arising it is necessary to look at the contracts to ensure certain heads of loss are not excluded and to assess the current approach of the court to such exclusion clauses.

Indirect Losses (Consequential)

3.26 The most common exclusion clause is one which may seek to exclude liability for indirect or consequential losses, for example FIDIC clause 17.6[20]:

> Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect of consequential loss of damage which may be suffered by the other Party in connection with the Contract…

[20] FIDIC Clause 17.6

3.27 There is no specific exclusion clause in the PWC; the exclusion operates by virtue of the prescription of the available means to adjust a contract sum, the noting that only these provisions permit an adjustment, and the exclusion of any consequential loss provision. This matter is addressed in the section hereunder dealing with delay and disruption claim prohibitions in the contract.

3.28 For claimants, it is of some comfort to see the approach of the Technology and Construction Courts; in *GB Gas Holdings Limited v Accenture* and *McCain Foods GB Ltd v Echo-Tec (Europe) Ltd*[21] the Courts took a very broad view of what constituted direct loss.

3.29 In *GB Gas Holdings* the damages listed below were considered direct, resulting from the failure of Accenture's IT system, which caused impediments to British Gas's billing process and other related matters, including the loss of profit that would have been generated from billed supply:

- Compensation to customers.
- Increased gas distribution charges.
- Overheads incurred to rectify the problem.
- Losses incurred due to unbilled and/or late billed gas supply.

3.30 A detailed analysis of the case law on loss of profit was completed in *Hotel Services Ltd v Hilton International (UK) Ltd*[22] where the court plainly stated that lost profit on the project is a direct loss not excluded by a very precise exclusion clause[23]:

> *"... if equipment rented out for selling drinks without defalcations turns out to be unusable ..., it requires no special mutually known fact to establish the immediacy both of the consequent cost of putting it where it can do no harm and — if when in use it was showing a direct profit — of the consequent loss*

[21] *GB Gas Holdings Ltd v Accenture* and *McCain Foods GB Ltd v Echo-Tec (Europe) Ltd* [2011] EWCH 66 (TCC)
[22] *Hotel Services Ltd v Hilton International (UK) Ltd* [2000] BLR 235
[23] ibid para 4: Section 14: Liability (1) The Company [HSL] will not in any circumstances be liable for any indirect or consequential loss, damage or liability arising from any defect in or failure of the System or any part thereof or the performance of this Agreement or any breach hereof by the Company or its employees. (2) Without prejudice to paragraph (1) above all and any liability on the Company's part arising in contract or tort (including negligence) or otherwise, howsoever, for any loss, damage, liability or injury of whatsoever nature arising in any way whatsoever from or in connection with this Agreement and/or the System and any part thereof (including without limitation the use, supply, possession, installation, repair or presence of the same) shall be limited to the net value of the System and the Company's performance of its obligations under Section 9.

> *of profit. Such losses are not embraced by the exclusion clause, read in its documentary and commercial context.*"

3.31 One type of loss that can be difficult to categorize as either direct or indirect loss is the loss of profit from other potential projects. Contractors often claim this type of loss when they argue that they were unable to make a profit because their management was occupied with a delayed or disrupted project. Based on clauses similar to those in the FIDIC form, it seems that such a loss would not be recoverable, and there appears to be no authority prohibiting an exclusion clause from functioning in this way.

3.32 As a result, it seems that loss of chance profits will not be recoverable if an exclusion clause is present.

PWC exclusions on delay, disruption, acceleration, loss of productivity

3.33 There is no specific exclusion clause for consequential losses in the PWC; however, there are many provisions which have the same effect. The most straightforward of these is clause 10.7.4 as follows:

> Except as provided in this sub-clause 10.7 [notwithstanding anything else in the Contract] losses or expenses arising from or in connection with delay, disruption, acceleration, loss of productivity or knock-on effect shall not be taken into account or included in any increase to the Contract Sum, and the Employer shall have no liability for such losses or expenses.

3.34 There is little difficulty in understanding the meaning of this clause; the issue that arises is whether this exclusion applies to claims under 10.7 alone (delay claims), or also to claims under 10.6 (general valuation of adjustments to the contract sum).

3.35 There are two lines of thought on which of the above is the case.

3.36 In the first instance it is argued that to hold that the clause applies to the entire contract is reading too much into the clause, thereby preventing the contractor from submitting otherwise valid claims arising from the actions of the employer.

3.37 On the other hand, to hold that the clause only applies to 10.7 claims provides a means for contractors to prepare complex delay and disruption claims under 10.6; thereby attempting to override the contractual provisions.

3.38 Given that this clause is in essence an exclusion clause, it is arguable that it ought to be construed strictly and in so doing one needs to look at the use of the words "[notwithstanding anything else in the contract]". The inclusion of these words clearly, in the author's view, precludes a contractor from thereafter using another part of the contract to claim what follows as excluded.

3.39 So the question is, what is thereafter excluded; this again is relatively straightforward – "losses or expenses arising from or in connection with delay, disruption, acceleration, loss of productivity or knock-on effect".

3.40 In addition to clause 10.7.4, it is arguable that the following provisions read together preclude any claims for consequential losses:

- Clause 1.10.1 – the contract supersedes all previous representations...neither party has relied on any other written or oral representation…
- Clause 10.1.2 – The Contractor's sole remedies for a compensation event shall be those stated in the contract.
- Schedule 1K sets out the basis for adjustments for delays and compensation events.
- Schedule 2D sets out the Contractor's tendered rates for delays, see below.
- Article 3 of the 'Agreement' states "The initial contract sum is a lump sum as shall only be adjusted when the contract says so".

3.41 Despite the observations above, there is still an ongoing debate regarding this specific provision. Many commentators argue that claims can be submitted for losses or expenses resulting from or associated with delay, disruption, acceleration, loss of productivity, or knock-on effects, regardless of the clause's provisions. In fact, most practitioners have likely encountered claims for all these excluded items, often labeled under one of the mentioned headings.

PWC Daily rate

3.42 One final provision in the PWC form of contract, which it has been argued is an exclusion clause, is the provision in part 2D of the tender schedule[24] that limits the claim a contractor can submit for delay to a tendered daily rate. This is no different from a rate in a contract bill of quantities to which a contractor is bound, regardless of the actual cost of the work item.

3.43 However, this is not the end of the discussion; there are numerous other arguments that can and have been made concerning the daily delay rate, though these fall outside the ambit of this paper.

[24] Public Works Contract FTS1-3, page 24, item 2D

4.0 Extensions of Time and Liquidated and Ascertained Damages

4.1 In construction contracts, the contractor is given a specified period to complete the works. The "commencement date" and "date of practical completion" are two critically important dates. These represent the dates when the site is taken over by the contractor and subsequently handed back to the employer.

4.2 During the construction period, the contractor is responsible for the site and must insure against risks to the works and third parties. The contractor is also entitled to bring onto the site and maintain infrastructure required for the building works, such as machinery and scaffolding.

4.3 If the contractor fails to complete the works within the stipulated time, they may be obliged to pay liquidated and ascertained damages to the employer.

4.4 To avoid liquidated and ascertained damages, it is necessary for the contractor to apply for an extension to the date of practical completion, an Extension of Time. The application requirements almost always include a time-bar provision, as addressed elsewhere in this paper.

4.5 Whilst there are other consequences to obtaining or not an extension of time, it is the avoidance of liquidated and ascertained damages and the entitlement to compensation that is addressed herein.

Entitlement to Delay and/or Compensation

4.6 The entitlement to compensation for an extension of time will be ascertained by reference to the Contract being used; this is a separate issue and is addressed in the section hereunder on heads of loss.

4.7 Under the PWC there is a schedule of compensation events, detailing whether the event will entitle the contractor to an extension of time and/or compensation for delay, this is very prescriptive and ought to make the job of ascertaining an application easy, though it remains a contractual area fraught with difficulty.

Proofs for an Extension of Time

4.8 The area of preparing and proving extension of time claims has become very complicated; however, the principles, as stated elsewhere here, are very simple.

4.9 Has there been an event for which the employer is liable that has delayed the completion of the works, then, unless there is something to the contrary in the contract, the contractor ought to be entitled to an extension of time and depending on the contract it may be entitled to compensation.

4.10 Or, has there been an event for which the contractor is liable that has delayed the completion of the works, then in all likelihood, it will not be entitled to an extension of time, and it may be liable for liquidated and ascertained damages.

4.11 The above two simple statements are easy to follow, but what if the statement is that: there has been one event which delayed item A for which the employer is responsible, there has been another event which delayed item B for which the contractor is responsible, item B now took place concurrently with item A as delayed, but, item B would not have overlapped with item A in the first place were it not for the first event happening.

4.12 This example is at the simple end of the scale. You often have multiple events with differing liability and multiple instances of concurrency. As a result of this, an entire industry has sprung up around the issue of delay analysis.

4.13 In a complex case of delay and/or disruption, the claim can be very difficult to present, answer and decide on. In the first instance it is necessary for a contractor to prove that an employer's actions have resulted in a delay and/or disruption, then he will have to prove the duration of the delay and/or the effect of the disruption, then he has to address concurrency, finally he will have to attribute costs against the durations.

4.14 Arising out of the development of complex delay analysis, the Society of Construction Law prepared a useful guidance document called 'The SCL Delay and Disruption Protocol'[25].

4.15 In this document there are four main methods of assessing the impact of delay and/or disruption: as-planned v as-built, impacted as-planned, collapsed as-built and time-impact analysis. Readers are directed to the Protocol for detail on these approaches. Though it carries with it no contractual status and there is no obligation for a contractor to prepare its claim in accordance with any of the models it is often used.

Calculating the Time-Impact of a delaying and/or disrupting event:

4.16 Of the four methods of analysis suggested above, the most suitable and useful tool from a financial claims' perspective is arguably the time-impact analysis. This is the most forensic method and consists of an analysis of the effect of each delay event on the future programme. In doing so it is possible to assess delay claims as they arise and simultaneously any disruption claims. This method can also take account of mitigation and acceleration as it happens.

4.17 Where a contractor does not have the records to complete a time-impact analysis, one of the other methods can be used. The least forensic being an overall as-planned vs as-built.

4.18 The as-planned vs as-built can be very difficult to interrogate at the late remove concerned; this leads to the next issue, tying the delay to events for which the employer is responsible where there are no concurrency or contractor issues.

Proving that the Employer is responsible for the delay and/or disruption event

4.19 In all claims it is necessary to prove that the employer is responsible for the event/s which caused the delay and/or disruption; this includes proving that this was an event for which the employer has accepted liability. It is not intended to go into this in any detail as it is very fact specific. However, practitioners need to be aware of the effect of any contractual provisions in this respect. For example, in the PWC

[25] The Society of Construction Law *Delay and Disruption Protocol, Second Edition,* 2017

there is a table referred to as Schedule 1K where items are noted as compensation events or not[26].

4.20 The first task is to establish the relevant programme just prior to the event complained of. Once this is established, it is necessary to extract the critical path to completion from this programme.

4.21 A contractor will generally use the programme provided at the start of the works to establish its baseline programme; however, once this has happened once and that programme is then revised, the next extension of time application will have to be prepared on the revised programme with a revised critical path.

4.22 An added complexity in the above, is that while a project programme will generally be provided prior to commencement on site; within this programme a contractor will be permitted to reschedule items of work to suit its planning of work, providing it does not adjust the end date, other agreed partial handover dates, or dates listed in the Contract.

4.23 The problem with this flexibility within the project programme is that when an extension of time application is prepared a contractor will often present a programme for the works different from the original programme, such that an event that was not on the critical path, now is.

4.24 So, even before one considers the event complained of and the effect thereof, it is necessary to look in detail at the baseline programme being used by the contractor. Only once the above has been considered, then can the parties look to the event complained of and the effect this has on the programme.

4.25 The first issue that often arises is a dispute as to whether the event is one for which the Employer is liable and, even if the event is one for which the employer is liable, the employer will often argue that the contractor was in delay at the time of the event such that the event had no effect. This goes back to an assessment of the programme at the time of the event to account for previous delays.

[26] Public Works Contract FTS1-3; page 11, item 1K

4.26 An even more difficult issue is where it is argued another event, for which the contractor was responsible, occurred at the same time which gave rise to concurrent delay, as discussed above.

4.27 It is for the reason of the various complexities noted that delay analysts or experts are commonplace in Extension of Time applications and delay and disruption claims generally.

5.0 Heads of Losses

General:

5.1 A construction contract is similar to any other contract. To make a compelling case for a claim, one must establish the loss, causation associated with an employer risk event, and ensure that the damages sought are not too far removed. However, this paper does not delve into the fundamental and well-known principles of what is required to substantiate a claim for damages resulting from a breach of contract.

5.2 The following are typical heads of loss, which have been accepted by the courts along with a commentary on the court's approach to these clauses.

Preliminaries & Overheads

5.3 Preliminaries and overheads are two very distinct heads of loss; however, a most contractors know how to present these figures to increase one or the other to their advantage, and employers need to be aware to this. As a result of this these heads are examined together.

5.4 Preliminaries are the costs of running the project and will include the following among many other items:

- Site huts
- Electricity
- Security
- Site setup
- Site demobilization
- Site foreman
- Site engineer

5.5 The costs mentioned here accrue daily and are distributed across all aspects of the project. Therefore, if a contractor demonstrates that a delay in the project is compensable and subject to any contractual limitations, they should be able to claim the items listed above through a straightforward calculation.

5.6 Preliminaries may also include the following items:

- Craneage
- Quantity Surveyor
- Concrete pumping
- Cleaning
- Insurance

5.7 Preliminaries may include these items as some of these costs may actually be better described and included in head office overheads (Quantity Surveyor, insurance), or may be attributed to trade rates (craneage, concrete pumping, cleaning).

5.8 Finally, head office overheads will include the following, bearing in mind that there could be some duplication with the items directly above.

- Head office staff (accountants, receptionists, non-work specific directors).
- Head office costs (rental, power, etc…)
- Overall company insurance

5.9 The eligibility to claim these expenses is contingent upon the pricing method used for the project and the type of claim being made. If the claim relates to an extension of the project duration without a corresponding increase in cost, the insurance premiums may or may not rise, depending on the circumstances. Similarly, if there is an issue with the concrete element that results in disruption, even if it doesn't cause a delay to the overall project, the cost of concrete pumping may increase.

5.10 The key takeaway for both representatives and dispute resolvers from the previous section is to scrutinize claims for Preliminaries and Overheads to ascertain whether the claimant has genuinely incurred costs. Failure to substantiate the costs incurred will result in the claimant being unable to prove that the event caused them a loss. On the other hand, a party making a claim should not assume that they are not entitled to damages simply because the overall project was not delayed. They should include trade-specific costs as part of a variation claim or disruption claim to ensure that they receive the appropriate compensation.

5.11 The English courts have accepted that head office overheads are recoverable. In *Aerospace Publishing Limited v Thames Water Utilities Limited* the court held that in order to succeed in a claim for overheads the following needed to be established:

> *"The fact and, if so, the extent of the diversion of staff time have to be properly established and, if in that regard evidence which it would have been reasonable for the claimant to adduce is not adduced, he is at risk of a finding that they have not been established. (b) The claimant also has to establish that the diversion caused significant disruption to its business. (c) Even though it may well be that strictly the claim should be cast in terms of a loss of revenue attributable to the diversion of staff time, nevertheless in the ordinary case, and unless the defendant can establish the contrary, it is reasonable for the court to infer from the disruption that, had their time not been thus diverted, staff would have applied it to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time."*[27]

5.12 Judge Holland went on to award the claimant costs for staff that had been diverted in dealing with the breach of contract.

5.13 This approach was affirmed in the subsequent cases of *Bridge UK.Com Limited v Abbey Pynford Plc*[28] and *Azzurri Communications Ltd v International Telecommunications Equipment Ltd (t/a SOS Communications)*[29].

5.14 Claims for preliminaries are pertinent to both delay and disruption claims and can be easily substantiated if records of resources used in the project are maintained.

Loss of contribution

5.15 This is another means by which to present a claim for overheads and is actually referred to in the *Aerospace* judgement as quoted above, namely where the Judge stated the following:

[27] *Aerospace Publishing Limited v Thames Water Utilities Limited* [2007] EWCA Civ 3 at para 86
[28] *Bridge UK.Com Limited v Abbey Pynford Plc* [2007] EWHC 728
[29] *Azzurri Communications Ltd v International Telecommunications Equipment Ltd (t/a SOS Communications)* [2013] EWPCC 17

"...had their time not been thus diverted, staff would have applied it to activities which would, directly or indirectly, have generated revenue for the claimant in an amount at least equal to the costs of employing them during that time."[30]

5.16 In essence, in an overheads' claim a claimant claims the costs he incurs in head office overheads. In presenting the case as a loss of contribution, the claimant claims for the loss of income which would have contributed to the cost of overheads.

5.17 Submitting a claim in this manner was endorsed by the Court in *Property & Land Contractors Ltd v Alfred McAlpine Homes (North) Ltd*[31].

5.18 The claimant argues that they incur fixed annual costs for running their business and aim to complete a certain amount of work to cover these costs. They claim that due to the employer's actions, they completed less work than expected and earned less money to cover these fixed costs. If not compensated for this loss of contribution, the claimant's profit may decrease as they use project profit to cover head office overheads.

Loss of profit (on the project)

5.19 This is a very straightforward concept; the project was expected to return a profit percentage; however, due to the actions of the employer, the project returned a lesser percentage or amount. This is addressed under exclusion clauses and consequential loss.

Loss of productivity

5.20 Loss of productivity claims arise when claimants argue that due to project disruptions, their resources were unable to deliver the expected output and profit. The claim focuses on the difference between the actual and expected return.

Additional resources

[30] [2007] EWCA Civ 3 at para 86
[31] *Property and Land Contractors Ltd v Alfred McAlpine Homes North Ltd* 47 ConLR 74

5.21 When additional resources are needed on a project due to delay or disruption, it's important to determine why they are required. If additional resources are needed to complete the project on time, they are considered acceleration resources and are not claimable without proper instruction. If resources are needed due to a specific event, they may be priced as specific preliminaries associated with a variation.

5.22 The two scenarios above constitute the vast majority of additional resources claims; however, there will be occasions where due to the delay and/or disruption of the works through multiple events that additional resources are required to manage the project. A clear example of this would be a programmer being brought onto a project due to continuous change orders where one was not previously required; their job is not to accelerate the works or mitigate delay.

5.23 Great care must be taken when assessing additional resources to ensure it is not acceleration without an instruction to so do.

Loss of chance

5.24 Primarily loss of chance is associated with negligence; in this respect it is noted that such a claim is equally open to someone in a construction contract scenario where negligence is in issue. It is less common for loss of chance to be dealt with in a breach of contract scenario; however, in the case establishing loss of chance in the first place, *Chaplin v Hicks*[32], the issue was a breach of contract. Unfortunately, there are very few authorities addressing this under contract thereafter, though it remains a valid head of claim.

5.25 The courts examined this issue in *Allied Maples v Simmons & Simmons*[33], a negligence action, and the courts findings of when a loss of chance claim was appropriate were summarised in *Emden's Construction Law* as follows:

- where the defendant is guilty of a positive act or statement which was negligent. The question is , what would have happened if the defendant had not so acted or advised?;

[32] *Chaplin v Hicks* [1911] 2 KB 786
[33] *Allied Maples v Simmons & Simmons* [1995] 1 WLR 1602

- where the defendant is guilty of a negligent omission to act or advise; there the question is, what would the claimant have done had the defendant acted or advised properly?;
- where the question is what would a third party have done had the defendant acted or advised carefully?[34]

5.26 As stated by Clarke in *Contract Law in Ireland* the court the test established was "whether the chance or possibility was substantial enough to warrant some award of damages"[35]. If a claimant can show that he was prevented from accepting a profitable venture as a direct result of the defendant's actions, be that negligence or breach of contract, and that these losses are not to remote, then there is a claim to be considered. This would fall at the higher end of the spectrum; at the other end of the spectrum would be where a contractor was prevented from tendering for works, and therefore a benefit may have accrued, see commentary hereunder on this.

5.27 One notable difference in relation to loss of chance claims is the level of proof required. In general, as everyone involved in these matters is aware, civil law a matter must be proven on the balance of probabilities; however, in loss of chance claims the proof differs as explained by Stuart-Smith LJ in *Porter v Secretary of State for Transport* as follows:

> *"Where a court or tribunal has to decide what would have happened in a hypothetical situation which does not exist, it usually has to approach the matter on the basis of assessing what were the chances or prospect of it happening. The chance may be almost a certainty at one end to a mere speculative hope at the other. The value will depend on how good this chance is. Where, however, the court or tribunal has to decide what in fact has happened as an historical fact, it does so on balance of probability; and once it decides that it is more probable than not, then the fact is found and is established as a certainty."*[36]

[34] *Emden's Construction Law* (Issue 151, 2013)
[35] Robert Clarke *Contract Law in Ireland* (7th ed., Roundhall, 2013) at 684
[36] *Porter and another v Secretary of State for Transport* [1996] 3 All ER 693 at 704

5.28 As stated in *Hudson*, "once it is found that the chance is real and not merely speculative, then the quantification of that chance is a matter of measure of damage and not causation"[37].

5.29 Loss of chance claims are rare in construction cases, but they can arise when claimants reveal they could not tender for or accept a project. However, these claims often fail due to insufficient evidence. See *Bridge UK.Com Limited v Abbey Pynford Plc*[38] for an example where the court accepted that an executive had been distracted from other revenue generating activities but refused to award damages for loss of opportunity:

> *The Claimant has also sought to recover a 25% uplift, described as an "opportunity cost". I am not satisfied that this is recoverable. I therefore allow 100 hours at £48 per hour, making £4,800.00*[39]

5.30 This ruling should not be taken as indicative of a reluctance on the part of the courts to accept such claims, it was simply the case that the claimant did not submit sufficient evident to ground the uplift sought.

5.31 When evaluating such claims, it's essential to consider if the losses are direct or indirect, as contracts often exclude indirect or consequential losses.

Inflation

5.32 This is included in this paper as commonly contractors claim for unforeseen inflation encountered due to delays in the completion of the contract. The main forms of Contract make provision for inflation in the terms and conditions.

5.33 Under the RIAI there is a clause that makes provision for an index linked approach to inflation; however, it is common practice to have this clause struck out entirely and a fixed price premium agreed in lieu of same.

[37] *Hudson's Building and Engineering Contracts* (12th ed., Sweet & Maxwell, 2010), para 7-020
[38] [2007] EWHC 728
[39] [2007] EWHC 728, para 130

5.34 Under the Public Works Contracts there have been changes recently due to the excessive price rises in the market and the effect this was having on contractors' willingness to undertake public contracts.

5.35 The Public Works Contracts make provision for the selection of one of two Price Variation Clauses, PVC1 and PVC2.

5.36 In practice, PCV1 has been used mostly to date and this is assessed hereunder; however, the criteria set therein meant it was all by impossible for a contractor to recover for price increases in all but the most extreme of circumstances.

5.37 The recovery of wages and expenses were/are related to Sectoral Employment Order directed increases; this does not necessitate commentary in this paper

5.38 Price Variation Clause 1 permitted the recovery of material cost increases in two instances.

5.39 First, where the cost of materials had increase by more than 50% within a month or post the designated date, and there, the contractor was only entitled to the increase over and above 50%. In effect, this turned out to never be utilised, as increases never reached this level.

5.40 Second, after the expiration of 30 months from the Contract date, the contractor was entitled to any uplift over and above 10% for materials purchased after this date. This period exceeded the Contract duration for most contracts and so in itself prevented recovery. In addition, even if a project exceeded the duration, in all likelihood very little materials would require purchasing at this stage of a project.

5.41 Arising from the Covid-19 pandemic and Brexit, material price increases spiraled out of control in 2021/22. This gave rise to some interim measures by the Government to address the issues arising in the delivery of public contracts.

5.42 The first and most significant amendment was the reduction of the general threshold percentage from 50% to 15%. There were some additional changes in the definition of dates, but these do not greatly affect the effect of this percentage reduction.

5.43 The second amendment was to reduce the fixed price period from 30 months to 24 months; thereafter, the 10% threshold applying.

5.44 The significance of these provisions are that the contract makes express provision for this head of loss; accordingly, it should be dealt with under the contract and not as a general additional head of loss in a delay claim.

Additional Heads of Loss and Cumulative Claims

5.45 Cumulative claims often come to light at the end of a project, where a contractor has issued various notifications for compensation events and/or delay events; however, on approaching the end of the project, it becomes aware that in addition to the individual claims, there is another effect of all the claims, a cumulative effect.

5.46 An interesting case arose in *TJD Trade Ltd v BAM Construction Ltd*[40] in the Technology and Construction Courts in England which provides food for thought in relation to heads of loss, and more particularly any time bar that may be pleaded against the introduction of a cumulative delay claim or a global delay claim at the end of a project, which is often the case.

5.47 The Plaintiff in TJD wanted to add in a head of loss for finance costs arising from a delay, having previously only included a claim for damages for professional charges.

5.48 The issue was that the statute of limitations, arguably the ultimate condition precedent, had expired with respect to the additional head of loss.

5.49 The Court, having completed a detailed review of whether a new head of loss was in fact a new head of claim, decided that "the proposed amendment does not seek to raise a new claim but rather to add a new head of loss allegedly flowing from the claimed breach of contract which is already pleaded"[41].

[40] *TJD Trade Ltd v BAM Construction Ltd* [2022] BLR 637
[41] *Ibid para 11*

5.50 The judge, citing from *Harland and Wolff Pension Trustee Ltd v Aon Consulting Financial Services Ltd* [2009] EWHC 1577, summarised the issue succinctly as follows:

> "*…provided that the substance of the new claim can be pleaded simply as a consequence of the facts originally pleaded*" [42]

5.51 Applying the above logic to a cumulative claim raised at the end a project when multiple notices were issued throughout a project upon which the cumulative delay is based, it is arguable that the cumulative claim is simply a head of loss arising from the events already notified.

Proofs on quantum

5.52 There is no need to discuss the methods of determining quantum, which involve identifying actual losses and establishing causation when each event can be linked to a specific effect and corresponding costs. The principles in such cases are relatively straightforward and fact-specific, making it unnecessary to explain in detail.

Calculating costs associated with the above proven delay and/or disruption

5.53 After proving the most challenging aspects of a delay and/or disruption claim, i.e., that an event attributable to the employer has caused delay and/or disruption, the claimant must determine the financial impact of the event on the project. Generally, this part of the claim is handled by quantity surveyors and/or cost accountants. It is common for tribunals to encourage parties to agree on quantum between themselves rather than leaving it to the tribunal to decide. Parties should be aware that they are best suited to assess these issues and that failing to do so may result in an arbitrary outcome from a third party who cannot possibly be as familiar with the project's resources as the two quantity surveyors or similar professionals.

5.54 Where the question is one of delay, Part 2D of the Tender Schedule of the PWC includes a section where a contractor must include a figure to be applied for each

[42] *TJD Trade Ltd v BAM Construction Ltd* [2022] BLR 637 *para 14*

day of delay[43]; it is a case of 'must' as if he fails to enter a figure, then it is taken as being 'nil'. In a simple case of delay (falling outside the programme float discussed hereunder) the cost of delay is calculated by multiplying the working days delayed by the figure inserted in section 2D.

5.55 Where there is not a provision in the contract as there is in the PWC, the Employer's Representative must ascertain the losses associated with the delay. The question of the level of proof that is necessary to ascertain costs was addressed in *How Engineering Services Limited v Lindner Ceilings Floor Partitions Plc*[44] where Dyson J summarised the level of proof as follows:

> In my view it is unhelpful to distinguish between the degree of judgment permissible in an ascertainment of loss from that which may properly be brought to bear in an assessment of damages. A judge or arbitrator who assesses damages for breach of contract will endeavour to calculate a figure as precisely as it is possible to do on the material before him or her. In some cases, the facts are clear, and there is only one possible answer. In others, the facts are less clear, and different tribunals would reach different conclusions. In such cases, there is more scope for the exercise of judgment. The result is always uncertain until the damages have been assessed. But once the damages have been assessed, the figure becomes certain: it has been ascertained. In my view, precisely the same situation applies to an arbitrator who is engaged on the task of "ascertaining" loss or expense under one of the standard forms of building contract. Indeed, it would be strange if it were otherwise, since a number of the events which give rise to a right to recover loss or expense under the contract would also entitle the claimant to be awarded damages for breach. I would hold, therefore, that, in ascertaining loss or expense, an arbitrator may, and indeed should, exercise judgment where the facts are not sufficiently clear, and that there is no warrant for saying that his approach should differ from that which may properly be followed when assessing damages for breach of contract.

5.56 In essence this endorses the fact that ascertainment means to reach a decision on the balance of probabilities; something which many tribunals often need reminding about.

[43] Public Works Contract for Building Works Designed by the Employer: PW-CF1 v2.6, page 24, item 2D
[44] *How Engineering Services Ltd v Lindner Ceilings Floor Partitions Plc* [1999] 2 All E.R. (Comm) 374; 64 Con. L.R. 67

5.57 In *Bridge UK.Com Limited* where, unlike in *Aerospace Publishing* the claimant did not have detailed records of the time spent by employees, the Court confirmed that working out costs from recollection was acceptable but subject to discount for uncertainty:

> "*123 Such a method of retrospective assessment is, I consider, a valid method of calculation. I have been referred to the judgment of His Honour Judge Peter Bowsher QC in Holman Group v. Sherwood (Unreported, 7 November 2001) where he indicated that in the absence of records, evidence in the form of a reconstruction from memory was acceptable. I respectfully agree. However, it must be borne in mind that such an assessment is an approximation of the hours spent and may over-estimate or under-estimate the actual time which would have been recorded at the time.*
>
> *124 Some hours have been included for organising the outsourced work at M and M Printing. In addition, I consider that a discount should be applied to allow for the inherent uncertainty in this retrospective method.*"[45]

5.58 It is worth reiterating the point that if the methodology utilised to calculate the delay period is done so in a comprehensive manner it ought to provide a useful template for preparation of the costs associated with the event, particularly in relation to head office overheads and site preliminaries. Preliminaries ought to be easily enough quantified in relation to delay. This is not the case in relation to head office overheads where the counter argument is often used that these costs exist for the company regardless and so the contractor fails to prove loss; an argument arguably refuted by submitting the claim as a loss of contribution claim.

5.59 Where claimants are having difficulty establishing the quantum of overheads on a factual analysis, there are a selection of so-called formula used to calculate claims for delay and disruption. These formulas are really only suitable for delay claims, and the strength of these claims will depend on the factual backup to the figures used. They are very simple in what they set out to do and how they do it; they are set out hereunder with a very brief description of the logic behind each one.

[45] [2007] EWHC 728

5.60 *Hudson's:*

$$\frac{\textit{Head office overheads and profit \%}}{\textit{100\%}} \times \frac{\textit{Contract sum}}{\textit{Contract period}} \times \textit{Period of delay}$$

This formula simply applies the overheads and profit percentage allowed in the tender on a pro rata basis for the delay period in question. In order to succeed with this formula, it will be necessary to show that the resources constituting the percentage overheads would have been otherwise engaged in profitable work or at least contributing to their own expenditure.

5.61 *Emden's:*

$$\frac{\textit{Head office overheads and profit \%}}{\textit{100\%}} \times \frac{\textit{Contract sum}}{\textit{Contract period}} \times \textit{Period of delay}$$

This formula simply applies the overheads and profit percentage from the overall company turnover on a pro rata basis for the delay period in question. There is very little difference between this and Hudson's formula.

5.62 *Eichleay's:*

This again is very similar to both of the above formulas in effect, whilst not addressing profit; however, it is approached as a three-stage process:

$$\frac{\textit{Project Account}}{\textit{Overall company turnover}} \times \textit{Company overheads for the project period} = \textbf{\textit{Allocatable overheads}}$$

$$\frac{\textbf{\textit{Allocatable overheads}}}{\textit{Project duration (d)}} = \textbf{\textit{Daily rate}}$$

Daily rate *x* *Number of days* = *Claim amount*

The primary advantage of this formula is that if the overheads of the company increased for some reason during the project, then a higher percentage will apply for the delay period. However, if the overheads increased specifically during the contract period, it is likely that these costs relate directly to the contract and a prudent contractor will have these allocated as preliminaries; or conversely they relate to some other factor unrelated to the contract and a prudent defence will be able to draw a tribunal's attention to this.

5.63 It is notable that certain of the above formula are also used in relation to profit calculations; thereby addressing the head of loss – loss of projected profit on the project and/or projected company profitability.

5.64 The result of these different formulas is often the same. In fact, providing a contractor has calculated his attributable head office overheads correctly for the duration of the project, the result should be the same regardless of what formula is used. The only caveat here is that if head office overheads varied greatly during a project because of the project in question, then Emden's formula may give a slightly lesser value depending on the period used to calculate the annual overheads relative to the project period.

5.65 While it is arguable that these formulas should only be used when a claimant is unable to prove his losses in the traditional manner, the courts have accepted the use of formula as an acceptable manner to calculate overheads[46].

5.66 It is advisable that claimants complete the calculations using each of the methods, thereby seeing if there is an advantage to using one or the other. The opposite also applies, if that a defendant should complete this exercise to ascertain if there is a manner by which to prove the claimant could have used another method and claimed much less, thereby undermining the use of formula in general.

5.67 Finally, in relation to assessing quantum, the comments by Judge Wilcox in *Skanska Construction UK Ltd v Egger (Barony) Ltd* as follows provide useful guidance on the matter:

[46] *Property and Land Contractors Ltd v Alfred McAlpine Homes North Ltd* 47 ConLR 74

"*[323] Mr Williamson [Counsel] submits that:*

"the appropriate approach is one based on common sense and practicality. This is not a criminal trial or a 19th Century Chancery Action: the court, taking into account its considerable and specialist experience should adopt a common sense and practical view of the question of whether the SCL have proved their loss. Perfect proof may on occasion be lacking, but that is no reason for the court not to do the best it can." (Emphasis supplied).

[324] I accept that the court should adopt a sensible and pragmatic view. The context is the realities of the construction site, but mere common sense cannot supplant proof, which to be effective needs to be at least "adequate"."[47]

[47] *Skanska Construction UK Ltd (formerly Kvaerner Construction Ltd) v Egger (Barony) Ltd* [2004] EWHC 1748 (TCC)

6.0 Concluding Remarks

6.1 Records, Procedures, Records, Timely Presentation and Records.

Martin Waldron BL FCIArb MSCSI MRICS

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THE EFFECTIVE TERMINATION OF CONSTRUCTION CONTRACTS – THE TENSION BETWEEN REPUDIATION AND CONTRACTUAL PROCEDURE

Imogen McGrath SC and Shauna Keniry BL

I. INTRODUCTION

1. Challenges faced by the construction industry come into sharp focus during straitened economic times. Projects are often beset by the cost of credit, cashflow pressures, inflation in the cost of building materials and difficulties in securing and maintaining sufficiently skilled labour force. Such factors make the risk of events that may give rise to grounds for termination, such as delay in the progression and completion of works under construction contracts, or, at worst, the insolvency of a party to the contract, more likely to materialise.

2. Key strategic decisions on how and when to determine a construction contract may have to be made by parties and their legal advisers. Such decisions fall to be made under significant time pressure, and with an eye to the litigation risk that may arise from the premature or wrongful termination of the contract.

3. The purpose of this paper is to discuss, in outline, the legal issues that may be of relevance in that context by reference to:

   3.1. General considerations and risks that can arise in decision-making relating to contractual termination,

   3.2. Legal principles applying to contractual termination notices, and

   3.3. An illustration of how the above may apply and be resolved by the courts in practice by reference to the recent judgment of the High Court of England and Wales in ***Thomas Barnes & Sons plc (in administration) v. Blackburn with Darwen Borough Council***[1]**.**

II. CONSIDERATIONS AND RISKS RELATING TO CONTRACTUAL DETERMINATION

Analysis of the remedy being exercised

4. In a scenario where it becomes clear that a party to a construction contract has defaulted on its obligations, the innocent party may wish to bring the contractual relationship to an end. This may be effected in one of two principal ways:

   4.1. If the breach is sufficiently serious to be regarded as a repudiatory breach of the contract, the innocent party may choose to accept the repudiation by the defaulting party and therefore release both parties from further performance of contract at common law, or

[1] *Thomas Barnes & Sons plc (in administration) v. Blackburn with Darwen Borough Council [2022] EWHC 2598 (TCC), (2022) 144 Con. L. R. 144.*

4.2. Alternatively, if the parties have expressly provided for termination by a contractual termination clause, the innocent party may exercise its rights under the termination clause to bring the contract to an end.

5. A contractual termination clause may be triggered by a range of different events, which may include both breaches which are less significant, but contractually designated by the parties justifying termination, and breaches that are very significant, such that could be regarded, in the alternative, as a repudiatory breach of the contract. As such, remedies arising from the acceptance of repudiation and from the termination by contractual termination may both be available. It is incumbent, in such circumstances, for the innocent party to carefully consider which remedy to use, and when.

6. Whether a contract is determined at common law by an innocent party accepting a repudiatory breach by the defaulting party, or by operating a contractual termination clause, is an important distinction in light of the following three points:[2]

6.1. ***First,*** If a party accepts a repudiatory breach at common law it will be entitled to damages, including damages for the consequences of ending the contract. By contrast, the damages that an innocent party may be entitled on determination of the contract under a contractual termination clause will depend on the wording of the contract.

6.2. ***Second,*** in principle, and, as recognised by the Supreme Court in ***Galway City Council v. Samuel Kingston Construction Ltd.,*** usually the entitlement to rely on a contractual termination clause and the right to accept repudiation will not be mutually exclusive at the outset. [3] A contract will only usually only be held to exclude the remedy of acceptance of repudiation at common law where that intention is clearly expressed.[4] A risk may arise if the innocent party initially elects to use the contractual termination clause, but gets the of the termination procedure wrong, it will be necessary to consider whether he can later rely alternatively on the right to accept repudiation at common law. Where the consequences of the separate remedies (whether in terms of rights of the parties on termination, or the measure of damages) are more or less equivalent, the innocent party will normally be entitled to exercise both remedies.[5] However, if the consequences of the separate remedies are very different, there is authority to the effect that by initially electing to use the contractual termination clause the innocent party can lose the right to later rely alternatively on the remedy of acceptance of repudiation at common law.[6]

6.3. ***Third,*** the wrongful use of a termination clause may itself be a repudiatory breach of the contract by the innocent party, which the defaulting party can take advantage of by

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[2] For a general discussion of these issues see Hudson's Building and Engineering Contracts (14th ed., Sweet & Maxwell, 2020) at §§[8–001]–[8–068], and Keating on Construction Contracts (11th ed., Sweet & Maxwell, 2021) at §§[6–094]–[6–121] and §§[11–001]–[11–012].

[3] Galway City Council v. Samuel Kingston Construction Ltd. [2010] IESC 18, [2010] 3 I.R.95 at p. 126, per O'Donnell J..

[4] Stocznia Gdynia SA v. Gearbulk Holdings Ltd. [2009] EWCA Civ 75, [2009] 3 W.L.R. 677 at pp. 687–698.

[5] Stocznia Gdynia SA v. Gearbulk Holdings Ltd. [2009] EWCA Civ 75, [2009] 3 W.L.R. 677 at pp. 694–695.

[6] Dalkia Utilities Services plc v. Celtech International Ltd [2006] EWHC 63 (Comm) at §§143–144 and Phones 4U Ltd (in administration) v. EE Ltd. [2018] EWHC 49 (Comm), (2018) 176 Con.L.R. 199.

accepting it as repudiation of the contract that in turn entitles the defaulting party to claim damages.[7]

7. The conundrum does not end there. The above scenarios, in turn, give rise to the following considerations:

   7.1. ***First,*** when considering whether to elect to exercise a contractual termination clause in circumstances which also may objectively be regarded to constitute a repudiatory breach of the contract, it will be relevant to consider the advantages and disadvantages of doing so relative to exercising a common law right to accept repudiation.

   7.2. ***Second,*** it is necessary to assess the extent to which it is possible to rely on a contractual termination clause while reserving rights at common law. It will usually be advisable for an innocent party to expressly include language reserving the right to use the alternative remedy of accepting repudiation in the termination notice. Indeed, it has been observed that where it is possible to determine the contract on both contractual and common law bases, "a *party may be well advised to terminate on both bases, expressing the most favourable basis as its primary case and the less favourable basis as its alternative position*." [8]

   7.3. ***Third,*** where an innocent party is electing to terminate a contract, it will be important to carefully observe the pre-requisites for exercising the contractual termination clause.

8. The legal principles informing the above are discussed in the next section.

III. LEGAL PRINCIPLES APPLYING TO CONTRACTUAL TERMINATION NOTICES

Overview

9. An election to accept repudiation of a contract does not have to be made in any particular form, but simply must convey clearly and equivocally, by communication or conduct, to the defaulting part that the innocent party is treating the contract to be at an end.[9]

10. However, where a party seeks to determine a contract based on a contractual termination clause, there will usually be a number of steps to observe by way of contractual notice requirements. These may include requirements regarding the content, timing, or formalities of the notice.

Events triggering contractual termination clause

11. The first matter which it will be necessary to verify is whether an event has occurred which enables the contractual termination clause to be exercised. The events that trigger the clause will usually

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[7] *Architectural Installation Services Ltd v. James Gibbons Windows Ltd (1989) 16 Con. L.R. 68.*

[8] *See Editorial Comment on Phones 4U Ltd (in administration) v. EE Ltd. [2018] EWHC 49 (Comm), (2018) 176 Con. L. R. 199, pp. 200–201.*

[9] *Vitol S.A. v. Norelf Ltd. [1996] A.C. 800 p. 811, cited with approval by Hardiman J. in Owens v. Duggan (Unreported, High Court, 2 April 2004).*

be defined in the clause itself, and might include, for example, a material breach of the contract, a failure by a contractor to proceed diligently with the works, a persistent failure by the contractor to carry out instructions, a failure by the employer to pay contractors after the date for honouring certificates, or the insolvency of one of the parties to the contract.

12. It may be necessary to interpret the contract to establish whether an event within the scope of the contractual termination clause has taken place. In interpreting the contract, the courts would likely have adopt the "*text in context*" approach to the construction or interpretation of commercial contracts in Irish law, outlined in*, inter alia*, ***Law Society of Ireland v. Motor Insurers Bureau of Ireland***,[10] ***Jackie Greene Construction Ltd v. Irish Bank Resolution Corporation***[11] and ***Clarion Quay Management CLG v. Dublin City Council.*** [12]

13. Regarding contractual termination notices in particular, guidance on the approach to determining whether an event has occurred to justify a termination can be taken from the judgment of the Supreme Court in ***ICDL v. European Computer Driving Licence Foundation Ltd.*** [13]

14. The defendant in that case had sought to terminate a licence agreement for the provision of an IT skills training programme in Saudi Arabia on the grounds that it was no longer lawful for the second plaintiff to operate the programme there. The defendant alleged that the operation of the programme was unlawful in the absence of a licence from the government body charged with the responsibility for vocational and educational training in Saudi Arabia.

15. The Supreme Court (Fennelly J. giving the majority judgment) determined that the High Court (Clarke J.) had been correct to find, having regard to the proper interpretation of the contract and the evidence, including expert evidence of the law of Saudi Arabia, that it was not unlawful for the first plaintiff to operate the programme in the Kingdom of Saudi Arabia without a licence from the relevant government body. Consequently, the first plaintiff was not in breach of the licence agreement and no event justifying recourse to the contractual termination clause had in fact taken place.[14] The wrongful service of the termination notice *"amounted to a breach of contract […] because the conditions did not exist for the valid termination of the agreement on the claimed ground"*.[15]

16. The insolvency of a party to the contract may be designated as an event triggering a contractual termination clause. Standard form contracts issued by the CIF, RIAI an IEI will normally include insolvency as a ground for termination, and will define the meaning of an insolvency event for that purpose. Where it arises, it will be necessary to very carefully assess the terms of the contract to ascertain whether the insolvency event it is proposed to rely on comes within the scope of the contractual termination clause.

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[10] *Law Society of Ireland v. Motor Insurers Bureau of Ireland [2017] IESC 31.*

[11] *Jackie Greene Construction Ltd v. Irish Bank Resolution Corporation [2019] IESC 2.*

[12] *Clarion Quay Management CLG v. Dublin City Council [2021] IEHC 811.*

[13] *ICDL v. European Computer Driving Licence Foundation Ltd. [2012] IESC 55, [2012] 3 I.R. 327.*

[14] *ICDL v. European Computer Driving Licence Foundation Ltd. [2012] IESC 55, [2012] 3 I.R. 327, p. 363.*

[15] *ICDL v. European Computer Driving Licence Foundation Ltd. [2012] IESC 55, [2012] 3 I.R. 327, p. 376.*

Content of termination notice

17. A potentially useful reference regarding the approach of the courts to analysing the validity of termination notices in light of contractual requirements as to their contents is the judgment of the Court of Appeal in ***O'Leary v. Volkswagen Group Ireland Ltd.***[16]

18. The defendant terminated three dealership contracts with the plaintiff, an authorised Volkswagen sales dealer, by notice in writing giving the plaintiff twenty-four months' notice of termination. The dealership contracts were vertical agreements drafted in light of a relevant EU block exemption regulation for the motor vehicle sector, and contained a clause stipulating that notice of termination given by the supplier had to contain "*a detailed statement of reasons which shall be transparent and objective*". The plaintiff claimed, inter alia, that the termination notices were invalid for failure to give the type of reasons required by the transparency clause.

19. The Court of Appeal (Costello J. giving judgment) held that the requirement to give objective and transparent reasons had to be read in the light of the purpose for giving the reasons required by the transparency clause, which were linked to the need for the dealership contracts to give effect to, and benefit from, the EU block exemption regulation. The Court further agreed with the defendant's submission that the adequacy of the reasons given must be assessed by reference to the background knowledge of the person to whom the notice is given, having regard, in this particular context, to the fact that "*all recipients of the notice had attended a detailed presentation three days earlier, where the respondent set out the situation with regard to the Volkswagen network and its future plans for the network in the state*". The Court therefore held that the content of the termination notices was not contrary to the transparency clause, and that the contracts had been validly terminated.[17]

20. This analysis suggests that courts will not take an overly legalistic approach to requirements regarding the content of notices. Similarly, the courts of England and Wales have frequently taken the view that in interpreting a termination clause, regard should be had to the commercial purpose of the termination clause. What is important is that the notice is sufficiently clear and unambiguous in its terms to convey the intention to determine the contract and constitute a valid notice, and the failure to comply strictly with contractual requirements may not always mean that the notice is ineffective.[18]

21. This is consonant with the observation by the authors of ***Hudson*** at §[8–048] that the courts will "*adopt a realistic view as to the way in which notice is given, so that clear general words will suffice"*. However, it is important to note that in the same passage, the authors warn that the meaning of the words used may later become critical where most contractual termination clauses will not allow the determining party to rely at a later stage on a reason which was not specified in the notice.

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[16] *O'Leary v. Volkswagen Group Ireland Ltd. [2020] IECA 18.*

[17] *O'Leary v. Volkswagen Group Ireland Ltd. [2020] IECA 18 at §53.*

[18] *Mannai Investment Co Ltd v. Eagle Star Life Assurance Co Ltd [1997]AC 749, p. 768 per Lord Steyn, Ellis Tylin Ltd v Co-operative Retail Services Ltd. (1999) 68 Con. L .R. 137, and Tees Esk & Wear Valleys NHS Foundation Trust v. Three Valleys Healthcare Ltd & Anor [2018] EWHC 1659 (TCC).*

Timing of termination notice

22. One type of contractual pre-requisite to the termination of contracts that the courts may construe strictly is a requirement regarding the timing of the termination notice. In that regard, the authors of ***Hudson*** consider at §[8–049] that *"[e]xact compliance with notices will usually be required and will be treated as a condition precedent to a valid contractual termination*".

23. An example illustrating this point is ***Afovos Shipping Co SA v. Pagnan***.[19] A notice by the plaintiffs to terminate a charterparty was permitted to be given 48 hours after a payment under the contract became due or was not received. The 48 hours' notice was to expire at midnight on the relevant day. However, the termination notice was given at 16:40 on the relevant day, where it appeared to the owners that it would be impossible for the defendants make the payment after normal banking hours. The Court of Appeal of England and Wales held that the notice of termination was given prematurely and was therefore invalid.

Formalities relating to the termination notice

24. The following well known quote from the judgment of Lord Hoffmann in ***Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.***,[20] concerning the service of a break clause in a lease, is frequently cited as support for the view that formalities in contractual notices should normally be strictly adhered to. Lord Hoffman observed in relation to the service of a notice exercising a break clause in a lease:

> *"If the clause had said that the notice had to be on blue paper, it would be no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease."*

25. More recently, however, this approach appears to have softened and the requirements relating to formalities for the service of notices are likely to be construed with regard to their commercial purpose in the context of the document.

26. The decision of the Court of Appeal in ***ADM Londis plc v. Ranzett*** is instructive.[21] The defendant in that case purported to terminate a franchise agreement with the defendants, who had been carrying on business as a supermarket. A termination clause in the contract permitted the plaintiff to terminate the contract "*forthwith*" in the event of breach of the contract by the defendant. The Court of Appeal disagreed with the finding of the High Court (Hogan J.) that the franchise agreement had been wrongfully terminated for failure to give adequate written notice. Ryan P. observed that:

> *"It is of course true that there was no written notice in the sense of formal written notification which was in breach of the terms of the agreements but on the evidence and facts found it seems to me that nothing happened by reason of the failure to put the termination in writing which could give rise to a claim for loss by*

[19] *Afovos Shipping Co SA v. Pagnan, (The Afovos) [1983] 1 W.L.R. 195.*

[20] *Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] A.C. 749.*

[21] *ADM Londis plc v. Ranzett [2016] IECA 290.*

Ranzett. There is no doubt that the relevant parties were duly informed as to what was happening. It seems to me, accordingly, that the mere failure to put in writing what was communicated orally in the clearest terms is not something that gives rise to a cause of action. No loss flowed from it and there was not even a failure of communication or a misunderstanding in the result."[22]

This more pragmatic approach to the contents of notices is consistent with the recent judgment of the High Court of England and Wales in ***Thomas Barnes & Sons plc (in administration) v. Blackburn with Darwen Borough Council***[23] discussed further in the next section.

IV. CASE IN CONTEXT: THOMAS BARNES & SONS PLC

27. The recent judgment of High Court of England and Wales (H.H.J. Davies) in ***Thomas Barnes & Sons plc (in administration) v. Blackburn with Darwen Borough Council***[24] demonstrates the operation of several the above principles in practice.

28. The claimant contractor was employed by the defendant to carry out the construction of a bus station under a standard form JCT contract. The construction of the bus station was subject to significant cost increases and delay overruns. The contract was terminated by the defendant for alleged default by the claimant on 4 June 2015 before work was finished and the defendant proceeded to have the work completed by a replacement contractor.

29. The defendant alleged in its termination notice that the claimant had failed to proceed regularly and diligently with the works and had substantially suspended the carrying out of the works, and stated that as an alternative to contractual termination, the letter was to take effect as an acceptance of repudiatory breach.

30. The claimant subsequently entered into administration later that year. In 2020, the claimant's administrators issued proceedings claiming monies alleged to be due to the claimant under the contract on a proper valuation of the works done at termination, and damages for wrongful termination of the contract by the defendant representing the claimant's loss of profit on the remaining works.

Thomas Barnes & Sons - the termination clause

31. Under clause 8.4 of the standard form JCT contract (**"the termination clause"**) the contract administrator was permitted to give the contractor a default notice in specified events, including where the contractor without reasonable cause wholly or substantially suspended the carrying out of the works and where it failed to proceed regularly and diligently with the works. If the contractor continued the specified default for 14 days then the employer might terminate within 21 days or, if the default was repeated by the contractor, within a reasonable time of such

[22] *ADM Londis plc v. Ranzett [2016] IECA 290 at §79.*

[23] *Thomas Barnes & Sons plc (in administration) v. Blackburn with Darwen Borough Council [2022] EWHC 2598 (TCC), (2022) 144 Con. L. R. 144. Also of note is the Judgment of Struthers and another v. Davies (trading as Alastair Davies Building) and another [2022] EWHC 333 (TCC).*

[24] *Thomas Barnes & Sons plc (in administration) v. Blackburn with Darwen Borough Council [2022] EWHC 2598 (TCC), (2022) 144 Con. L. R. 144*

repetition. However, such termination notices could not be given unreasonably or vexatiously. All such notices required, by reference to a separate clause, to be delivered by hand or recorded or special delivery post.

32. The judgment recorded, at p. 189, that the contract stated in terms that the termination provisions were "*without prejudice to any other rights and remedies of the employer".* It followed that it was open to the defendant to serve a notice of termination under the termination clause, and, in the alternative, by the same notice inform the claimant of the acceptance of the claimant's repudiatory breach. The Judge relied, in that regard, on ***Keating*** at §§[6–118]–[6–120] and the cases cited therein. The authors note, inter alia, that:

> *"6–118 Contractual determination clauses do not exclude common law remedies available upon repudiation unless the agreement expressly or impliedly provides that the contractual rights are to be the exclusive remedy for the breaches in question […]*
>
> *6–120 […] Where the contractual determination clause is expressed to be operable without prejudice to the parties' rights, there would appear to be no difficulty in that party subsequently relying on the same events as a ground of repudiatory breach".*

Thomas Barnes & Sons - event triggering the termination notice

33. Davies J held, at p. 188, that the two separate substantial grounds referred to in the termination notice, that is, the claimant contractor's failure to proceed regularly and diligently with the works and substantial suspension of the works, would, if established, both be sufficient to justify termination under the termination clause.

34. The Court then considered whether the conduct of the claimant contractor would, in the alternative, have amounted to a repudiatory breach of the contract.

35. The judgment cites the following useful observations of Etherton L.J. in ***Eminence Property Developments Ltd v. Heaney***[25] outlining the test for a repudiatory breach of contract:

> *"'(a) (at [61]):*
>
> *First […] So far as concerns repudiatory conduct, the legal test is simply stated […] It is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.'*
>
> *(b) (at [62]):*
>
> *'Secondly, whether or not there has been a repudiatory breach is highly fact-sensitive. That is why comparison with other cases is of limited value.'*

[25] *Eminence Property Developments Ltd v. Heaney [2010] EWCA Civ 1168.*

(c) (at [63]):

'Thirdly, all the circumstances must be taken into account in so far as they bear on an objective assessment of the intention of the contract breaker. This means that motive, while irrelevant if relied upon solely to show the subjective intention of the contract breaker, may be relevant if it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been, aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person.'

(d) (at [64]):

'Fourthly, although the test is simply stated, its application to the facts of a particular case may not always be easy to apply […]'"

36. Davies J was satisfied, at p. 189, that where from the end of February 2015 the works had been plagued by delays which were almost entirely the claimant's own fault and contractual responsibility, the claimant was in such serious and significant breach of contract as entitled the defendant to terminate the contract or to accept that breach as repudiatory so as to discharge itself from any continuing obligation to perform the contract from that date.

37. Interestingly, at pp. 191–192, the Court rejected an attempt by the defendant to rely on the insolvency of the claimant contractor as a further ground for determining the contract.

38. This was because,

    38.1. ***First***, there was no mention of insolvency as a ground for terminating the contract in the termination notice (which the Court surmised was probably because the specific definition of insolvency in the termination clause was not satisfied at the date the termination notice was served), and nor had the defendant it expressly referred to insolvency as evidence of repudiatory conduct on the part of the claimant, and

    38.2. ***Second***, the Court considered that there was no hard evidence that the claimant was insolvent at date of service of the termination notice. Davies J concluded that the default on the part of the claimant contractor justified the defendant in terminating the contract, but considered that the separate alleged ground was not made out.

Thomas Barnes & Sons - formalities for the service of the termination notice – wrongful termination?

39. The formalities for the service of the termination notice were not strictly complied with by the defendant. This gave rise to an issue of whether the defendant had wrongfully terminated the contract, and thus itself committed a repudiatory breach of the contract, in light of the principle noted in ***Keating*** at §[11–033] that "*a wrongful termination by the employer or its agent normally amounts to repudiation on the part of the employer*."

40. At issue was the fact that the contract required service at of the termination notice at the claimant's registered office either by hand or by recorded or special delivery post before the

claimant contractor was excluded from the site, but the defendant had instead delivered to the site, as the known address where the claimant was based. Davies J was therefore satisfied, at p. 194, that the defendant failed to terminate the contract in accordance with the contractual termination provisions.

41. However, in the circumstances, the Court considered that that failure to comply with the formalities for service of the termination clause was ***not*** a repudiatory breach by the defendant.

42. It was held that while, for example, a termination could be wrongful and itself amount to a repudiatory breach where the party purporting to determine the contract trying to terminate had no right to terminate because the substantive conditions for termination were not made out, the situation at hand was markedly different. Davies J explained at p. 197 that:

> *[255] […], the essential question is whether the ineffective contractual termination and the removal from site in reliance on such ineffective contractual notice was repudiatory, in circumstances where the defendant was entitled to terminate and had communicated its decision to do so before it excluded the claimant from the site, but in a legally ineffective manner, but also where the claimant knew from the termination letter already sent by email that the defendant intended to send the notice by the correct contractual method, i.e. by recorded delivery to the claimant's registered office. In deciding the issue in this case I have again found helpful the approach of Etherton LJ in [**Eminence Property Developments Ltd v. Heaney** [2010] EWCA Civ 1168] and focused on all of the relevant circumstances.*

43. He continued:

> *[256] In my judgment the crucial question is whether the impact upon the claimant of being removed from site in such circumstances, effectively two working days earlier than it could validly have been removed anyway, was conduct which was in all the circumstances repudiatory? In my judgment it was not, for the following principal reasons: (a) the claimant had by then – as I have found – effectively ceased all meaningful activity on site and was, realistically, in no position to move forwards to complete the works even in accordance with a proper EOT had one been granted; (b) the claimant must be taken to have known, objectively, that the defendant was entitled to terminate under the contract; (c) the claimant knew that the defendant was intending to terminate the contract by receipt of the termination notice before it was excluded from site; (d) the claimant knew from the last section of the termination notice that the defendant was seeking to exclude the claimant from site and to secure it under and in accordance with the termination provisions of the contract; (e) the claimant must be taken to have known, objectively, from the top of the termination notice that the defendant intended to and doubtless was in the process of serving the termination notice by the required contractual means; (f) there was no adverse impact upon the claimant in being removed from site two days earlier than it would have had to leave anyway.*

44. At p. 198, the Court concluded:

> *"In the circumstances, the claimant was not entitled to accept the defendant's precipitate termination as repudiatory and it follows that the defendant was entitled to terminate under the contract at the point when its termination notice was deemed served and took effect."*

45. In summary, although the defendant had not strictly complied with the formalities for service of the termination notice, in light of the technical and inconsequential nature of the defect in service, and objective reality that the claimant contractor was well aware that the defendant was intending to terminate the contract, and was actually in the process of doing so in a manner that would comply with the contractual termination provisions, the defect in complying with the required formalities was not a repudiatory breach.

46. It is relevant to note that, by way of preface to all of the above, the Court also made the interesting and quite technical point at pp. 192 to 193 that (i) because the claimant was also already in repudiatory breach of the contract, and the defendant had expressly made clear in the termination notice that it was relying alternatively on the right to accept the claimant's repudiatory breach, it followed that (ii) even if the defendant's termination of the contract had been wrongful for defective service of the termination notice, the claimant would simply be too late to accept that breach as repudiatory in turn.

47. Therefore, by relying in the alternative on the right to accept the claimant's repudiatory breach in the termination notice, the defendant had already successfully accepted the claimant's prior, and overarching, repudiatory breach of the contract. In effect, the way it had drafted its termination notice meant that the defendant had successfully hedged its bets, and ensured that its acceptance of repudiation would be in any event be first in time.

Thomas Barnes & Sons - the outcome

48. Davies J ultimately held that the claimant had no prospect of recovering anything in the litigation. Any entitlement it could establish under a final account analysis would be extinguished by the defendant's right to recover and to set off against such entitlement the net cost of having the contract completed by replacement contractors. The Judge declined to consider in detail the quantum of the claimant's claim.

V. CONCLUDING COMMENT

49. The judgment in ***Thomas Barnes & Sons plc (in administration) v. Blackburn with Darwen Borough Council*** highlights, first and foremost, the importance that serving termination notices in compliance with the formalities required by the contract. Careful attention to the contractual requirements regarding the content, timing and means of service of a termination notice can avoid expensive litigation of a claim for wrongful termination of the contract by the defaulting party.

50. It also illustrates the utility, where possible for an innocent party to do so, of relying alternatively on the common law right to accept repudiation of the contract. It could be very helpful in the long run (where it appears there are good objective grounds for alleging that a breach of contract amounts separately to a repudiatory breach of the contract) if a carefully drafted termination notice is served which makes clear that the defaulting party's repudiatory breach is relied on.

51. Separately, ***Thomas Barnes & Sons*** demonstrates where the failure to comply with a termination notice is largely technical and the prejudice to the defaulting party is minor or insignificant, the courts are not likely to allow it to advantage the defaulting party.

52. Terminating a construction contract is a perilous exercise. The terminating party must follow any contractual termination procedure in its entirety. Any deviation from that process runs the risk of rendering the termination invalid. Even worse, a failure to terminate the contract correctly may itself constitute a repudiatory breach. Undoubtedly, careful consideration is required as to whether to nail one's colours to the common law or contractual mast.

28 April 2023

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ANNUAL CONFERENCE

5th MAY 2023

CONSTRUCTION INSOLVENCY – A MOSTLY PRACTICAL CONSIDERATION

Jonathan S Fitzgerald BL

(with special thanks to Dan O'Mahony BL)

INTRODUCTION

1. A number of alarms are sounding in respect of increased insolvency risk in the Irish construction market. The challenges of seemingly relentless construction material inflation, increasing interest rates, labour costs and energy prices in the context of the inherent fragility caused by the disruption of the Covid 19 pandemic and the Russian invasion of Ukraine have been well flagged.

2. Anecdotally, the number of construction companies appearing in matters before the Chancery Judges of the High Court are growing. The PWC Insolvency Barometer (Q1 2023) has opined that the direct economic impact of business failures is expected to be significantly higher in 2023 (albeit that same is being measured against a relatively low baseline vis-à-vis 2021 and 2022). Against the backdrop of a possible global recession, and with business failures reaching close to 1,000, PwC estimates that the direct economic impact of business failures will be in the range of €3 to €4 billion in 2023, and possibly higher if larger companies begin to encounter some financial distress. Ken Tyrrell, PwC Ireland Business Recovery Partner, said:

> "On average, just over one company is currently failing every day in Ireland. By comparison, in the years following the global financial crisis, over 5 companies a day were failing. This illustrates the low business failure rate at present but also the potential for business failures to increase if economic conditions worsen in 2023. With economic headwinds remaining driven by high inflation, energy costs and interest rates, in our view, there will continue to be significant pressure on the profitability and cash flow of many businesses through the early part of 2023 at least. The focus should be on performance improvement and cost reduction with a view to cash generation and preservation."

3. The deteriorating position in respect of construction firms in the UK is significantly more alarming. Increases in interest rates, construction material costs, and energy inflation affects all market sectors; however, the construction industry has its own particular risks.

   3.1. **Cashflow:** this is an inherent aspect of the construction project profile where there is a systemic delay between work being performed and the payment for that work. During the financial crash in the period following on from 2008, money ceased to flow in many projects where parties higher in the chain wrongfully withheld payments to try to maintain their own cash positions, thereby causing cascade failures from

subcontractor level up. The Construction Contracts Act, 2013 is, in part, intended to mitigate this risk.

3.2. **Contagion:** corporate failure inherently involves the crystallisation of bad debt where companies in construction projects are in value for chains and where the insolvency of one party in the chain will have a deleterious ripple effect on other participants in the project / supply chain.

3.3. **Sacrificing tomorrow for today:** accumulating financial headwinds often lead to a depression in project commencements and a reduction in the availability of projects, which in turn encourages market participants to aggressively chase work by way of unsustainably low tenders, resulting in low profitability over the medium term.

WHAT IS "INSOLVENCY"

4. Under the Companies Act 2014 (the "2014 Act"), a company is insolvent if it is unable to pay its debts (s.569(1)(d) of the 2014 Act).

5. The meaning of that phrase was considered by Laffoy J in **Re Connemara Mining Company plc** [2013] IEHC 225, wherein the learned Judge observed that there was no Irish authority directly on point on the criteria to be applied in determining whether a company is unable to pay its debts.

6. In paragraph 44 of the judgment, Laffoy J referenced the judgment of Barron J in **H Albert de Barry and Co NV v O'Mullane** (2 June 1992) HC, Barron J) [1992] WJSC-HC 2961, where he stated:

> "Insolvency is essentially a matter of assets and liabilities. If liabilities exceed assets, the position is one of insolvency. But the reverse is not necessarily true. A company is not solvent because its assets exceed its liabilities. It cannot for example take into account assets which it requires to remain in existence save insofar as they may be used as security to raise finance. The test is ultimately, can it pay its debts as they fall due …"

7. Laffoy J said that the test to be applied in determining whether the ground had been satisfied was whether the company was able to pay its debts as they became due (i.e.when the petition was presented). Laffoy J then went on to consider whether the court should apply

a balance sheet test or a cash flow test, noting that counsel for the petitioner had advocated the application of the "cash flow test" (which had come to prominence in Australian jurisprudence) which involved a consideration of the following factors:

(a) inability to pay debts includes the inability to pay debts as they fall due;

(b) only readily realisable assets can be used to determine the company's solvency; and

(c) any 'purported' future funding of the company must be credible.

Of these proposed factors, Laffoy J stated in paragraph 45 of her judgment that:

> "The factor at (a) is certainly part of Irish law, having regard to the decision of the Supreme Court in *Crowley v Northern Bank Finance* [1981] IR 353; although, there is no specific authority in this jurisdiction as to how far into the future the Court must look to determine whether or not the Company can meet its debts as they fall due. In relation to the factor at (b), the Petitioner properly conceded that, in determining whether a company is able to pay its debts as they fall due, the Court is not limited to assessing whether cash in hand was adequate to cover the debts. Where other assets have to be resorted to, the factor at (b) certainly accords with common sense.
>
> If a company is relying on borrowings or raising capital by a share issue to meet current liabilities, the application of the factor at (c) also accords with common sense. Accordingly, while I do consider that in an appropriate case the factors at (b) and (c) may be relevant in determining whether a petitioner has proved that the company the subject of the petition was unable to pay its debts as they fell due at the relevant time, each petition must be considered on its own facts. It is unnecessary to express any view on the appropriateness of the cash flow test as distinct from the balance sheet test, having regard to the facts before the Court."

8. The usual standard form building / construction contracts often provide a more explicit definition of insolvency or the occurrence of an insolvency event, where they may provide that a company is deemed to be insolvent when any of the following occur:

- it enters examinership;
- on the appointment of a receiver;

- on the passing of a resolution for voluntary winding-up; or
- upon the making of a winding-up order.

(NB: a liquidation arising pursuant to an orderly corporate restructuring are often explicitly exlcuded)

9. Experienced participants in the construction industry have systems and mechanisms in place to deal with insolvency risk. However, repeated experience through the economic cycles demonstrates that as part of the human condition, we reveal a remarkably consistent inability to learn or, perhaps more accurately, to remember and apply the harsh lessons of the past.

10. Given that economic alarm bells are starting to toll, it is strongly suggested that we dust off the lessons book from the financial crisis of 2008 *et seq* and place increased emphasis upon the prudent management of insolvency risk in project planning, contract formation and administration.

PRE-CONTRACT FORMATION

11. Prior to any contract formation, employers and their advisers should consider putting in place a stronger emphasis upon due diligence carried out in respect of contractors including the carrying out of a robust credit analysis prior to the formation of any contracts. Indeed, prudence would dictate that security options are considered.

12. **Parent Company Guarantee:** In circumstances where a shortlisted contractor is part of a larger corporate group, an Employer should consider seeking a parent company guarantee to guarantee the contractor's performance during the building contract. The pro forma content of such parent company guarantees address and cover the performance of the contractor's obligations under the contract, whilst also allowing for a term of liability of six years (or twelve years if the contract is executed as a deed). Admittedly, this form of guarantee can prove to be of dubious efficacy (i.e., when a particular contractor gets into trouble, it is often the case that the entire group is compromised). However, it may also be the case that financial difficulty is confined to certain companies within a corporate group (by accident or design), and that the group will seek to confine the credit stress to those limbs that can be sacrificed, thereby allowing the remaining group companies to survive. The form of parent guarantee can insulate an employer from being a victim of such survival "structuring".

13. **Performance Bond:** The CBA Codex contains excellent papers upon the law of performance bonds ("The Law of Performance Bonds – Michael Binchy BL (October 2013); "Bonds in Pandemic Times - Reg Jackson SC (June 2020)).

14. In theory, a well drafted performance bond is a strong form of security in circumstances of insolvency, as it is, in essence, a guarantee provided by an independent third party (usually a specialist insurer) which should not be impacted by a contractor's financial distress. Obviously, performance bonds are expensive (circa 10% of the contract sum): therefore, if a performance bond is dictated as part of a contract suite, this will invariably add to the contract price that is ultimately paid.

15. The law of performance bonds is particularly technical and, therefore, should be the subject of specialist advices from a suitably informed and experienced legal adviser. It is becoming increasingly rare that the performance bonds are granted "on demand" and, therefore, the bond will usually provide for a claim upon it "after the event" for any losses sustained.

16. It is not uncontroversial to note that suitable bonds are becoming more difficult to obtain and certainly more expensive. Further, their previous efficacy has been reduced as a result of of the various conditions attached by sureties.

17. **Collateral warranties:** An Employer's right to pursue a claim against a main contractor will be provided for under the building contract. It is usual, and entirely prudent, for an Employer to seek warranties from key members of the professional team (who are often in contract with the contractor in a design and build contract) involved in the project (such as the design architect, consulting engineer, project manager, etc) and from key subcontractors.

18. In an employer design context, the insolvency of the main contractor will not impact the position of the design team. However, in a design and build contract, the insolvency of the contractor will lead (without other contractual terms) to the determination of the consultant appointments, with any fees outstanding ranking as unsecured debts in the insolvency.

19. Generally speaking, the principal purpose of collateral warranties is to provide a second layer / level of protection in respect of future defects in the works. It is advisable that these Employer warranties should actively consider the provision of "step-in" rights in favour of the Employer, which will allow the Employer to step into the contract between the insolvent

main contractor, on the one hand, and consultants or key subcontractors, on the other, in circumstances of the insolvency of the main contractor (or the termination of the contractor for other good reason).

20. It should be noted that the exercise of these step-in rights is a sword with two edges, whereupon the Employer will become liable for amounts unpaid under any relevant subcontract stepped into. However, the exercise of a step-in right is likely to be a more cost-effective option than entirely clearing out the Project.

21. The common standard form step-in provisions also place obligations upon the relevant members of the professional team and subcontractors to provide advance notice to the Employer in the event that the relevant warrantor believes that it has grounds to terminate the relevant appointment or subcontract. This is a useful obligation designed to forewarn the Employer and allow the Employer's election to step in prior to the termination of the relevant appointment or subcontract. As an aside, this advance notice obligation can often serve as a "canary in the coal mine" providing early / timely forewarning of a contractor's financial distress.

22. In addition to paying increased attention on the foregoing security mechanisms at the conception of the project, it would be wise to keep the security bulwarks to the forefront during the project build. A practical way of achieving this prudent goal is to provide for drafting in the relevant contracts which will entitle the Employer to withhold a specified sum from payment to the contractor under the building contract until all security documents provided for in a contractual schedule have been provided. Furthermore, it is advisable to draft an obligation that new subcontractors and/or new advisers/construction professionals appointed during the project should provide equivalent security by way of warranty.

INDICIA OF FINANCIAL DISTRESS

23. Those of us who experienced the unpleasantness of 2008 *et seq* can recall the tell-tales of financial distress, which include *inter alia* rumour and industry intelligence, lateness in the filing of annual returns to the CRO, unexplained employee turnover, unexplained slow progression of works on site, reduced or inadequate resources been deployed to site, increasing incidences of defective workmanship, subcontractors complaining to the employer or its representative of not being paid by the contractor or of being paid late, the submission of unusual or inflated claims for payment, the seeking of advance (extra-contract) payment etc..

24. Obviously, the occurrence of one of these indications may not indicate a critical state of financial distress in the Contractor; however, prudent Employers and their advisers should maintain a consistent watchfulness for signs that a contractor may be experiencing financial difficulty.

25. The ancient aphorism that forewarned is forearmed as ever applies and may allow an Employer critical time to take practical steps to mitigate the damage that would result from the insolvency of the main contractor on the project.

26. If the insolvency of the Main Contractor appears imminent by reason of the occurrence of some or all of the warning signs noted above, the Employer and its advisers should take immediate action to mitigate the impact which may include the following:
    26.1. conduct a further credit checks / judgment review of the main contractor;
    26.2. prepare a plan to secure the site (in the event of chaotic insolvency);
    26.3. check to ensure that the contractor's insurance policies are being maintained;
    26.4. conduct a site audit to get a snapshot assessment of the progress of the project;
    26.5. consult the building contract and access suitably expert advice to inform the available options (in particular, termination);
    26.6. conduct a review of payments and exercise day-to-day control over payment applications and responses to bring the payment positioned strictly into accordance with actual progress; and,
    26.7. conduct a review of milestones\progress\extension of time applications to consider the position of liquidated damages.

UPON INSOLVENCY – "GRADUALLY, THEN SUDDENLY"

27. If an Employer receives a notification of a Contractor's insolvency, the first and most important steps are all entirely practical. Obviously, the Employer will seek to limit the impact of the Contractor's insolvency and try to mitigate the significant losses that are no doubt going to be incurred.

28. It iserhaps tautologous, but one should expect a lot to happen all at once. It is vital to keep the prescriptive terms of the building contract in mind and to strictly adhere to its provisions. Therefore, prior to doing anything irreversible, the Employer should look to its contractual rights under the building contract.

29. All of the usual standard forms speak to what may happen upon the occurrence of party's insolvency. For example, Clause 33(b), (c) and (d) of the RIAI standard forms of contract (2017 Ed) provides that in circumstances of Contractor insolvency (as defined), the Employer can determine the contract by notice with immediate effect.

30. Upon the occurrence of an insolvency event, Clause 33(b) allows the Employer to issue a "written notice determining the employment of the Contractor". Clause 33 (c) sets out a number of consequences from the said termination for insolvency. Clause 33(d) allows the Employer (through its Architect) to take steps to secure the site.

31. The PWC suite of contracts provide more detailed contractual mechanisms in respect of Contractor insolvency pursuant to which the Employer is typically entitled to the following:
    31.1. Termination of the Contractor's engagement;
    31.2. Look to any performance bond in place;
    31.3. Instruct the Contractor not to remove from the site any plant, materials or goods belonging to the Contractor or, alternatively, the Employer can direct the Contractor to remove any of its temporary buildings, plant, appliances and materials;
    31.4. Engage a third party Contractor to complete the Works and the replacement contractor will be entitled to use all materials, goods, temporary buildings, plant and appliances for the works;
    31.5. Make the Contractor to assign the benefit of contracts for the supply of materials and/or works intended for use under the Contract;
    31.6. Take steps to secure the site and look to the Contractor for the cost of same by way of deduction from any monies due under the Contract);
    31.7. Withhold payment to the insolvent contractor until after completion of the works;
    31.8. Moreover, if the expenses incurred by the Employer exceed any amount payable to the Contractor (or into the Liquidation) on completion, the Contractor will owe this as a debt. However, the Employer will typically rank as an unsecured creditor in the insolvency process.

TERMINATION

32. It is remarkable how often termination is mishandled. Hudson comments that earlier contract forms suffered from poor drafting in respect of termination leading to the jurisprudential cloud over the contractual process.

33. Termination arising from an insolvency event is inherently less opaque than termination for "failing to execute the Works in accordance with the Contract…". In circumstances of insolvency, there is an objective guillotine event which entitles the Employer to take certain action and exercise certain contractual rights.

34. However, in circumstances where the prescriptive terms of termination under a standard form contract are not strictly followed, it may be the case that the Employer will be reduced to relying upon common law rights of termination. This situation is to be avoided.

35. Consequently, Employers, suitably advised by their respective legal advisers, should exercise maximum care in strictly following the contractual provisions for the exercise of termination rights. To exemplify such an obvious risk, if an Employer sets about the termination of a Contractor in error, this may amount to a repudiatory breach of contract, entitling the Contractor (or the liquidator appointed) to seek to recover its losses from the Employer, including loss of profit.

36. All of the usual determination clauses contained within standard form contracts require written notice in one form or another at the time of final determination. In every case, the clause and the termination mechanism must be very carefully considered and closely followed in all respects, both as to the contents and timing of the notices. Any time limits or requirements specifically provided for in the contract must be fastidiously complied with (it is usually the case that exact compliance with time limits for notices will be treated as a condition precedent to a valid determination of the construction contract). Hudson states as follows:

> "Moreover, exact and meticulous compliance by the determining party with any formal or procedural requirements laid down in the termination clause, for example, as to notices or time limits, will usually be required if a contractual termination is to be successful, whereas the formal requirements for a successful common law determination are much more broadly based and require little more than a clear and unequivocal indication of the intentions by the determining party."
>
> [Hudson's Building and Engineering Contracts 11th ed, paragraph 12.004)

OTHER CONSIDERATIONS:

37. It is a labour Sisyphus to attempt to compile an exhaustive checklist of what an Employer should consider in circumstances of an insolvency event on the part of Comtractor. Nevertheless, at a minimum, the Employer and his advisers should consider the following:

35.1. Seek detailed advices in respect of termination of the building contract.

35.2. Assess the insurance and security arrangements for both the site and the materials thereon. Specifically, the Employer should be aware that the Contractor's "all risks" insurance policy may well determine upon termination. More generally, the overarching insurance position for the project should be considered (as this is likely to become the employer's responsibility after termination of the building contract).

35.3. Assess the security documentation to include any parent company guarantee and performance bonds. It is usual that the security documentation will require notices to be issued to various parties in order to set about the enforcement of the security.

35.4. Assess the collateral warranty position in respect of construction professionals and key subcontractors in the context of a cold-eyed all review of what parties are necessary to complete the project.

35.5. Conduct an audit of drawing\specification files and immediately seek copies of any documents that are not already on the file (and then press the liquidator, receiver, examiner for same).

35.6. Consult with and/or notify any relevant lenders or other funders of the project.

35.7. Once the building contract has been properly terminated in strict accordance with the contract, the Employer should seek to secure the services of a replacement main Contractor who can (hopefully) promptly enter and take possession of the site.

35.8. The Employer and its advisers should communicate with all third-party suppliers (who are often local) to agree terms for the continued use of plant and equipment and to ensure supplies of materials to site to enable the completion of the project.

35.9. Contemporaneously, in a design and build context, the Employer should, having been suitably advised, assess extant liabilities under the various subcontracts and then activate step-in rights to secure the continued involvement of important design professionals and important subcontractors in the project (see above). The Employer should also seek sound advices in respect of the novation of these important subcontracts to the replacement Contractor in due course.

35.10. An Employer should be prepared for pushback from any replacement contractor in respect of. design responsibility and other aspects of the project (which may well prove to be a source of particular difficulty when snagging\rectifying defects post-practical completion).

LITIGATION IN THE AFTERMATH OF INSOLVENCY: SECTION 62 OF THE CIVIL LIABILITY ACT, 1961

36. The inaugural paper presented by Cian Ferriter SC (now the Honourable Mr Justice Cian Ferriter) presented at the first meeting of the CBA on 6th June 2013 was drafted and presented at a time when litigation arising from the financial crash and the collapse of the construction industry was still flowing through the Four Courts.

37. Section 11 of the CLA 1961 states as follows:

> "11. — …[t]wo or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person […the plaintiff] for the same damage, whether or not judgment has been recovered against some or all of them."

38. Section 62 of the CLA 1961 states as follows:

> "62. — Where a person (hereinafter referred to as the insured) who has effected a policy of insurance in respect of liability for a wrong, if an individual, becomes a bankrupt or dies or, if a corporate body, is wound up or, if a partnership or other unincorporated association, is dissolved, moneys payable to the insured under the policy shall be applicable only to discharging in full all valid claims against the insured in respect of which those moneys are payable, and no part of those moneys shall be assets of the insured or applicable to the payment of the debts (other than those claims) of the insured in the bankruptcy or in the administration of the estate

of the insured or in the winding-up or dissolution, and no such claim shall be provable in the bankruptcy, administration, winding-up or dissolution."

39. The author canvasses and summarises the law relating to section 62 through the illuminating prism of the following relevant judgments:

Dunne v PJ White Construction Company Limited [1989] ILRM 803

McCarron v Modern Timber Homes Limited (In Liquidation) [2012] IEHC 530; and

Yun Bing Hu v Duleek Formwork Limited (In Liquidation) [2013] IEHC 50

40. The foregoing jurisprudence confirms the import of section 62 CLA 1961, that where a company enters liquidation, and where "moneys are payable" to the insolvent company under an insurance policy in respect of a "valid" claim, these sums do not constitute the assets of the company in question and are not available to a liquidator available to discharge the company's debts.

41. The same caselaw also clarifies what section 62 does not do. It does create an entitlement for a Plaintiff (or a co-Defendant) to receive moneys from an insurance company in respect of a policy which was maintained by a company which is subsequently wound up (the section explicitly refers to moneys which are "payable").

42. Therefore, if an insurance contract is repudiated by an insurer, insurance moneys will not be payable and, therefore, section. 62 will not avail the Plaintiff. Furthermore, where the insurer has repudiated, in order to challenge this position, the Plaintiff is required to prove its case against the insolvent insured (admittedly, often in default) and, thereafter, commence proceedings as against the insurer to seek the payment of insurance monies. Obviously, the requirement of consecutive sets of proceedings leaves the claim against the insurer subject to tolling of the Statute of Limitations, not to mention strong arguments premised upon privity of contract. Further, the Plaintiff usually has to make decisions in respect of the litigation in a relative information blackout.

43. If the insurer claims it has validly repudiated the insurance contract, it will bear the burden that the contract was validly repudiated (per the Supreme Court in **Dunne**). The two most common basis of repudiation relied upon by insurers are a failure to notify in a timely manner and a failure to pay an excess due under the insurance contract which are circumstances which can occur all too frequently in the chaos of insolvency and once a liquidator / receiver has been appointed to the insolvent company. The said limitations of s.62 CLA 1961 still maintain

as the recent judgment of Heslin J in **Moloney v Cashel Taverns Limited (In Voluntary Liquidation and Liberty Insurance DAC** [2020] IEHC 658 confirms.

44. The position under Irish law is unsatisfactory from the viewpoint of a Plaintiff or a Co-Defendant seeking contribution. A Plaintiff who has suffered damage by a Contractor or a co-Defendant seeking a contribution from an insolvent concurrent wrongdoer has no direct or strong means of learning of the insurance position or of ascertaining whether the claim has been properly notified to the insurer or whether the various other conditions under the policy (such as the payment of an excess charge) have been complied with. Those parties are entirely dependent upon the directors of the insolvent primary Defendant or, as the case may be, the Contractor's liquidator to activate the policy of insurance and to ensure that the requirements under the contract of insurance are complied with. There is an obvious discordance of interests at play. Curiously, the LRC 2008 paper on third party rights did not deem it necessary to address the limitations of s. 62 CLA 1961 in any particular detail.

45. In England and Wales, the parlous position of a plaintiff / co-Defendant in circumstances of the insolvency of an insured Defendant has been partially addressed in the Third Parties (Rights Against Insurers) Act 2010 (commenced in 2016 replacing the Third Party Rights Against Insurers Act, 1930) which allows a third party to bring a single set of proceedings against both the insured and the insurer in which it can ask the court to determine both the insured's liability to it and the insurers' obligation to provide an indemnity. The same legislation also imbues the Plaintiff with statutory rights to information so that the litigation strategy is not made in the blind.

CONCLUSION

46. All of the above is not new; however, the industry would benefit from refreshing its collective mind in respect of old lessons. The unanticipated financial collapse of a contractor can be a disastrous event for a project. However, prudent preparation from pre-contract stage can manage the risk and contain the damage. The wind appears to be cooling and it is past time to look to the defences.

Jonathan S. FitzGerald BL

(with thanks to Dan O'Mahony BL)

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THE CONSTRUCTION BAR ASSOCIATION

The Construction Contracts Act 10 Years On – the Adjudicator's Perspective

Gerard Meehan SC

1. On 29 January 2014, Mr Justice Frank Clarke (prior to his appointment as Chief Justice) gave a public lecture at Engineer's Ireland on "*Adjudication – The Role of the Courts*". At the date of that lecture, the Construction Contracts Act 2013 ("the 2013 Act") had been passed but had not yet been commenced and the Code of Practice had not been published. Clarke J offered a view as to the sort of legal issues which might give rise to litigation. In this paper I will seek to review the small body of case law that has developed in relation to the 2013 Act with an eye on those same legal issues.

Trust of the Construction Industry

2. At a general level, Mr Justice Clarke predicted that the effectiveness, or otherwise, of the 2013 Act might turn out to be as much about trust as about its precise legal consequences. In the UK, adjudication had gone some way towards supplanting a lot of traditional dispute resolution methods, not least arbitration and perhaps even the courts where there was not an arbitration clause in a contract. However, that is not a legal consequence of adjudication. An adjudication is binding only in the short-term sense of requiring specific payments to be made. Ultimately, a party can have the same dispute referred to arbitration or litigated in the courts if they want. Depending on the level of trust which the players involved have in the adjudication system, however, the extent to which they will actually resort to a more elaborate final dispute resolution process may well be affected.

3. Clarke J questioned whether a party would really put a lot of time and effort into a major arbitration to second guess what happened in an adjudication. He pointed out that money will have passed hands and the starting position will not be zero but rather whatever position the adjudicator has decided on. He emphasised that in order for adjudication to have the effect of supplanting arbitration, trust would be very important. Parties would have to trust the process as being both fair and delivering as good a resolution as they are likely to get in any other way.

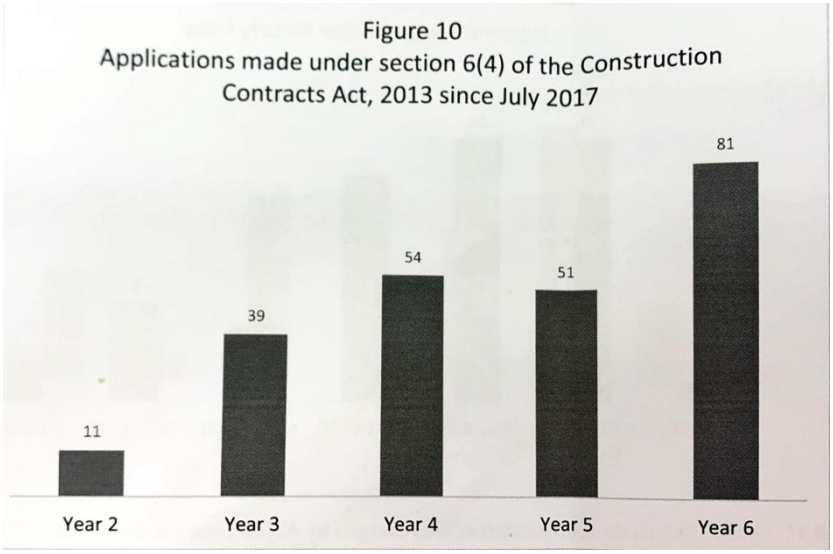
4. I am not aware of any published statistics on how this has played out over the first ten years of the new regime, however, anecdotally it does seem that the number of

construction contract arbitrations has fallen off a cliff and that parties in the vast majority of cases, are accepting adjudicators' decisions and moving on. It is still early days, but it does appear particularly in recent years that parties are placing their trust in the adjudication regime.

5. In August 2022, Mr Bernard Gogarty issued the "*Sixth Annual Report of the Chair Person of the Construction Contracts Adjudication Panel to the Minister of State for Business, Employment and Retail"* (hereinafter referred to as "the **2022 Annual Report**").

6. During the period covered by the 2022 Annual Report, there were 81 applications seeking the appointment of an adjudicator received by the Construction Contracts Adjudication Service of the Department of Enterprise, Trade and Employment (hereinafter referred to as "the **CCAS**").

7. The 2022 Annual Report sets out the number of applications requesting the Chairperson to appoint an adjudicator under Section 6(4) of the Act in the last five years. In total, there have been 236 applications and there has been an almost 60% increase in the number of applications in year 6 when compared to year 5. Figure 10 of the 2022 Annual Report is set out below.



8. The 2022 Annual Report concludes that there has been a significant increase in the number of applications requesting the appointment of an adjudicator under Section 6(4) of the 2013 Act when compared to the previous year. The Chairman has appointed 71 adjudicators to payment disputes with a combined total value of almost €50 million in the period covered by the 2022 Annual Report. This number is the highest since the 2013 Act came into force in July 2016 and the Chairman states that it is clear that parties to construction contracts are pursuing their rights under the 2013 Act to seek redress for non-payment or under payment.

9. In addition, adjudications may have taken place pursuant to the 2013 Act where the parties agreed on the appointment of the adjudicator without recourse to the CCAS. Such cases may not be included in the 2022 Annual Report statistics.

10. The trust of the parties that Mr Justice Clarke identified as being so important does therefore appear to exist.

Trust of the Courts

11. In addition to the trust of the parties, Mr Justice Clarke identified the trust of the courts as being necessary if the new regime was to successfully take hold. He compared the new adjudication process to the more established arbitration process under the Arbitration Act 2010. The courts were comfortable with arbitration and a hands-off approach had *become increasingly evident although this had been developing over the years anyway, even under the previous legislation.*

"…strictly speaking, it is not a question of trust - either the adjudication is legally binding or it is not - it would be naïve, I think, not to take into account the fact that an overall impression on whether a system works well can have at least a subliminal effect on

the attitude which the courts take to it and the extent to which the courts will be prepared to countenance interference with it. However, adjudication is new and it always takes a little while for trust to be built. The question of the courts trusting the system may, to some extent, depend on the early experiences which the courts get of considering disputes arising out of the adjudication system. Of course, such disputes are yet to arise, so it is hard to comment on exactly how that will work out."

12. Now, nearly ten years on, I suggest that the *early experiences* of the High Court *considering disputes arising out of the adjudication system* have been positive. The Courts have generally supported adjudication and specifically identified the speed of the process and its binding nature as its essential elements. Indeed in *John Paul Construction Limited v Tipperary Cooperative Creamery Limited* [2022] IEHC 3, Simons J described *"the default position"* as being *"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.* He stated 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.

13. In *Principal Construction Ltd v Beneavin Contractors Ltd* [2021] IEHC 578 Meenan J considered the regime created by 2013 Act. He emphasised that the purpose of the Act is to enable speedy payment in the building and construction industry:

"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."

14. Mr Justice Simons in *Gravity Construction Limited v Total Highway Maintenance Limited* [2021] IEHC 19 in considering the issue of costs said that the Court has to have some regard to the legislative intent underlying the 2013 Act, and in particular, the need for expedition.

15. The Judge went on to say that the 2013 Act allows for the possibility of the making of, and enforcement of, adjudications in construction disputes on an expedited basis. He emphasised that adjudications are binding pending the resolution of the dispute between the parties by way of arbitration or legal proceedings.

16. In *John Paul Construction* Simons J described the temporarily binding nature of an adjudicator's decision in the following terms:

> *"The special feature of the legislation is that an adjudicator's decision is binding in the interim, unless and until superseded by another decision. Even though the adjudicator's decision is not final and conclusive, it nevertheless gives rise to an immediate payment obligation. The successful party is entitled to enforce the adjudicator's decision forthwith, by invoking a summary procedure, notwithstanding that the adjudicator's decision is amenable to being overreached by a subsequent decision of an arbitrator or a court. This special dispute resolution mechanism is sometimes described by the shorthand "pay now, argue later"."*

17. In the same case, the Judge referred to the rationale for the High Court having a limited role on an application to enforce an adjudicator's award; firstly, because the adjudicator's decision is not final and conclusive but rather is only binding until the payment dispute is settled or reconsidered in subsequent court or arbitral proceedings; and secondly the underlying purpose of the 2013 Act is to facilitate expeditious payments within the construction industry.

18. Simons J noted the trade-off required to achieve this expedition, i.e. that the adjudication process is less elaborate than conventional arbitration or litigation:

> *"The Oireachtas have 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. It would undermine the legislative policy of "pay now, argue later" were the court to refuse to enforce an adjudicator's decision precisely because the adjudicative process failed to replicate that of conventional arbitration or litigation."*

Discretion to Enforce - Natural and Constitutional Justice

19. The Courts therefore have generally supported adjudication and recognised the importance of speedy payment in the construction industry. This support and recognition I would suggest, demonstrates the "trust" that Clarke J suggested was required for the new regime to take hold.

20. However, the Courts will not support a decision where an adjudicator exceeds their jurisdiction and/or breaches the rules of Natural and Constitutional justice. This is not a surprise and was predicted by Clarke J in his 2014 . Indeed, Clarke J suggested that the Irish Courts might intervene more readily than their UK counterparts where they detect a breach of natural and constitutional justice.

> *"In the round, what the Irish courts have considered to be the rules of natural or constitutional justice are not dissimilar to the like rules which apply in the UK but, nonetheless, in Ireland, as a matter of constitutional law, there is implied into any process which is legally binding by statute (and this is a legally binding process by statute), an obligation on the part of anyone making a decision in that process to conduct that process in accordance with the rules of constitutional justice. So this is not just a matter of statutory construction or a matter of whatever guidance may be given in respect of the statutory regime by ministerial order. It is a matter of constitutional law in Ireland. That is something which does not apply in the UK and, therefore, I do not think it can be assumed that the precise way in which the Irish courts will approach issues arising out of adjudication will be identical to the way in which similar questions might be approached in the UK…It is perhaps, therefore, a stronger requirement in Ireland because of its constitutional provenance than it would be in the UK. I think that this is also an important part of the backdrop."*

21. In *Principal Construction Ltd*, Meenan J noted that the UK authorities have determined that the decision of an adjudicator may be unenforceable either on grounds of jurisdiction or natural justice.

22. In *Aakon Construction Services Limited v Pure Fitout Associated Limited (No.1)* [2021] IEHC 562, Simons J described the Court as having "*discretion to grant leave to enforce"*:

> *In summary, and having regard to the very specific and limited grounds of objection advanced in this case, I am satisfied that the court – in the exercise of its statutory discretion to grant leave to enforce – is required to consider, first, whether the adjudicator's decision comes within the terms of the payment dispute as referred;*

and, secondly, whether fair procedures, and, in particular, the right of defence, has been respected. 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."

23. In *John Paul Construction*, Simons J again noted that 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."*

24. In an echo of Mr Justice Clarke's comments about trust, Simons J stated that the existence of this judicial discretion represents an important safeguard which "*ensures confidence in the statutory scheme of adjudication*".

25. The language used and the decisions in general clarify that the judicial discretion will be used to preserve trust in the process rather than to pedantically comb through adjudicator's decisions to render them unenforceable. In *John Paul Construction*, Simons J stated:

> *"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."*

26. In *Aakon Construction Services*, Simons J said that it is consistent with the general supervisory jurisdiction of the High Court in respect of statutory decision-makers to say that a Court should not enforce, even on a provisional basis, an adjudicator's decision which has clearly been reached in breach of fair procedures.

27. It is not yet clear what type of breach of fair procedures might convince a Court to exercise its discretion not to grant leave to enforce an adjudicator's decision. In 2014, Mr Justice Clarke noted that where a person's legal rights are affected that person is entitled to "*some degree of constitutional justice"*. He referred to the Supreme Court decisions *in Dellway Investment Ltd & Ors v National Asset Management Agency & Ors* [2011]4 I.R. 1 and *MacPhartalainn v Commissioners for Public Works* [1992] 1 I.R. 111 (HC); [1994] 3 I.R. 353 before identifying as the starting point *"that the constitutional requirement of fair process necessarily applies in the adjudication process despite the fact that there is a degree of lack of finality about the adjudication decision".*

28. In *Aakon Construction Services Limited*, Simons J warned against the dangers of simply reading across the case law from England and Wales, given the different statutory backgrounds. However, he did describe that case law as a great assistance in addressing the question of principle as to whether and when a Court should depart from the literal meaning of the legislation which designates an adjudicator's decision as "*binding"*. Broadly, he identified two circumstances where the jurisprudence of the neighbouring jurisdiction allows for Court interference with adjudicators' decisions:

> *"In brief, the case law from England and Wales identifies two broad exceptions to the binding nature of an adjudicator's decision. The first concerns the adjudicator's jurisdiction. It has been held that where an adjudicator exceeds the jurisdiction conferred upon him by the parties, the adjudicator's decision will be treated as invalid (subject to the possibility of severance). The second exception concerns the requirement that an adjudicator comply with fair procedures. If it is demonstrated that fair procedures have not been properly observed and that this has had a material effect on the outcome of the adjudication process, then, again, the adjudicator's decision will not be regarded as valid."*

29. The Judge considered the precise legal basis for these exceptions to the binding nature of the adjudicator's decisions:

> *"There has been much debate as to the precise legal basis for these exceptions and as to how they can be reconciled with the literal wording of the legislation, i.e. "*the

decision of the adjudicator is binding until …*". There is some suggestion in the case law from England and Wales that an adjudicator's decision which has been reached in excess of jurisdiction or in breach of fair procedures is a nullity; and thus does not actually represent a "* decision*" within the meaning of the legislation. This is similar to the approach adopted, in the context of public law, in the landmark judgment in* Anisminic Ltd v. Foreign Compensation Commission *[1969] 2 A.C. 147.*

Moreover, when speaking of an adjudicator's jurisdiction, one has to consider whether same is concerned only with the initial jurisdiction to enter upon a consideration of a payment dispute, or, alternatively, whether an error of law made in the course of the decision-making might itself be characterised as having been made outside jurisdiction.

These are difficult issues, and given that, to date, there have only been a handful of written judgments delivered in respect of the Construction Contracts Act 2013, it is appropriate to proceed with caution. The precise contours of the High Court's discretion to refuse to enforce what is expressed under legislation to be a binding decision should be developed incrementally."

30. In *Aakon Construction Services*, Simons J pointed out that the "*binding*" status is conferred only on an adjudication which meets the criteria prescribed under the 2013 Act. A court, in exercising its discretion to grant leave to enforce, must be entitled to consider whether a purported adjudication meets the statutory criteria. He noted for example, that the 2013 Act only apply to construction contracts entered into after 25 July 2016. He stated that it would seem to follow that the Court must also be satisfied that the adjudication has been made in respect of a "*payment dispute"*. He described it as "*only a small step"* to say that the Court should also consider whether the adjudicator's decision is confined to the dispute which had been referred for adjudication.

31. Simons J summarised the position in relation to exceptions to the "*binding"* nature of adjudicator's decisions as follows:

"In summary, and having regard to the very specific and limited grounds of objection advanced in this case, I am satisfied that the court—in the exercise of its statutory discretion to grant leave to enforce—is required to consider, first, whether the adjudicator's decision comes within the terms of the payment dispute as referred; and, secondly, whether fair procedures, and, in particular, the right of defence, has been respected. 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."

Constitutional and Natural Justice - Specifically

32. The principle that some degree of constitutional justice is required is unremarkable. However, Mr Justice Clarke noted that the precise type of constitutional justice required can vary significantly depending on the kind of issue which is involved. He described this as a "moveable feast". For example, in *MacPhartalainn* all the Supreme Court said was required by the State was that there had to be some opportunity or means for anyone affected to dispute in advance that an area should be designated as a special area of conservation. The court did not seem to suggest that there needed to be a hearing as such or any kind of elaborate process. Likewise, the Supreme Court commented in *Dellway* that it was not necessary that there had to be a full hearing involving the question of whether someone's loans went into NAMA. There had to be some process or opportunity for the borrower to put forward whatever case they wanted as to why it should not happen. Clarke J made the following comment:

A case, for example, where someone is going to be dismissed from the Civil Service on the grounds on an allegation of corruption may involve a different level of process than a question of whether there should be a designation of an area in a particular way under a particular statute.

33. Clarke J acknowledged that this variable standard of constitutional justice made it difficult to predict with precision what kind of minimum process the courts would say is implied into adjudication in order for it to meet the constitutional obligation of fair process. He considered at length that the process as then envisaged was *"significantly inquisitorial rather than adversarial – an adjudicator is required to go and find out what the answer is."* The former Chief Justice then considered the inquisitorial process employed by the Refugee Applications Commissioner and noted that "*there is a constitutional duty on the decision maker to inform those potentially affected by the decision of any materials which are potentially going to affect the judgment".*

"So that means that if the adjudicator either obtains information, him or herself, or perhaps takes advice from a third party of some sort, which might be useful, and assuming that whatever has been found out is potentially going to have an effect on the view of the adjudicator, I think there is clearly an obligation on the adjudicator to

share that information with any potentially affected parties, and give them some opportunity to deal with it."

34. In *John Paul Construction*, the respondent argued that the adjudicator failed to consider the defence put forward. Simons J stated that were this allegation to be made out on the facts, then it would justify the refusal of leave to enforce the adjudicator's decision. Fair procedures demand that a party be afforded a right to be heard before a decision is reached requiring that party to make a payment under a construction contract.

35. The Judge identified two scenarios where there might be a failure to consider a defence. Firstly, an adjudicator has deliberately excluded a particular line of defence from consideration, ruling for example that a defence falls outside the terms of the adjudication. In such a scenario, the debate becomes whether the adjudicator erred in their ruling on jurisdiction. The second scenario is where a particular line of defence has not been expressly excluded, but the respondent argues that the adjudicator's decision shows that the defence was not considered. Simons J stated that the High Court will adopt a pragmatic approach to such an allegation. The Court will have regard to the adjudicator's decision in the round; the decision is not to be parsed line by line:

"…the adjudicator will not necessarily be required to set out separate findings on each and every subtopic. It is sufficient that the substance of the defence have been addressed in the decision."

36. At paragraphs 16 and 17, Simons J stated:

"It is important to distinguish between (i) the rejection of a line of defence as inadmissible, and (ii) the failure to consider a line of defence. This distinction is illustrated by the facts of Aakon Construction Services Ltd. It had been alleged there that the adjudicator had failed to consider an alternative line of defence advanced by the paying party, namely that the true value of the works was less than that sought under a payment claim notice. This court held that the adjudicator had not disregarded or ignored the defence, but had rather reached a reasoned decision as to why the paying party was not entitled to pursue that line of defence in the context of the specific adjudication.

Similarly, it is important to distinguish between (i) the dismissal of a defence on the merits, and (ii) the failure to consider a line of defence. Say, for example, that the respondent to a payment claim had sought to assert a right of set-off. Were the adjudicator to refuse to consider the set-off on jurisdictional grounds, i.e. on the

mistaken assumption that it did not come within the scope of the payment dispute, then this might well be a ground for refusing to enforce the adjudicator's decision. If, conversely, the adjudicator had considered the asserted set-off on its merits, but had mistakenly concluded that it did not meet the criteria for a contractual set-off, then this would not justify the refusal of leave to enforce. If and insofar as the respondent contended that the finding was incorrect, the remedy would be to pursue the matter by way of separate arbitral or court proceedings."

37. In 2014, Clarke J suggested that *adjudicators might be given greater guidance on what is meant in practice by the obligation to comply with "natural justice".* There was scant practical guidance available to adjudicators as to what process to follow. He suggested that the Code of Practice *could provide some more detailed guidance rather than generalities.*

38. Under Section 9 of the 2013 Act, the Minister may prepare and publish a code of practice governing the conduct of an adjudication. The Minister did so on 25 July 2016, when the Department of Enterprise, Trade and Employment published "*Construction Contract Act 2013 – Code of Practice Governing the Conduct of Adjudications"* ("the **Code of Conduct**").

39. The Code of Conduct contains a section entitled "Adjudication of a payment dispute – Procedures and Decisions". The Code requires the adjudicator to observe the principles of procedural fairness, which shall include giving each party a reasonable opportunity to put their case and to respond to the other party's case. Furthermore, the adjudicator is to ensure that the procedure adopted is commensurate with the nature and value of the payment dispute and he/she shall be mindful of whether or not an oral hearing is required having regard to matters such as to whether or not there is a conflict of fact or other relevant matter that requires such a hearing.

40. Paragraph 28 of the Code of Conduct requires the adjudicator to use reasonable endeavours to process the payment dispute between the parties in the shortest time and at the lower cost. He/she shall promptly notify the parties of any matter that will slow down or increase the cost of making a determination.

41. Paragraph 36 of the Code of Conduct provides that the adjudicator's fees, costs and expenses shall be reasonable in amount having regard to the amount in dispute, the complexity of the dispute, the time spent by the adjudicator and other relevant circumstances.

42. The Code of Conduct therefore goes some way towards providing guidance to adjudicators as to the procedures to be adopted.

43. Clarke J was conscious of the proposed inquisitorial nature of the proposed process. He felt there might be some merit in trying to work out, by reference to the established jurisprudence of the courts in other similar areas, what kind of process is to be carried out by an inquisitorial adjudicator, would be sufficient to meet the constitutional requirements of fair process. That would provide guidance to an adjudicator on what needs to be done and would also allow the process the best chance of being able to be completed within the timeframe which the 2013 Act requires.

44. Clarke J considered the possibility of an adjudicator taking the view that an adjudication cannot be done in accordance with fair process within the statutory time limit. By analogy he considered the case of *O'Briens Irish Sandwich Bars Ltd v Companies Acts* [2009] IEHC 465. In that case the courts were faced with the prospect of conducting a number of hearings within the tight statutory timeframes provided for examinerships under the Companies Acts. The Court ultimately took the view that it did not have the necessary time to conduct all these hearings in a fair way before the time limit ran out. There was insufficient time to allow each of those hearings to be conducted in accordance with fair process:

"I suppose what is relevant here is that the court took the view that it could not dispense with fair process. The consequence was that the examinership process came to an end and the company was liquidated. So it seems that the need to comply with fair process overrides practicality."

45. Another question Clarke J considered in relation to fair process was whether an adjudicator would be required to convene an oral hearing. In this context he referred to the decision of Hogan J in *Lyons & Murray v Financial Services Ombudsman* [2011] IEHC 454; "*Given that the Financial Services Ombudsman is making a binding decision under statute… where it comes down to a pure question of fact, like what actually happened on a particular occasion… I do not think that it is constitutionally permissible to exclude cross-examination in those circumstances and any attempt to do so would likely leave the decision of the adjudicator open to challenge."*

46. In *John Paul Construction*, Simons J said a right to be heard implies a right to have one's submissions considered by the decision-maker but not necessarily a right to an oral

hearing. However, in *John Paul Construction* there did not appear to be a material question of fact in issue.

47. The Code of Conduct provides that an adjudicator may hold an oral hearing where appropriate. This obviously places the onus back on the adjudicator; I suggest it would be prudent to hold an oral hearing where there is a material question of fact and at least one of the parties requests it.

48. Of all the concerns identified by Clarke J in 2014, I suggest that this is the one that remains of greatest concern to adjudicators. It is difficult to work out by reference to established jurisprudence of the courts in other similar areas what kind of process is to be carried out by an inquisitorial adjudicator sufficient to meet the constitutional requirements of fair process. Limited guidance has been provided by the Code of Conduct.

Discretion to Enforce - Jurisdiction

49. In *Principal Construction*, the respondent submitted that since the final certificate was not disputed within the time provided by the 2013 Act it could not subsequently be referred to an adjudicator. The respondent relied on the decision in *The Trustees of the Marc Gilbard (2009) Settlement Trust v OD Developments and Projects Ltd* [2015] EWHC 70 (TCC). However, Meenan J noted the distinction between the jurisdiction an adjudicator has to hear a claim and the adjudicator's decision on that claim. The Judge stated that the jurisdiction of the adjudicator derives, not from the contract, but rather from the terms of the 2013 Act. the Judge stated:

> *"This Act confers on a party to a construction contract a clear unfettered right to refer a payment dispute for adjudication. When the payment dispute has been referred, the adjudicator, in determining the dispute, may have regard to the terms of the construction contract itself.*

50. In *Principal Construction*, Meenan J referred to the decision of Coulson in *Pilon Limited v Breyer Group plc* [2010] EWHC 837 (TCC) in considering the respondent's submission that the adjudicator's refusal to allow the respondent to prosecute its counterclaim was made in material breach of natural justice. Meenan J quoted the TCC Judge as follows:

> *''Having reviewed a number of authorities, Coulson J. stated:-*

"(22) As a matter of principle, therefore, it seems to me that the law on this topic can be summarised as follows:

22.1 The adjudicator must attempt to answer the questions referred to him. The question may consist of a number of sub-issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question then, whether right or wrong, his decision is enforceable: see Carillion v Devonport.

22.2. If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed to even consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice: see Ballast, Broadwell, and Thermal Energy.

22.3. However, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable: see Bouygues and Amec v TWUL.

22.4. It goes without saying that any such failure must also be material: see Cantillon v Urvasco and CJP Builders Ltd v William Verry Ltd [2008] EWHC 2025 (TCC), [2008] BLR 545. In other words, the error must be shown to have had a potentially significant effect on the overall result of the adjudication: see Keir Regional Ltd v City and General (Holborn) Ltd [2006] EWHC 848 (TCC), [2006] BLR 315.

22.5. A factor which may be relevant to the court's consideration of this topic in any given case is whether or not the claiming party has brought about the adjudicator's error by a misguided attempt to seek a tactical advantage. This was plainly a factor, which in my view rightly, Judge Davies took into account in Quartzelec when finding against the claiming party."

51. This same passage from *Pilon* was subsequently, having being relied on by both parties, cited by Simons J in *John Paul Construction*.

52. The referring party cannot seek to limit the defences available to the respondent by limiting the scope of the notice of intention to refer. In *John Paul Construction*, Simons J described as an unremarkable proposition that:

> *"… the claiming party in an intended adjudication cannot, by purporting to define the dispute in narrow terms at the time of the reference, circumscribe the type of defences which the responding party may raise."*

53. Simons J referred again to the decision of Coulson J in Pilon:

> *"Adjudicators should be aware that the notice of adjudication will ordinarily be confined to the claim being advanced; it will rarely refer to the points that might be raised by way of a defence to that claim. But, subject to questions of withholding notices and the like, a responding party is entitled to defend himself against a claim for money due by reference to any legitimate available defence (including set-off), and thus such defences will ordinarily be encompassed within the notice of adjudication.*
>
> *As a result, an adjudicator should think very carefully before ruling out a defence merely because there was no mention of it in the claiming party's notice of adjudication. That is only common sense: it would be absurd if the claiming party could, through some devious bit of drafting, put beyond the scope of the adjudication the defending party's otherwise legitimate defence to the claim."*

54. Simons J said that the same principle applies to a notice of intention to refer under the 2013 Act.

55. An issue advanced in *Aakon Construction Services Limited* which the Court felt it was unnecessary to answer was whether the precise parameters of the adjudicator's jurisdiction are forever fixed by the summary of the details of the payment dispute as set out in the notice of intention to refer. The Judge warned that it should not be assumed that the position is the same as it is in the UK. Simons J noted that the range of disputes which can be referred to adjudication under the UK legislation is far broader than under the 2013 Act, which confines the the adjudication process to payment disputes. The Judge stated:

> *"In circumstances where the Construction Contracts Act 2013 is largely silent on the status of the notice, it is at least arguable that the detail of the dispute can be further refined by the content of the subsequent referral. To hold that the adjudicator's*

jurisdiction is rigidly defined by what will, of necessity, be a brief description set out in the notice of intention to refer would appear to be inconsistent with the statutory provision that the adjudicator may take the initiative in ascertaining the facts and the law in relation to the payment dispute (section 6(9) of the Act).”

56. Simons J stated that this question of jurisdiction is ultimately a matter of fair procedures. The responding party must have notice of the case it has to meet. The essential elements must be set out in the notice of intention to refer, however, the Judge indicated that these matters can be expanded on in the referral.

> “*Ultimately, the overarching principle is that an adjudication must comply with fair procedures. An essential element of this is that the responding party be aware of the case which it has to meet and afforded a meaningful opportunity to respond to that case. Whereas this will undoubtedly be achieved if the nature and extent of the dispute is set out in full in the notice of intention to refer, it does not follow as a corollary that an elaboration upon the detail of the dispute in the subsequent referral is inimical to fair procedures. Provided always that the notice of intention to refer identifies the gravamen of the payment dispute, and, in particular, identifies the construction contract; the parties; the site address; the payment claim notice; the response, if any, made to the payment claim notice; and the sum claimed, then the refinement of legal argument in the referral will normally be permissible.*
>
> *Moreover, the exigencies of fair procedures demand that a notice of intention to refer not be interpreted narrowly so as to deprive a respondent of a potential defence. A notice of intention to refer is authored by the claiming party and will ordinarily be confined to the claim being advanced. A notice will rarely refer to the points that might be raised by way of a defence to that claim. The notice should, however, be interpreted as encompassing any legitimate available defence. (See, by analogy,* Pilon Ltd v. Breyer Group plc *[2010] EWHC 837 (TCC); (2010) 130 ConLR 90 (at paragraph 25)).”*

57. In *John Paul Construction*, Simons J referred to the Scottish decisions of *NKT Cables A/S v. SP Power Systems Limited* [2017] CSOH 38 and *DC Community Partnerships Ltd v. Renfrewshire Council* [2017] CSOH 143. Simons J stated that the governing principle in these cases, that an adjudicator must consider the substance of the defences raised, is not in doubt.

58. In *John Paul Construction*, the employer argued that the adjudicator did not have jurisdiction to determine issues which had been the subject of an earlier binding adjudication decision. In his decision, the adjudicator had found that the claims made in the first adjudication had not been extension of time claims in respect of which prolongation costs were sought in the second adjudication. The adjudicator drew a distinction between the valuation of the variation, and the delay claim. In relation to this jurisdictional point, Simons J stated:

> *"An adjudicator's finding in respect of a jurisdictional issue is not binding on the parties unless they have agreed to be so bound. It is necessary for the court to examine the question of jurisdiction itself. On the basis of the materials and arguments put before the court, I am satisfied that the adjudicator's decision did not trespass upon issues which had been the subject of a binding determination in the first adjudication. It is apparent that the issue addressed in the first adjudication is not the same as that arising on the adjudication the subject of this application. The first adjudication did not involve a claim for an extension of time nor were prolongation costs sought."*

59. In *O'Donovan v Bunni* [2020] IEHC 623 the applicants sought to judicially review a finding of an adjudicator that he had jurisdiction in circumstances where the applicants argued that the contract between the parties was entered into before the coming into effect of the 2013 Act. In the context of an application for a stay on the adjudication after leave had been granted but before the substantive judicial review hearing, Barr J stated

> *"The court also accepts that in considering this matter, the court has to have regard to the fact that there is the public interest to be considered in the preservation and support of statutory schemes, such as the adjudication process, that have been put in place by the Oireachtas. The purpose of the adjudication process provided for in the Construction Contracts Act 2013, is to provide a fast, fair and efficient method of determining payment disputes which arise in connection with construction contracts. To that end, the adjudication process has been put in place, whereby such disputes are determined within a tight timeframe, as provided for under s.6 of the Act. Such dispute is adjudicated upon by an independent person, who has expertise in the area of construction contracts. The timeframes provided for in the Act are very tight, so as to ensure that such disputes are adjudicated upon quickly. This is seen as being beneficial to both parties to the construction contract. The court is obliged to have regard to these objectives and the public interest in the promotion of same, when coming to its decision on this application."*

60. It should be noted in passing that it is an open question whether judicial review lies in relation to adjudicator's decision under the 2013 Act. In relation to this issue, Simons J stated in *John Paul Construction*:

> *"Whereas the Act expressly contemplates that proceedings may be "initiated in a court in relation to" an adjudicator's decision (section 6), it does not stipulate that such proceedings must be by way of judicial review. The Act is also silent on whether judicial review lies to restrain an adjudicator from reaching a decision on a pending adjudication."*

Expedition

61. In 2014, Clarke J was concerned that delays in enforcing adjudicators' decisions might undermine the statutory intent.

"…*if it is going to take a long time to get the leave of the court to enforce an adjudicator's award, it clearly defeats the purpose of the whole process. So some thought needs to be put into how to devise a very quick but fair method for applying summarily to court to get the leave of the court to turn the adjudicator's award into, effectively, a court order…."*

62. This concern was echoed by Simons J in *Aakon Construction Services Limited*. That case involved an application for leave to enforce an adjudicator's decision under Section 6(11) of the 2013 Act. The Judge set out the legislative context and offered an overview of the statutory adjudication process provided for under the 2013 Act:

> *"The Construction Contracts Act 2013 has put in place a statutory scheme of adjudication whereby payment disputes under construction contracts can be heard and determined in a very short period of time. The adjudication process is designed to be far more expeditious than conventional litigation or arbitration. The default position is that the adjudicator shall reach a decision within 28 days beginning with the day on which the referral is made. This period can be extended by up to 14 days, with the consent of the party by whom the payment dispute was referred. Both parties may agree to a longer period."*

63. Simons J went on to consider how the legislative intent could potentially be undermined by delays in the enforcement process:

> *"The fact that an adjudication will be heard and determined within a matter of weeks has the consequence that the legal costs incurred by the parties will be much less*

than those of conventional litigation or arbitration. Moreover, the losing party is not liable to pay the costs of the successful party: section 6(15) of the Act provides that each party shall bear his or her own legal and other costs incurred in connection with the adjudication.

Of course, the fast-track process will be of limited practical benefit if the outcome of the process, i.e. the adjudicator's decision, cannot be enforced promptly. There is little point in putting the adjudicator under the cosh to produce a decision within a matter of weeks, only for there to be a delay of months, or even years, thereafter in the enforcement of that decision. The Act seeks to ensure that an adjudicator's decision may be enforced promptly by making it binding upon the parties on a provisional basis. The innovative feature of the legislation is that it provides that an adjudicator's decision shall be enforceable, by leave of the High Court, in the same manner as a judgment or order of that court with the same effect. Where leave is given, judgment may be entered in the terms of the adjudicator's decision."

64. The Superior Courts Rules Committee has prescribed an expedited procedure to be followed on an application for leave to enforce or to enter judgment in respect of a decision of an adjudicator. This is provided pursuant to Section 6(11) of the 2013 Act by Order 56B of the Rules of the Superior Courts. The application is by originating notice of motion grounded upon an affidavit sworn by or on behalf of the moving party. The respondent may deliver a replying affidavit within seven days. The applicant shall be at liberty to file a further affidavit within a further seven days.

65. In *Aakon Construction Services*, Simons J warned practitioners to be alert to the fact that the time-limits prescribed under Order 56B are not merely aspirational, but should be complied with unless there is good and sufficient reason for not doing so. It is expected that the exchange of affidavits between the parties should have been completed prior to the first return date to allow a hearing date to be fixed immediately.

66. High Court Practice Direction HC105 came into effect on 26 April 2021 and adds further clout to Section 6(11) and Order 56B. It provides that all applications for leave to enforce or to enter judgment in respect of a decision of an adjudicator pursuant to Section 6(11) of the 2013 Act shall be made returnable before the High Court on the first available Wednesday.

67. It appears then that Clarke J's suggestion that a very quick but fair method for applying summarily to court to get the leave of the court to turn the adjudicator's award into,

effectively, a court order has been adopted. Both the Superior Courts Rules Committee and the Courts themselves have recognised the expediency required by the 2013 Act.

68. In *John Paul Construction*, Simons J identified the proofs required to obtain leave to enforce an adjudicator's decision from the High Court:

> *"For the reasons set out in detail in this judgment, I have concluded that leave to enforce should be granted in this case. The "proofs" for the application, as identified in the Act and Order 56B of the Rules of the Superior Courts, have all been satisfied. In particular, the adjudicator's decision has been made in respect of a payment dispute properly referred to him under the Act. The adjudicator acted in accordance with fair procedures and natural justice and did not exceed his jurisdiction. The adjudicator's decision continues to be binding on the parties as it has not been superseded by a subsequent decision of an arbitrator or a court."*

Conclusions

69. It is clear, that after a slow start, the adjudication regime provided for by the Construction Contracts Act 2013 has started to "*take hold*". The trust of the industry identified as necessary to the success of the regime by Clarke J in 2014 is evident in the increasing number of adjudications enumerated in the 2023 Annual Report. Put very simply; there are more adjudications all the time. Conversely, it would appear anecdotally that there are fewer arbitrations.

70. The trust of the Courts in the adjudication process is also very much in evidence. Decisions such as *Principal Construction Limited* and *Aakon Constructions Services* and *John Paul Construction* have all emphasised the legislative intent that money would flow through the construction industry without undue delays and the binding nature of an adjudicator's decision.

71. It is also clear that the courts will exercise their discretion not to grant leave to enforce an adjudicator's award in very limited circumstances. These circumstances include where the adjudicator exceeds their jurisdiction and where natural and constitutional justice is not provided for. However, the Courts have stated strongly that the exercising of this discretion is to "*ensure confidence in the statutory scheme of adjudication*".

72. It is difficult to work out by reference to established jurisprudence of the courts in other similar areas and/or by reference to the Code of Conduct precisely what kind of process is to be carried out by an inquisitorial adjudicator sufficient to meet the constitutional

requirements of fair process. Fair procedures do require an adjudicator to consider any defence put forward to the claim and to afford an opportunity to the parties to address material which potentially affects their legal rights.

73. The 2013 Act, the Rules of the Superior Courts, and the High Court Practice Direction seek to facilitate the early payment of monies pursuant to an award. The Courts appear to be supporting that legislative intent by providing what Clarke J considered necessary in 2014; ie a *very quick but fair method for applying summarily to court to get the leave of the court to turn the adjudicator's award into, effectively, a court order.*

Gerard Meehan SC

5 May 2023

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Building Regulations, Control Compliance and Judicial Review

Catherine Dunne BL

Introduction

1. The Building Control (Amendment) Regulations of 2014 (hereinafter referred to as "BC(A)R") became effective on 1 March 2014 and concern developments for which Commencement Notices were lodged with building control authorities on or after that date. BC(AR) arrived at a time when concerns were arising from high profile industry cases ranging from contractor insolvencies, defects and fire safety breaches, including the highly publicised Priory Hall development. Many of these cases were attributed to below standard adherence to building control across the board, from design to supply of materials and works practices. A need was identified for a more robust building control regime and increased levels of accountability for professionals and contracts, from the outset to the completion of construction works. BC(A)R was introduced to strengthen the previous arrangements, in the form of statutory certification of design and construction, lodgement of compliance documentation, mandatory inspections during construction and registration of a series of certificates[1].

2. This paper will provide practitioners with an overview of the BC(A)R legal landscape and the current scope for claims arising from the regulations. The role currently played by Building Control Authorities pursuant to BC(A)R will be examined. Finally, the recent judicial review proceedings in *Coreet Ltd v Meath County Council & Ors*[2] will be considered, in which an order of *certiorari* was sought in respect of the local Building Control Authority's refusal to register a Certificate of Compliance in respect of an apartment block that was otherwise ready to be occupied.

Legislative Background

3. Historically, building control and fire safety legislation has tended to follow on as a response to building disasters and failures. The Great Fire of London, which occurred in 1666, began in a bakery on Pudding Lane and raged for four days, ultimately leading to the introduction of building regulation in the UK with the Rebuilding Acts in 1667. Before the

[1] Explanatory note for SI9 – introduction of BC(A)R
[2] High Court Record No. 2022/887 JR

Great Fire, London was comprised of a mass of timber-framed buildings and thereafter, the city's buildings were rebuilt on their original plots using brick and stone. In 1981, the tragic fire in the Stardust nightclub in Artane, Co. Dublin led to the introduction of the Fire Services Act, which was followed by the Building Control Act 1990.

4. The design and construction of buildings is now regulated under the Building Control Acts 1990 to 2014, which provide for the making of Building Regulations and Building Control Regulations. BC(A)R were introduced[3] in 2014 to amend the pre-existing legislation[4] in response to mistakes made in developments constructed during the Celtic Tiger period, including Priory Hall and Longboat Quay. Set out in 12 parts (classified as Parts A to M), BC(A)R represented one of the most significant changes to the Building Control Code since the 1990 Act, by strengthening the existing provisions in relation to notifications, compliance and registration of buildings.

Roles and Responsibilities

5. The primary legal responsibility for compliance with the requirements of the Building Regulations rests at all times with the owner of the building or works, and with any builder or designer engaged by the owner. It must be noted that contractual obligations are separate and distinct from the statutory obligations under BC(A)R. All new buildings and existing buildings which undergo an extension, a material alteration or a material change of use must be designed and constructed in accordance with BC(A)R. BC(A)R require the submission to the Building Control Authority ("BCA"), via the online Building Control Management System ("BCMS"), of statutory notices of commencement and completion, accompanied by certification of design and construction, lodgement of compliance documentation, proposed inspection regimes and evidence of inspections during the construction phase and validation and registration of certificates. Roles are assigned to various parties by BC(A)R, including Owners, Designers, Builders, Assigned Certifiers and Ancillary Certifiers.

Design Certifier

[3] SI 9/2014

[4] BC(A)R introduced amendments to the Building Control Act 1990 as amended by the Building Control Act 2007 and the Building Control Regulations 1997 as amended by the Building Control (Amendment) Regulations 2000, the Building Control (Amendment) Regulations 2004 and the Building Control (Amendment) Regulations 2009

6. The Design Certifier completes and signs the statutory Certificate of Compliance (Design) at the Commencement Notice stage, and thereafter, may become an Ancillary Certifier for any design changes, deferred elements or variations that take place to their design. Where subcontractors and other design specialists are involved in the works, the Assigned Certifier and the contractor will require Ancillary Certificates from these parties in respect of the specific works they have undertaken. A suite of Ancillary Certificates was developed in response to BC(A)R and complemented by the related Code of Practice for Inspecting and Certifying Buildings and Work. The format of these Ancillary Certificates has been agreed between the various professional bodies and the Construction Industry Federation.

Assigned Certifier

7. The Assigned Certifier must be a construction professional[5] and is required to devise an inspection plan, coordinate inspections in tandem with other members of the professional design team (Ancillary Certifiers) and certify the compliance of the building or works with the Building Regulations by way of collating certification, inspection records and the submission of appropriate documentation to show compliance on completion. Assigned Certifiers may also seek performance declarations from material suppliers to demonstrate that the materials used are in compliance with the Construction Products Regulation.

8. Both the Assigned Certifier and the main contractor must sign the Completion Certificate, in which they each certify that the building complies with the Building Regulations, albeit that their certificates are not identical in their terms. A building may not be opened, used or occupied until a Completion Certificate is filed and registered by the BCA on the Part IV Register[6]. The Completion Certificate produced jointly by the Assigned Certifier and the main contractor, stands as an imperative milestone which must be addressed, prior to the handover of a project under BC(A)R.

Contractor

9. BC(A)R also requires the owner of the property to appoint a competent contractor. Competency is a strict pre-registration requirement and is generally satisfied where the contractor is registered on the Construction Industry Register of Ireland. This registration

[5] Either an architect or a building surveyor under the 2007 Act, or a chartered engineer for the purposes of the Institution of Civil Engineers of Ireland (Charter Amendment) Act 1969.
[6] Paragraph 20F(1), Building Control Regulations 1997

is currently voluntary but following the recent enactment of the Regulation of Providers of Building Works Bill 2022, a new Statutory Register is to be established, making it mandatory for all providers of building works to be registered. The new Statutory Register will be known as CIRI and the current voluntary CIRI register will be renamed and known as the Voluntary Construction Register ("VCR"). It is envisaged that it will be mandatory for builders to join the Statutory Register from 2025[7].

Certification Process

10. A significant change brought about by BC(A)R was the introduction of a statutory certification process. Prior to the commencement of any project falling within the scope of BC(A)R, a Commencement Notice, or a seven-day notice must be filed. This notice must be accompanied by a valid application for a Fire Safety Certificate and a 7 day notice statutory declaration. Commencement notices must be received by the relevant Building Control Authority not less than 14 days and not more than 28 days before the Builder wishes to commence work on site. The Commencement Notice shall be accompanied by such plans, calculations, specifications and particulars as are necessary to outline how the proposed works or building will comply with the requirements of the Second Schedule to the Building Regulations relevant to the works[8].

11. Where works on non-domestic buildings and apartment blocks are commenced or completed without the necessary fire safety certification, a Regularisation Certificate can be granted by the BCA. This issue was central to the judicial review proceedings commenced in *Coreet*, which will be addressed later in this paper.

12. The following certificates and notices in the appropriate forms are set out in the Second Schedule to BC(A)R:
    - A Certificate of Compliance (Design Certifier)

[7] Department of Housing, Local Government and Heritage, 12 January 2022 *'Legislation requiring providers of building services to register with Construction Industry Register Ireland published'.*
[8] These include general arrangement drawings, including plans, sections and elevations; a schedule of such plans, calculations, specifications and particulars as are currently designed or as are to be prepared at a later date; the completion of an online assessment, via the Building Control Management System ("BCMS"), of the proposed approach to compliance with the requirements of the Second Schedule to the Building Regulations; the preliminary Inspection Plan prepared by the Assigned Certifier

- A Notice of Assignment of Person to Inspect and Certify Works (Assigned Certifier)
- A Certificate of Compliance (Undertaking by Assigned Certifier)
- A Notice of Assignment of Builder
- A Certificate of Compliance on Completion (Undertaking by Builder).

Reasonable Skill, Care and Diligence

13. The Certificate of Compliance on Completion requires the signatures of both the builder and the Assigned Certifier. The Assigned Certifier confirms that the inspection plan drawn up under the Code of Practice has been followed, and that reasonable skill, care and diligence has been exercised. Where a consultant can demonstrate that he or she acted in accordance with the usual practice and professional standards in place at the time the service was carried out, he or she will have a defence to a claim in negligence. Therefore, the Assigned Certifier does not guarantee the achievement of a particular result.

14. Separately, the builder or contractor certifies that it has exercised reasonable skill, care and diligence and that the building has been constructed in accordance with the plans, specifications and ancillary certifications already uploaded to BCMS and as certified in the Certificate of Compliance for Design. The builder or contractor is similarly certifying to the standard required of an architect or other appropriate professional, thereby imposing a 'reasonable skill and care' obligation as opposed to an absolute obligation to achieve a particular standard of work. It must be noted that contractual obligations are distinct and in addition to the obligations under BC(A)R.

Code of Practice for Inspecting and Certifying Buildings and Works

15. BC(A)R introduced a Code of Practice for Inspecting and Certifying Buildings and Works, which was amended in September 2016[9]. Parties involved in a BC(A)R project must be able to demonstrate compliance with this Code of Practice. Compliance with the Code is not mandatory but it has a statutory status, such that inspection and certification carried out in accordance with the Code will be regarded as *prima facie* evidence of compliance with the requirements of the Regulations. The Assigned Certifier certifies on completion that

[9] Regulation 20G(1) Building Control (Amendment) Regulations 2014

regard has been given to the Code when carrying out the inspection plan and the certification process.

Option to 'Opt-Out'

16. An 'opt-out' is available from the application of the BC(A)R regime for one-off houses and domestic extensions. This option came into force on 1st September 2015 and recognised that BC(A)R can result in increased professional fees for consumers. This 'opt-out' allows owners to withdraw from the statutory certification process required by BC(A)R. However, the building must still comply with all 12 parts of the Building Regulations. Certificates may still be required by investors and solicitors where, for example, the construction is financed or is going to be placed on the market.

17. Owners and individuals engaged in an 'opt-out' project must fully comprehend their legal exposure and contractual duties in relation to the project. Parties must also be aware of the duty of care owed to others, such as prospective tenants and purchasers who may be affected at a later date if defects are identified with the building.

Enforcement

18. A failure to comply with the requirements of the Building Control Regulations is an offence which can be prosecuted. Enforcement proceedings may be taken by the Building Control Authority against the owner or occupier of the building or any other person who carried out the works. Civil proceedings can also be taken against any or all parties involved in the construction for a failure to properly discharge any of the obligations under BC(A)R. The basis of any such claim could be granted in breach of contract, breach of common law and breach of statutory duty. Additionally, the builder or contractor would almost always have a contractual obligation to comply with all statutory regulations affecting the works. It is therefore imperative that parties involved in a BC(A)R project identify and understand the level of their responsibility at the outset of the construction process. Where BC(A)R is not properly adhered to, the Building Control Authority will not validate and register the Certificate of Compliance on Completion. Where a building is not added to the Register, it cannot be opened, used or occupied. This is a no-win situation for all current and prospective parties.

Pre-BC(A)R Landscape

19. By way of comparison, the BC(A)R regime differs to the pre-BC(A)R landscape where the format and method of certification was largely left open to parties to decide unless mandated by the contractor, investors or solicitors for conveyancing purposes. The certification used was generally an Opinion on Compliance by the designer employed by the consumer, rather than a statutory certificate of compliance issued by the local authority.

20. Furthermore, the frequency of inspections was often driven by clients' cost motivations. Where periodic inspections were carried out, often times these occurred when the work was covered up. A certificate and final inspection was usually carried out at the completion stage; however, this was usually because funds were drawn down on foot of the certificate, rather than certifying and inspecting for compliance or quality purposes. Opinions on compliance were not based on an agreed number of inspections and were often provided by a consultant employed by the owner or builder, and much of the work was never actually inspected. It was often up to the builder alone to check that all materials were of a particular standard.

21. Pre BC(A)R, there was no legal obligation to inspect a completion other than a potential contractual one. The contractor would not have to sign off or certify completion unless it was mandated by the terms of the contract itself. In many instances, there was no building contract at all. Often on such projects, to save costs the contractor would work off planning drawings with little to no involvement from the consultant who would, at the completion stage, issue a certificate for the purposes of drawdown of funds and to pay the contractor.

22. The pre-BC(A)R stage had little or no involvement from Building Control. Claims have been brought where the Certifier or the Inspection Consultant was a member of junior staff, or indeed, any one of the available staff members at the time. This led to a 'tick the box' scenario whereby there was an absence of due focus and attention given to the works as they were carried out from commencement to completion. The BC(A)R regime has established a paper trail to document all building activity on a project and identify those responsible in the event of a defect occurring.

Building Control Involvement under BC(A)R

23. Building control is the means by which the administration and enforcement of the Building Regulations is carried out by Building Control Authorities in accordance with the Building Control Acts 1990 and 2007. The Building Control Act 1990 designated local authorities as Building Control Authorities (hereinafter referred to as "BCAs"), and provided for the making of Building Regulations and Building Control Regulations. BCAs are empowered to ensure compliance with BC(A)R by means of regulatory processes, inspection, oversight and enforcement. The compliance documentation in respect of the commencement and completion of works to which BC(A)R apply is to be submitted to the relevant BCA by way of the electronic Building Control Management System.

24. The Building Control Management System ("BCMS") was established by BC(A)R as the preferred means of electronic building control administration. The BCMS operates as a publicly-accessed system of validation of receipt of the correct documentation, rather than an actual inspection of the documentation. It must be noted that BCAs are empowered to inspect documentation for up to seven years following registration. The BCMS allows property owners, builders, developers, architects and engineers to submit notifications, applications and compliance certificates digitally. All projects must be registered on the platform.

25. It is important to note that where a Certificate of Compliance on Completion or a Commencement Notice is submitted to a BCA, Section 6(4) of the 1990 Act (set out below for ease of reference) clearly asserts that the BCA is not under any duty to ensure that the relevant works or building complies with the Building Regulations, is free from defect or that the Certificate of Compliance is true and accurate:

> "(4) *Where a certificate of compliance, or a notice to which* subsection (2) (k) *relates, is submitted to a building control authority, the building control authority shall not be under a duty to any person to –*
> *(a) ensure that the building or works to which the certificate or notice relates will, either during the course of the work or when completed, comply with the requirements of building regulations or be free from any defect,*
> *(b) ensure that the certificate complies with the requirements of this Act or of regulations or orders made under this Act, or*
> *(c) verify that the facts stated in the certificate are true and accurate."*.

26. BCAs have the power under Section 11(3) of the Building Control Acts 1990-2014 to request information, examine and scrutinise proposals, carry out inspections, issue enforcement notices and, where necessary, prosecute owners and/or builders who fail to comply with statutory requirements. The Act also recognises that persons may seek civil remedy pursuant to the Act and regulations made thereunder.

27. It is asserted in the Framework for Building Control Authorities that BCAs undertake an appropriate level of assessment and inspection, informed by a risk analysis of the Commencement Notices submitted, thereby ensuring that available inspection resources are targeted towards projects carrying the greatest risks. The Framework asserts that the BCAs' inspections are undertaken in the interests of public safety and law enforcement. These inspections are not intended to relieve building owners, builders, designers or Assigned Certifiers of their statutory obligations to design and construct in compliance with the BC(A)R. It is noted in the Framework document that inspections may be limited and subject to the particular compliance requirements for the inspection.

28. Currently, it appears that Building Control has a 'hands-off' role in the application of BC(A)R; it simply considers the documentation submitted to the BCMS for the purposes of certification, which is largely similar to the previous 'tick the box' exercise engaged in during the pre-BC(A)R era outlined above. The system can still largely be described as 'self-certification' as no independent inspection system exists. While many developers can and do hire independent Assigned Certifiers, they are not required to do so. Designers and builders can sign off on their own buildings, a practice that would not be deemed permissible in many other jurisdictions

29. There appears to be a clear demand for more active, independent on-site inspections by local authority personnel[10]. A major issue identified with BC(A)R is that the BCAs are not required to perform technical assessments of compliance with building regulations at the commencement or completion stage[11]. If a technical assessment of compliance were to be

[10] Local authorities have a responsibility to inspect new buildings notified to them, to ensure that the building is in compliance with the Code of Practice for Inspecting and Certifying Buildings and Works. Nationally, only 27.35% of notified new buildings were inspected in 2021, which was an increase from 21.71% in 2020
[11] Monahan, 2015, '*The Effect of the Building Control (Amendment) Regulations 2014 on Small Construction Projects in Ireland*', MBA, DBS.

conducted by the BCA, at commencement and completion stages for all projects, this would constitute a second level check to capture the vast majority of non-compliance. It appears that a way to effectively prevent similar construction disasters to those of the past is to bring about a statutory regime whereby the BCAs themselves act as inspectors in an independent oversight role, as a means of officially verifying that the works have been built in accordance with the building regulations.

Scope for Judicial Review

30. Although it can be argued that the BCAs could have a more involved role in the application of BC(A)R, they can still have a significant impact on the completion of a project. This was evident in the recently settled proceedings in *Coreet v Meath County Council & Ors*[12], which concerned the purpose and effect of a Certificate of Regularisation under BC(A)R.

31. The Plaintiff developer ("Coreet") claimed that the First Defendant (the Building Control Authority for the purposes of BC(A)R) refused to issue compliance documentation in respect of a block of newly built social housing in Co. Meath that were otherwise ready for occupation. Coreet acknowledged it was in default by its failure to submit the required seven-day notice to the BCA the week before it commenced works at the site. The seven-day Commencement Notice was submitted, in default of the prescribed time limits, to Meath County Council on October 21, 2020. The Notice was returned as invalid on October 27, 2020, in circumstances where the works on the development land had already started. Coreet was informed that the works had to halt in order to regularise its position. Coreet claimed that it was informed by the BCA that it could submit a Certificate of Compliance on Completion if it first obtained a Regularisation Certificate for works completed to date. The works were halted temporarily while a Regularisation Certificate was obtained and lodged with the BCA. Coreet claims it was subsequently informed that the BCA could not grant the Regularisation Certificate until all works on the apartment block were completed. The Certificate of Regularisation was later granted on 5 April 2022.

32. It was submitted by Coreet that at a follow-up meeting with representatives of the BCA in May 2022, it was informed that there was no mechanism to register the apartment block on the BCMS because of its earlier delay in respect of the seven-day Commencement Notice.

[12] High Court Record No. 2022/887 JR

The Plaintiff claimed it was informed that there was no route to bypassing this requirement, and as such, the only way to achieve validation would be to fully demolish the completed building, clear the site and start again on foot of a new Commencement Notice. It was submitted on behalf of Coreet that the BCA accepted that Block D was designed and constructed in accordance with all applicable statutory obligations and standards, with the exception of the late seven-day Commencement Notice and accompanying plans.

33. An order of *certiorari* was sought in respect of the Council's decision on the grounds that it was disproportionate and that the Commencement Notice was valid, albeit late, at the date of the ruling on 21 September 2022**.** In the alternative, the Applicant sought orders striking down BC(A)R as unconstitutional and *ultra vires* of the Building Control Act 1990**.**

34. In its application to have the proceedings fast-tracked into the Commercial division of the High Court, the Applicant cited reasons such as the contract for sale of the 24 apartments to housing body Tuath, the demand for housing supply and the fact that the apartments were ready for immediate occupation by residents selected from the social housing list. According to court filings, the cost of buying and developing the land was in the region of €4.5million with construction costs amounting to €3.4million. The filings also confirmed that the purchase price for Tuath exceeded €5.3million and the apartments were being paid for, to a large extent, by public funds from the Housing Finance Agency. Block D was part of a wider Strategic Housing Development for 250 dwellings and a creche at the Bryanstown site, where planning permission was obtained in June 2019**.**

35. One of the narrower points contended by the BCA was that in the statutory forms set out at the Second Schedule to BC(A)R, there is only a reference to a seven-day notice, in the context of a Certificate of Compliance on Completion. This form does not, as it should, reference a Certificate of Regularisation. When a party comes to certify compliance, they should be able to certify in relation to *either* a seven-day notice, or where a seven-day notice was not originally submitted, a Certificate of Regularisation. Although this omission appears to be no more than an oversight on the part of the statutory draftsman, it has resulted in a slight misalignment between the substantive provisions of the Regulations and the contents of the forms in the Second Schedule. This is likely to be addressed by amendment in due course.

36. These proceedings were ultimately settled and there is no prospect of knowing how exactly this matter was resolved. The Commercial Court heard that the local authority has agreed to register the particulars of the Certificate of Compliance on the register it maintains under BC(A)R. It can be argued that given the timeline in the factual matrix of the *Coreet* case, the BCA ought to have been aware that the construction works were proceeding despite the failure of Coreet to timely lodge the seven-day commencement notice. If the BCA believed that the works could not legally be certified, one might say it was incumbent on it to intervene and stop the works. This rings true of this paper's earlier observations in respect of the 'hands-off' approach employed by Building Control in the practical application of BC(A)R.

37. The inception of these proceedings serves to highlight the powers of BCAs to stringently enforce BC(A)R. This case serves as a warning to developers, architects and engineers to be absolute in their awareness from the commencement of works that compliance with the Regulations is of utmost importance. By way of general observation, BC(A)R benefit from a close and careful reading, as nearly every scenario in the context of building works has been catered for. When the substance of the regulations is examined, the language is clear and concise and this is highlighted by the fact that the courts have not been required to clarify obtuse statutory language.

Conclusion

38. The BC(A)R have had a considerable effect on the way building design and construction are both managed and executed in Ireland. The post-BC(A)R roadmap provides a clear audit trail of responsibility in respect of the various certifiers. The creation of the publicly-accessed BCMS register under BC(A)R gives visibility to those responsible for compliance with the regulations. It is no longer simply about getting the job done; with BC(A)R, parties now have to show how it's done.

39. However, concerns have been identified regarding the lack of an independent form of building inspection and control. The establishment of a statutory regime for building inspection would serve to provide a consistent approach to BC(A)R compliance and ensure early identification of building defects. It is argued that BCAs are best positioned to carry out such inspections. Certification will only operate at an optimum level where it is

supported by an independent regime of inspection and enforcement to ensure that the required standards are maintained.

40. The recent proceedings in *Coreet* highlight the power of BCAs to stringently enforce the regulations in respect of construction works and serve as a reminder to construction professionals that the wording of the regulations and statutory certificates contained thereunder benefit from close and careful scrutiny.

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Finola McCarthy leads RDJ's construction team. She is experienced in all principal forms of contract used in design build, EPC, construction and infrastructure projects such as FIDIC, NEC RIAI, JCT, government public works and bespoke forms. Finola has been widely recognised for her work in construction law in Chambers Europe and The Legal 500. She is a lecturer to the Law Society's Diploma in Construction Law.

BESPOKE CONTRACTS AND THE LOSS OF THE ARBITRATION CLAUSE

Finola McCarthy, Partner, RDJ LLP

Introduction

1. Disputes are a common feature in the construction industry. During the construction phase of a project there are substantial risks with significant costs, tight deadlines and multiple parties involved all of which combine to give rise to potential issues about quality, additional costs, and delays. Following project completion, disputes can arise in relation to defective works.

2. A recent report identified some of the reasons for disputes are due to contractors wanting to preserve or increase their margins, risks being inappropriately transferred, an adversarial approach among project partners and complexity of procurement and contracting processes.[1] These disputes can be highly technical and specialised.

3. Typically, arbitration has been the main stay of dispute resolution in construction disputes. However, there are indications that this is changing. I will consider the possible trend to provide for court rather than arbitration for the resolution of construction disputes in bespoke building contracts and design team appointments.

Construction Disputes and Arbitration

4. The principal Irish standard form building and engineering contracts for both main contracts and sub-contracts (RIAI, Public Works contracts and the Private Sector contract) provide for construction disputes to be finally resolved by arbitration. The same position applies in the Irish standard form professional appointments for consultants (RIAI, SE9101, ME9101 and the Public Works Conditions of Engagement).

5. In private sector projects, it is usual for the standard form contracts to be amended by the Employer through special conditions to address project specific risk allocation and issues. The extent of the amendments will vary from project to project and in many cases, the amendments will be extensive and negotiated such that it becomes a bespoke contract. Design build contracts are fully bespoke as currently there is no Irish standard form.

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[1] RIBA Construction Contracts and Law Report 2022

6. The dispute resolution clause is usually one of the last items to which attention is given in the negotiation of the contract. Many bespoke contracts do not amend the standard arbitration clause. This will generally be accepted without much debate on the basis that it is the industry norm and considered to be suitable procedure for complex and specialised construction disputes.

7. The Irish courts have consistently supported arbitration agreements in construction contracts and perhaps have even welcomed the fact that these technical cases do not have to be dealt with by judges! In this context, Keane refers to Chief Justice Thomas Finlay in an address to the Chartered Institute of Arbitrators which sums up the position when he said: "*Anybody who would remove from me the diligent, and I hope, patient consideration of damp-proof courses, the depth of foundations, Armstrong junctions, and, I regret to say, even the quality of door-knobs on built-in wardrobes is my friend, not my enemy*."[2]

8. A brief look at the key advantages of arbitration which are said to be privacy, expertise, flexibility, speed, finality of award and costs.

9. *Privacy:* arbitration hearings are held in private. They are not subject to being reported in the media and members of the public are not allowed to be present at the hearing. This is probably one of the main advantages that both sides will usually welcome.

10. *Expertise:* an arbitrator can be chosen who has expertise in construction matters such as an architect, engineer or quantity surveyor. Time can be saved in the proceedings where the arbitrator has the required knowledge of technical terms and processes. Also, the arbitrator will quickly understand the issues which can reduce the chances of the decision being incorrect for the wrong reasons. In default of agreeing on the choice of arbitrator, the arbitration clause will provide for an independent body to appoint an arbitration. In the RIAI contracts this will be the Royal Institute of Architects of Ireland. In the public works contracts it is also the RIAI by default if no other body is stated in the Schedule to the Form of Tender.

11. *Speed*: The arbitration procedure can be flexible if the parties agree. This together with the expertise of the arbitrator can facilitate a speedier resolution of the dispute. However, with the formality of procedure that has become more common practice, such as exchange of detailed pleadings and court like procedures such as discovery, the arbitration process can take as long

[2] David Keane The RIAI Contracts- A Working Guide page 199

if not longer than court proceedings. Some have experienced arbitrations which have taken much longer than they should have particularly at the hearing stage, with concerns about effective case management. That said, where both sides wish to progress the matter quickly this can be achieved. The Engineers Ireland 100 Day Arbitration is designed to provide a rapid process where the amounts are not high[3] and the issues are relatively straightforward. However, In contrast.

12. *Flexibility:* the parties can agree on the procedures to be applied to the case and agree on shorter timeframes, limited time for oral submissions for example and longer days for the hearing.

13. *Finality of the award*: the decision is final and binding and there is no appeal.

14. *Costs*: while costs are generally in line with court costs, it is open to the parties to agree a truncated procedure with a view to reducing the costs. Section 21 of the Arbitration Act 2010 provides that the parties to an arbitration agreement can agree to make any provision in relation to costs and therefore the parties can agree on the allocation of costs before the dispute has arisen. In relation to public works contracts, it is a term of the Form of Tender that the Contractor agrees that if an arbitration takes place and a sealed offer has not been made, or where a sealed offer has been made and the Contractor's award is greater than the sealed offer, then each party will bear their own costs in relation to the arbitration proceedings.

15. In recent years we have seen a marked reduction in the number of construction arbitrations.

16. An ongoing research project on arbitration led by Tony Cole of the University of Leicester, recently published preliminary notes from interviews with Irish arbitration practitioners that took place in September 2022. These initial observations refer to the low rates of arbitration in Ireland and indicate that arbitration is not the dominant dispute resolution method in Irish construction disputes. Interviewees considered that conciliation is playing the dominant role in construction dispute resolution and is the primary obstacle to high levels of construction arbitration.[4] They also described the introduction of adjudication as a reason for the reduction in the number of arbitrations in Ireland.

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[3] The Private Sector contract provides for this procedure to be used for disputes valued at below €1m.

[4] Tony Cole Reader in Arbitration and Investment Law, The Social and Psychological Underpinnings of Commercial Arbitration in Europe https://commercialarbitrationineurope.wordpress.com/,

17. Cole also noted that the interviewees pointed to the general effectiveness of the Irish courts as creating somewhat of an obstacle to the development of domestic arbitration in Ireland, for the simple reason that parties often saw no reason to use arbitration for domestic disputes.

18. There is very little data available on the number of construction arbitrations taking place in Ireland. Interesting information looking at the statistics of nominations by nominating bodies was recently published by Peter O'Malley. He reports that over the 4-year period between 2019 and 2022 there were a total of 32 arbitrator nominations from the construction industry bodies of SCSI, RIAI, EI and CIArb[5] as detailed in an extract from the publication below.

DISPUTE NOMINATION STATISTICS FROM THE CONSTRUCTION INDUSTRY BODIES IN IRELAND - 2018 TO 2022

For construction disputes only - period 26.07 to 25.07 annually

Peter O'Malley Dispute Resolution

		Mediation					Conciliation					Adjudication					Arbitration					Totals
		18/19	19/20	20/21	21/22	4yr total	18/19	19/20	20/21	21/22	4yr total	18/19	19/20	20/21	21/22	4yr total	18/19	19/20	20/21	21/22	4yr total	
Construction Industry Federation	CIF	12	1	1	0	[14]	10	4	1	0	[15]	6	1	0	0	[7]	5	1	3	0	[9]	45
Chartered Institute of Arbitrators	CIArb	1	0	0	0	[1]	1	0	0	1	[2]	2	1	0	0	[3]	0	0	0	0	[0]	6
Society of Chartered Surveyors of Ireland	SCSI	1	0	0	0	[1]	2	0	0	1	[3]	1	0	0	0	[1]	0	0	0	0	[0]	5
Royal Institute of the Architects of Ireland	RIAI	1	1	0	1	[3]	20	11	9	4	[44]	1	0	0	0	[1]	2	4	7	6	[19]	67
Engineers Ireland	EI	2	0	0	0	[2]	1	1	1	4	[7]	0	0	0	0	[0]	0	0	3	1	[4]	13
Construction Contracts Adjudication Service	CCAS	0	0	0	0	[0]	0	0	0	0	[0]	32	46	37	71	[186]	0	0	0	0	[0]	186
						[21]					[71]					[198]					[32]	
Annual totals		17	2	1	1		34	16	11	10		42	48	37	71		7	5	13	7		322

Data sources:

SCSI	01.08.2019, 21.09.2020, 18.08.2021, 08.11.2022
CIArb	05.09.2019, 07.09.2020, 17.08.2021,18.11.2022
RIAI	23.08.2019, 25.08.2020, 08.09.2021, 08.11.2022, 18.11.2022
CIF	28.08.2019, 30.09.2020, 22.09.2021, 28.11.2022
EI	20.08.2019, 14.10.2020, 04.10.2021, 08.11.2022
CCAS	August 2019, August 2020, October 2021, November 2022

Alternative Dispute Resolution

19. The above statistics also point to alternative dispute resolution (ADR) procedures of adjudication, conciliation and mediation being used more frequently than arbitration. This

[5] Peter O'Malley Dispute Resolution, Dispute Nomination Statistics from the Construction Industry Bodies 2019-2022
www.peteromalley.ie

indicates that the effectiveness of ADR could be another reason for the low levels of arbitrations taking place.

20. In construction disputes, there has been a continuing focus on alternatives to court and arbitration. One of the original motivators for ADR in Ireland was dissatisfaction with arbitration and court. The ADR process aims to encourage representatives to recognise the weaknesses of their own case and the strengths of their opponent's case as well as the commercial implications of the dispute. While adjudication is growing, the most widely used forms of ADR still appear to be conciliation and mediation. In conciliation, a conciliator appointed by agreement between parties will encourage them to negotiate with each other but with a view to making his own recommendations. The parties can agree that if the recommendation is not rejected within a specific period it becomes binding. In mediation, the mediator assists the parties to negotiate a solution. The mediator cannot compel the parties to reach a settlement.

21. In a recent construction dispute that I was involved with, the dispute was finally settled in mediation, having been through unsuccessful conciliation and was progressing relatively slowly through arbitration with a concurrent adjudication happening in the meantime, ending the dispute 4 years after it commenced.

Loss of the Arbitration Clause

22. In practice, in the last few years, we are seeing more contracts, (both building contracts and design team appointments) that do not include an arbitration clause. Typically, these contracts relate to large scale commercial and residential developments with the potential for complex dispute issues should they arise. (In my experience, we are not yet seeing this in other areas, such as energy and manufacturing projects which tend to continue to favour arbitration for various reasons). Also, some semi-state bodies have developed their own forms of standard contracts which provide for court rather than arbitration. The model form collateral warranties for use with the public works contracts, to be provided by specialists also provide for court only.

23. The dispute resolution clauses now usually set out a detailed resolution procedure involving several steps which focus first on dispute avoidance and then provide for senior management negotiation, mediation, conciliation and then court as the final procedure. Even without an arbitration clause, it remains open to the parties during the contract or indeed the dispute to enter into an arbitration agreement.

24. It is not entirely clear if the move away from arbitration in a particular contract is because it is considered as not suitable for that specific project or whether it is due to a more fundamental concern about the arbitration process.

25. Anecdotally, there are a number of factors that might influence the decision to remove the arbitration clause. One such factor is the changes introduced by the Arbitration Act 2010 such as the limited ground for challenging the arbitration award and the end of the case stated procedure. The case stated procedure allowed an arbitrator to refer a question of law to the High Court during the course of an arbitration. The very limited circumstances in which the intervention of the court can be sought means that there is a greater reliance on the arbitrator and the arbitration procedure. If it "goes wrong", there is no appeal. Another potential issue is the perception that there is a reduced pool of experienced arbitrators available in Ireland for construction disputes.

26. With multiple parties involved in a project, court procedures allow the possibility of bringing multiparty proceedings if needed, which is particularly important in relation to disputes about defective works. The Arbitration Act does not make provision for proceedings between more than two parties. However, the parties are free to agree on the consolidation of separate arbitration proceedings. Funders of projects will usually require that contracts include clauses which provide for this consolidation across the various contracts for the project such as the sub-contracts, consultants appointments and collateral warranties. However, in practice consolidation can be difficult to implement where several parties are involved.

27. Another reason why court is seen as a more attractive option than arbitration might be due to the strong position the High Court has taken over to enforce adjudication awards the last couple of years. This has shown that construction related matters are dealt with efficiently and effectively in court. In previous years there had been relatively few judgments dealing with construction disputes perhaps due to the provision of arbitration clauses.

Conclusion

28. It remains important to advise clients on the options when choosing the appropriate method of dispute resolution. The value of the project, the risks involved and the possible issues at stake will also be factors in deciding on the appropriate procedure. While I consider that the arbitration clause is likely to remain as standard for construction disputes, in my view, based on the current position, we are likely to continue to see more bespoke contracts that choose court as the appropriate procedure.

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The Hon. Mr. Justice Denis McDonald

Mr. Justice McDonald is currently the head of the High Court Commercial List. He was appointed a judge of the High Court in April 2018. He served in the Chancery Division from then until October 2018 when he was assigned to the Commercial List. He has acted as head of that list since October 2021. He has also been Admiralty Judge since June 2018.

Previously, Mr. Justice McDonald practiced as a barrister from 1986 until his appointment as a judge in 2018. He specialised in commercial and chancery work and took silk in October 2000. He was appointed Chair of the Irish Takeover Panel by the Governor of the Central Bank in 2010 and served as Chair until his appointment as a judge. He was elected a bencher of the King's Inns in October 2017.

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John Trainor SC

Called to the Bar in 1980, John took silk in 1996. John practices in construction and commercial law, both in court and in arbitrations. John is a qualified arbitrator, mediator and adjudicator and is a former Chairperson of the CBA.

The Case for a TCC in Ireland: Is it only a matter of time?[1]

Introduction

1. For construction lawyers, the UK Technology & Construction Court is often held out as a paradigm as to how construction litigation facilities should be provided and operated. But often the detail behind the bigger picture is overlooked. This paper will address the following:-

   (a) What is the TCC?

   (b) How does it operate?

   (c) What are its procedures?

   (d) What is its output?

   (e) The CBA visit to the TCC on 23 March 2023

   (f) The case for a TCC in Ireland

   (g) Conclusions.

(a) What is the TCC?

2. The UK Technology & Construction Court is the successor in title to the old Official Referees' Courts. The first Official Referees of the Supreme Court of Justice were appointed in 1876 under the Judicature Act 1873-1875 which, under Part IV, permitted the English High Court and Court of Appeal to refer "*any question arising in any cause or matter*" for inquiry and report to "*any official or special referee*", whose report might be adopted in whole or in part by the Court and thereafter enforced as if a judgment of the Court.

3. Under the relevant UK legislation, any question could be referred for trial to the Official Referees Court with or without the consent of the parties if it involved the prolonged investigation of documents or accounts, or any scientific or local investigation. The

[1] By John Trainor SC

report of an Official Referee on a trial had to be accepted as if it were the verdict of a jury, but he could not give judgement or make any order as to costs.

4. By the Judicature Act 1884, power was given for an Official Referee to give a judgement, make orders for costs, and exercise the powers of a High Court Judge in a case referred to him.

5. The UK Arbitration Act of 1889 enabled parties to an Arbitration Agreement to require an Official Referee to sit as an Arbitrator.

6. From the outset, much of the Official Referees work was concerned with the construction industry in all its respects.

7. The Courts Act 1971 provided that in future, *"Official Referees' business"* should be dealt with by such Circuit Judges as the Lord Chancellor should determine. Although the title *"Official Referee"* was not legally preserved, it continued to be used universally.

8. By 1998, references were a rarity and most of the work in the Court was commenced in the Official Referee's Registry or transferred from the Chancery Division or the Queen's Bench division. In October 1998, the Lord Chancellor, with the concurrence of the Lord Chief Justice, directed that the Court should be re-named the Technology & Construction Court of the High Court of Justice and the TCC was opened by the Lord Chancellor on 9 October 1998.

9. As part of the creation of a new Court Centre for the City of London, the TCC, along with the Chancery Division and the Commercial Court, moved in October 2011 to the Rolls Building on Fetter Lane. The Registry is on the ground floor and the Courts used by the TCC are on the 2nd and 3rd floors. The Technology & Construction Court now forms part of the Business and Property Courts of England & Wales.

10. The current position in London is that the Judge in charge of the TCC, Mrs. Justice O'Farrell sits as a full time TCC Judge, and 2-3 other High Court Judges sit for at least half of every Term in the TCC. The work is now done by High Court Judges, and there are no longer any Senior Circuit Judges sitting permanently in the TCC.

11. Pursuant to Part 60 of the UK Civil Procedure Rules, per Rule 60.1(3), a claim may be brought as a TCC claim if:-

(a) It involves issues or questions which are technically complex; or
(b) A trial by a TCC Judge is desirable.

12. Practice Direction 60 gives examples of the types of claim which it may be appropriate to bring as TCC claims and these include the following:-

(a) Building or other construction disputes, including claims for the enforcement of the decisions of adjudicators;

(b) Engineering disputes;

(c) Claims by and against Engineers, Architects, Surveyors, Accountants, and other specialised advisors relating to the services they provide;

(d) Claims by and against Local Authorities relating to their statutory duties concerning the development of land or the construction of buildings;

(e) Claims relating to the design, supply and installation of computers, computer software and related network systems;

(f) Claims relating to the quality of goods sold or hired and work done, materials supplied or services rendered;

(g) Claims between landlord and tenant for breach of a repairing covenant;

(h) Claims between neighbours, owners and occupiers of land, in trespass, nuisance etc.;

(i) Claims relating to the environment (for example, pollution cases);

(j) Claims arising out of fires;

(k) Claims involving the taking of accounts where these are complicated; and

(l) Challenges to decisions of Arbitrators in construction and engineering disputes, including applications for permission to appeal, and appeals.

13. A claim given as an example as per the list above will nevertheless not be suitable for the specialist TCC list unless it demonstrates the characteristics in Rule 60.1(3), i.e., it must involve issues or questions which are technically complex or where a trial by a TCC Judge is desirable. Similarly, the examples given are not exhaustive and other types of claims may be appropriate to this specialist list.

(b) How does the TCC Operate?

14. With the exception of claims to enforce adjudicator's decisions or other claims with special features that justify a hearing before a High Court Judge, the TCC at the Rolls Building in London will not usually accept cases with a value of less than £500,000 unless there is good reason to do so. A non-exhaustive list of special features which will usually justify listing the case in the High Court is:
    (i) Adjudication and arbitration cases of any value;
    (ii) International cases of any value;
    (iii) Cases involving new or difficult points of law in TCC cases;
    (iv) Any test case;
    (v) Public Procurement cases;
    (vi) Part 8 Claims and other claims for declarations;
    (vii) Complex nuisance claims brought by a number of parties, even where the sums claimed are small;
    (viii) Claims which cannot be readily dealt with effectively in a County Court or Civil Justice Centre by a designated TCC Judge;
    (ix) Claims for injunctions.

15. TCC business is conducted by specialist TCC Judges unless a TCC Judge directs otherwise.

16. TCC business in the High Court is conducted by TCC Judges who are High Court Judges, together with designated Circuit Judges, Deputy High Court Judges and Recorders who

have been nominated by the Lord Chancellor pursuant to S.60(1)(a) of the Senior Court's Act, 1981 or are authorised to sit in the TCC as High Court Judges under S.9 of that Act.

17. An important feature of UK law is that it permits experienced King's Counsel to sit as Deputy High Court Judges. The capacity to have recourse to specialist Counsel who are willing to sit as High Court Judges from time to time provides a valuable increased specialist resource to the judiciary which assists the TCC in its hearing and disposal of cases.

18. Apart from London, TCC claims can be brought in the High Court outside London in any District Registry. BPC District Registries have been established in Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester and Newcastle where full-time or part-time specialist TCC Judges sit.

19. As a general rule, TCC claims for more than £500,000 are brought in the High Court, while claims for lower sums are brought in the County Court. However, this is not a rigid dividing line. Enforcement of adjudicator's decisions should ordinarily be commenced in the County Court where the sum in issue is less than £100,000.

20. An important feature of TCC practice is the TCC User's Committees. The TCC recognises that its continuing ability to meet the changing needs of all those involved in TCC litigation depends in large part upon a close working relationship between the TCC and its users. TCC Users' Committees are provided for in London, Birmingham, Manchester, Liverpool, Cardiff and Leeds. The London TCC Users' Committee is made up of 2 representatives of the London TCC Judges, along with 2 representatives of TECBAR, TECSA and the SCL. The TCC regards any suggestions or other correspondence raised through these channels of communication as extremely important. These contacts ensure that the TCC remains responsive to the opinions and requirements of the professional users of the Court.

(c) Procedures in the TCC

(i) The Pre-Action Protocol

21. The first step to be taken by those wishing to refer a dispute to the TCC is to have regard to the Pre-Action Protocol for Construction & Engineering Disputes (the "*Protocol*"). The purpose of the Protocol is to encourage the frank and early exchange of information about the perspective claim and any defence to it, to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of the proceedings, and to support the efficient management of proceedings where litigation cannot be avoided.

22. The main features of the Protocol are as follows:

(a) Prior to commencing proceedings, the Claimant or his or her solicitors must send to each proposed Defendant a copy of a Letter of Claim containing the following information:

(i) The Claimant's full name and address;

(ii) The full name and address of each proposed Defendant;

(iii) A brief summary of the claim or claims including (a) a list of principal contractual or statutory provisions relied upon and (b) a summary of the relief claimed, including the monetary value of any claim with a proportionate level of breakdown;

(iv) The name of any Experts already instructed by the Claimant;

(v) Whether the Claimant wishes the Protocol Referee Procedure to apply.

(b) Within 14 calendar days of receipt of the Letter of Claim the Defendant should acknowledge its receipt in writing and may give the name and address of his Insurer (if any) and also confirm whether or not it wishes the Protocol Referee Procedure to apply.

(c) If there has been no acknowledgement by the Defendant of the Claimant's Letter of Claim within 14 days, the Claimant will be entitled to commence proceedings without further compliance with the Protocol.

(d) If the Defendant intends to take any objection to all or part of the Claimant's claim on the grounds that (i) the Court lacks jurisdiction, (ii) the matter should be referred to arbitration, (iii) the Defendant contends that it is the wrong Defendant, that

objection should be raised by the Defendant within 28 days after receipt of the Letter of Claim.

(e) If the Defendant does not give a Notice of Objection to Jurisdiction etc., or has withdrawn any such objection, then, within 28 days from the date of receipt of the Letter of Claim, the Defendant is to issue a Letter of Response to the Claimant containing the following information:

(i) A brief and proportionate summary of the Defendant's response to the claim and, if the Defendant intends to make a counterclaim, a brief summary of the counterclaim, giving the same information as would be required for a claim;

(ii) The names of any Experts already instructed, identifying the issues to which that evidence will be directed;

(iii) The names of any third parties the Defendant intends to submit to a Pre-Action Protocol process.

(f) The Claimant is then required to provide a Letter of Response to any counterclaim proposed to be advanced by the Defendant within 21 days of the Defendant's Letter of Response, containing a brief and proportionate summary of the Claimant's proposed response to the Counterclaim.

(g) Within 21 days after receipt by the Claimant of the Defendant's Letter of Response, or after receipt by the Defendant of the Claimant's Letter of Response to the Counterclaim, the parties should normally meet. Although the Protocol does not prescribe in detail how the meeting should be conducted, the Court will normally expect that those attending will include:

(i) Where the party is an individual, that individual, or, where the party is a corporate body, a representative with authority to settle or recommend settlement of the dispute;

(ii) A legal representative of each party (if instructed);

(iii) Where the involvement of Insurers has been disclosed, a representative of the Insurer (who may be its legal representative);

(iv) Where a claim is made or defended on behalf of some other party (e.g., a Main Contractor pursuant to a contractual obligation to pass on sub-contractor claims), the party on whose behalf the claim is made or defended.

(h) Generally, the aim of the meeting is for the parties to agree what are the main issues in the case, to identify the root causes of disagreement, and to consider (i) whether, and if so how, the case might be resolved without recourse to litigation; and (ii) if litigation is unavoidable, what steps should be taken to ensure that it is conducted with the overriding objective as defined by Rule 1.1 of the CPR. Alternatively, the meeting itself can take the form of an ADR process such as Mediation.

(i) If the parties are unable to agree on a means of resolving the dispute other than by litigation, the Protocol advises that the parties should seek to agree:-

(i) If there is any area where Expert evidence is likely to be required, how expert evidence is to be dealt with, including whether a joint expert might be appointed and if so, who it should be;

(ii) The extent of disclosure of documents with a view to saving costs and to the use of the e-disclosure protocol;

(iii) The conduct of the litigation with the aim of minimising cost and delay.

(j) Any party required to attend at any pre-action meeting is thereafter at liberty, and may be required, to disclose to the Court:

(i) That the meeting took place, when and who attended;

(ii) The identify of any party who refused to attend, and the grounds for such refusal;

(iii) If the meeting did not take place, why not?

(iv) Any agreements concluded between the parties, and

(v) The fact of whether alternative means of resolving the dispute were considered or agreed.

(k) Except as provided for above, everything said at a pre-action meeting is to be treated as *"without prejudice"*.

23. If a cause of action is at risk of being barred by limitations, the Protocol provides that a Claimant may commence proceedings without complying with the Protocol but, in those circumstances, must thereafter apply to the Court on Notice for Directions as to the timetable and form of procedure to be adopted, at the same time as the Court is requested

to issue proceedings. The Court will then consider whether to order a stay of the whole or part of the proceedings pending compliance with the Protocol.

24. Compliance with the Protocol is required in all cases save where the proposed proceedings (i) are to enforce the decision of an adjudicator, (ii) include a claim for interim injunctive relief, (iii) will be the subject of a claim for summary judgement or (iv) relate to the same or substantially the same issues as had been the subject of recent adjudication, or some other formal ADR procedure.

25. If proceedings are commenced, the Court will be able to treat the standards set in the Protocol as the normal, reasonable, and proportionate approach to pre-action conduct. It is likely to be only in exceptional circumstances, such as a flagrant or very significant disregard to the terms of the Protocol, that the Court will impose cost consequences on a party for non-compliance with the Protocol.

26. Save in circumstances where the Protocol is expressly not required, all parties to construction and engineering disputes in the UK do, routinely and as a matter of fact, seek to comply with the Protocol before the institution of litigation.

27. Importantly, the Protocol provides, in Clause 5, that the Protocol *"... must not be used as a tactical device to secure advantage for one party or to generate unnecessary costs"*. Further, the Protocol *"... is not intended to impose a requirement on the parties to martial and disclose all the supporting details in evidence that may ultimately be required if the case proceeds to litigation"*.

28. The TCC has jurisdiction to make adverse costs orders against a party who has failed to comply with the Protocol. The TCC will normally exercise any sanctions available with the object of placing the innocent party in a position no worse than if there had been compliance with the Protocol.

29. However, the Court is unlikely to be concerned with minor infringements of the Protocol or engage in lengthy debates as to the precise quality of the information provided by one party to the other during the Protocol Stages. The Court will normally be principally concerned to ensure that, as a result of the Protocol stage, each party to any subsequent

litigation has a clear understanding of the nature of the case that it has to meet at the commencement of those proceedings.

30. If compliance with the Protocol does not result in settlement, then the costs of complying with the Protocol cannot be recovered as costs unless:

(a) Those costs fall within the principles stated by McGarry VC in **Re Gibson's Settlement Trusts** [1981] Ch 179; or

(b) The steps taken in compliance with the Protocol can properly be attributable to the conduct of the action (see **Roundstone Nurseries v Stephenson** [2009] EWHC 1431 (TC) per Coulson J at Para. 48.

(ii) Commencing Proceedings in the TCC

31. All proceedings before the TCC must be started using the appropriate CPR claim form applicable to Part 7 or 8. All claims allocated to the TCC are thereafter assigned to Multi-Track Procedure[2].

32. Where a claim has been issued at, or transferred to, the TCC in London, the Judge in charge of the TCC assigns it a particular TCC Judge. In general, the assigned TCC Judge who case manages a case will also thereafter try the case but this may not happen where e.g., all High Court Judges in the King's Bench Division have other judicial duties at the time.

33. When a TCC case has been assigned to a named High Court Judge, all communications about case management are thereafter made to the clerk of the assigned High Court Judge by email.

[2] Part 7 Claims are all claims with the exception of those claims brought pursuant to Part 8. A Part 8 claim form will normally be used where there is no substantial dispute of fact, and where the dispute turns e.g., on the construction of a contract or the interpretation of a Statute or e.g., the jurisdiction of an Adjudicator or the validity of his Decision.

(iii) E-Filing

34. Electronic filing is an important feature of TCC practice. The TCC in and outside London uses the CE-Filing System. For a party who is legally represented, Electronic Working must be used by that party to start or continue any relevant claims or applications. Procedures exist whereby, where an application or a document is uploaded, the document will be placed before the Judge by way of an electronic alert, identifying an indicative due date for the application to be dealt with. If a document needs to be seen urgently, the parties are required to contact the Judge's Clerk and provide the document by email. In general, hearing bundles are intended to be lodged in electronic format and hard copy bundles will not be lodged unless requested by the Judge hearing the case.

(iv) Case Management

35. Case management is an important feature of TCC litigation.

36. The Court will normally require the parties to attend an oral hearing for the purposes of the first Case Management Conference, whether in person, remotely or by private hearings. This is because there may be matters which the Judge would wish to raise with the parties arising out of the answers to the Case Management Information Sheets and the parties' proposed directions. Among the matters which the Judge may wish to consider include cost budgeting and ADR.

37. A further feature of TCC practice is the Pre-Trial Review. This is considered important even if the parties can agree beforehand any outstanding directions and the detailed requirements for the management of the trial, as the Judge may wish to raise matters of detailed trial management with the parties. In appropriate cases, e.g. where the amount in issue is disproportionate to the costs of the full trial, the Judge may wish to consider with the parties whether there are other ways in which the dispute might be resolved, e.g. ADR.

(v) Remote and Telephone Hearings, and Applications in Writing only

38. While the mode of hearing in the TCC is ultimately a judicial decision, the default position for all hearings under half a day will be for such hearings to take place remotely. Remote hearings include, inter alia, adjudication and enforcement hearings. The approach in relation to longer hearings and trials is a matter for the Judge based on the facts of each case.

39. Depending on the nature of the application and the extent of any dispute between the parties, the TCC may be prepared to deal with short case management matters, or other interlocutory applications, by way of a telephone conference, e.g., if parties are broadly agreed on the orders to be made, but are in dispute in respect of one or two particular matters. Similarly, specific arguments about costs or arguments consequential on the particular Judgement or order having been handed down, may conveniently be dealt with by way of telephone hearing. However, telephone hearings are generally not considered suitable for matters which are likely to last for more than an hour. Telephone hearings can be listed at any time between 8.30am and 5:30pm subject to the convenience of the parties and the availability of the Judge.

40. Parties to a TCC case are encouraged to deal with certain applications, permitted per CPR 23.8 and Para. 7.1.11.2 of Practice Direction 23A, to be dealt with in writing through CE-File, wherever applicable. Applications for abridgements of time, extensions of time and to reduce trial time estimates, can generally be dealt with in writing as well as other variations to existing directions which are wholly or largely agreed. Parties are encouraged to ask themselves, when considering an application to the TCC, *"can this application be conveniently dealt with in writing"*.

(vi) The TCC Guide

41. Procedure before the TCC is usefully summarised in the *"Technology & Construction Court Guide"* of which the most recent current edition is dated October 2022.

42. The practise in the TCC is for the parties to communicate electronically to the Court and the TCC Guide provides the email addresses of the Judge's Clerks in Appendix D thereto. It is also possible to provide documents to the Court electronically by email to the Judge's

Clerk, though there is a size restriction on the relevant email, including its attachments, so that other methods of delivering large electronic bundles may be appropriate.

43. In addition, the Judge may provide a direct contact email address so that the parties can communicate directly with him/her out of Court hours, but in such circumstances, the Judge and the parties are encouraged to agree the times at which the respective email addresses can be used. The TCC also identifies the circumstances and the manner in which TCC Judges may be contacted out of hours for urgent matters such as e.g. an injunction to prevent the commencement of building works which might damage adjoining property, or for an order to preserve evidence.

(vii) How Case Management in the TCC is conducted

44. The general approach to the TCC to case management is to give directions at the outset for the conduct of the case up to trial, and then, as necessary, throughout the proceedings, to serve the overriding objective of dealing with cases justly and at proportionate cost.

45. Since the introduction of the Disclosure Pilot and Costs Management, the control of disclosure and of costs are important factors in how cases are managed from the outset.

46. The Judge to whom the case has been assigned has wide case management powers which will be exercised to ensure:-

- The real issues are identified early on and remain the focus of the ongoing proceedings;
- A realistic timetable is ordered which will allow for the fair and prompt resolution of the action;
- Appropriate steps are taken to ensure that there is in place a suitable protocol for conducting e-disclosure;
- In document heavy cases, the parties will be invited to consider the use of an electronic document management system. It is important that this is considered at an early stage because it will be closely linked to e-disclosure;
- Costs are properly controlled and reflect the value of the issues to the parties. In claims below £10M, this will normally be done by way of Cost Management Orders.

47. Case management conferences ("CMCs") are relatively informal and business-like occasions, and the Judge and Counsel will be unrobed. Representatives may sit when addressing the Judge.

48. To facilitate effective case management:-

- On commencement of a case in the TCC, it is allocated automatically to the Multi-Track;
- The TCC encourages a structured exchange of proposals and submissions for CMCs in advance of the hearing;
- The Judges of the TCC operate proactive case management and will consider giving prior notification of specific or unusual case management proposals in advance of the CMC.

49. Where a claim has been started in the TCC, or transferred into the TCC, the Court is required within 14 days of the earliest of (i) the filing by the Defendant of the acknowledgement of service, or (ii) the filing by the Defendant of the Defence or (iii) the date of the Order transferring the case into the TCC, to fix the first CMC. The date of the first CMC will usually be fixed sufficiently far ahead to allow the parties time to comply with the requirements of both the Disclosure Pilot and Costs Budgeting.

50. Any of the parties may seek to delay the first CMC for good reason such as e.g. the need for reasonable additional time to complete the exchange of Statements of Case, or to comply with the Disclosure Pilot, or to comply with the timetable for Costs Budgeting, or because the parties wish to engage in ADR.

51. The TCC operates a capped costs list, and a *"shorter or flexible trials scheme"* where the Disclosure Pilot and Costs Management do not apply.

52. To assist case management, all parties are expected to complete a detailed response to the Case Management Information Sheet which will be sent out to the parties by the Listing Office when the case is commenced/transferred. The Listing Office will also send the parties a blank Standard Directions Form for completion.

53. If the case is proceeding in the High Court, the Advocates are required to prepare a note to be exchanged and provided to the Judge by 4:00pm two clear working days before the CMC which will address the issues in the case, the suggested directions, and the principal areas of dispute between the parties, so as to enable the other parties to have a reasonable opportunity to consider and respond at the CMC to any points raised, and to enable the Judge to prepare for the CMC in good time. Where required, the Advocates are also required to exchange and provide skeleton arguments.

54. Matters which the parties may require to consider at the first CMC can include:
    - The need for any further Statements of Case;
    - The outcome of the Protocol Process and the possible further need for ADR;
    - Whether the case is suitable for transfer into the Capped Costs Lists or into the *"Shorter Trials"* or *"Flexible Trial Scheme"*;
    - Any preliminary issues;
    - Issue Lists;
    - Modular trials and whether necessary;
    - Orders for Disclosure and a protocol to manage e-Disclosure;
    - Exchange of written Witness Statements, where appropriate;
    - Whether it is appropriate for the parties to rely on expert evidence and if so, what disciplines of experts should give evidence, on what issues and whether there should be a Single Joint Expert.
    - Review of the parties' costs budgets;
    - Any additional claims under Part 20;
    - The timetabling for the taking of interim steps, and for the fixing of dates of both the pre-trial review (PTR) and the trial itself (with regard to which the parties are required to provide the Judge with an estimate for the length of the trial, including judicial reading time, assuming all issues remain in dispute).

55. Absent good reason, the trial date will generally be fixed at the first CMC (with regard to which the parties are required to inquire as to the availability of witnesses, experts etc.). It should be noted that the fixing of a trial date at the CMC is a firm date and will not be vacated or re-arranged save for good reason and with the consent of the Judge.

Importantly, the trial fee is payable usually at least 3 months prior to the trial date, and if not paid, then the claim will be automatically struck out.

(viii) Pleadings

56. If no Defence has been served prior to the first CMC, the Court will usually make an order for service of the Defence within a specified period. Importantly, the Defendant must plead its positive case, and bare denials, or non-admissions are generally unacceptable. Requests for further information are required to be kept within reasonable limits and to concentrate on the important parts of the case. The requests and replies should always be set out in one composite document, with each reply appearing immediately after each request.

57. With regard to third party (Part 20) claims, Defendants are encouraged to start such proceedings and join additional parties as soon as possible.

58. If at any stage the Judge considers that the way in which the case is being pleaded is likely to lead to inefficiency in the conduct of the proceedings or unnecessary time or costs being expended, the Judge may order that the parties should re-plead the whole or part of the case and may make an adverse costs order in relation to same.

59. After service of the Defence and prior to the CMC, the Claimant is required to circulate a list of the key issues of fact and law in the case in electronic format. This should be a succinct neutral document intended to assist efficient case management and begins by summarising what is common ground, and then fairly identifies the main issues by reference to the Statements of Case. The Issue List is not intended to supersede the Statements of Case and, thus, no party is intended to be disadvantaged by any errors or omissions in the list of issues and the Court discourages unnecessary disputes as to its precise terms.

(ix) Scott Schedules

60. A Scott Schedule is a table, often in Landscape format, in which the Claimant's case on liability and quantum is set out item-by-item in the first few columns and the Defendant's response set out in the adjacent columns. The TCC Guide notes that the secret of an effective Scott Schedule lies in the information that is to be provided and its brevity, and excessive repetition is to be avoided. It is important that the Defendant's responses to any such Scott Schedule are as detailed as possible and each party's entries on the Scott Schedule should be supported by a Statement of Truth. However, noting that the preparation of a Scott Schedule can entail both time and cost, a Scott Schedule will only be ordered by the Court (or agreed by the parties) where appropriate and proportionate.

(x) Drawing up of Orders made at the CMC

61. Unless the Court itself draws up the Order, it may direct one party (usually the Claimant) to do so within a specified time. If no such direction is given, then the Advocate appearing for the Claimant must prepare and seek to agree a draft Order and submit it to the Judge's approval within 7 days of the conclusion of the hearing. This is to ensure that the Draft is presented while the case is still fresh in the Judge's mind.

62. In an appropriate case, the Judge may fix a review CMC to take place partway through the timetable to allow the Court review the progress, and allow the parties to raise any matters arising out of the steps taken up to that point. Review CMCs will generally only be ordered in cases of significant complexity.

(xi) The Permanent Case Management Bundle

63. In conjunction with the Judge's Clerk, the Claimant's solicitor is responsible for ensuring that, for the first CMC and at all times thereafter, there is a permanent electronic bundle of documents available to the Judge containing:-

- Any relevant documents resulting from the Pre-Action Protocol;
- The claim form and all Statements of Case;

- All orders;
- All completed Case Management Information Sheets;
- All cost budgets;
- Any proposed protocol re disclosure, if agreed;
- Disclosure review documents and disclosure issues.

(xii) TCC Hearings

64. TCC hearings are heard in public save where otherwise ordered. The TCC Judges will have pre-read all relevant documents and the parties and Counsel can assume that the Court will have a good understanding of the points at issue, thereby allowing Counsel to bring the Court to the particular documents relied upon by the parties and to address the important legal principles that arise.

65. Critically, TCC hearings require to be dealt with in the estimated time period. This is particularly the case since many applications are dealt with on Fridays and it causes major disruption if an application hearing is not disposed of within the estimated period.

(xiii) ADR

66. The TCC encourages the parties to use ADR and will, whenever appropriate, facilitate the use of such a procedure. In most cases, ADR takes the form of inter-party negotiations or a mediation conducted by a neutral mediator.

67. The TCC is given power to make an ADR Order. While the Court will not ordinarily recommend an individual body to act as mediator or to perform any other ADR procedure, the Court will select a person from a list provided by the parties in the event that the parties fail to agree the identity of a mediator. To assist the process, the Court requires to be furnished with the CVs of each of the individuals on any lists proffered by the parties.

68. If any other party considers that there has not been proper co-operation in relation to the arrangements for mediation or any other ADR procedure, the complaint will be

considered by the Court and cost orders and/or other sanctions may be ordered against the defaulting party in consequence.

69. In an appropriate case, and with the consent of all parties, a TCC Judge may provide an early neutral evaluation ("ENE") either in respect of the full case or of particular issues arising within it. Unless the parties otherwise agree, the ENE will be produced in writing and will set out conclusions and brief reasons but will not, save with the agreement of the parties, be binding on the parties.

70. If the parties would like an ENE to be carried out by a Court, then they may seek such an order. The assigned Judge may choose to do the ENE. In such instance, the Judge will take no further part in the proceedings once the ENE has been produced, unless the parties expressly agree otherwise. Alternatively, the assigned Judge will select another available TCC Judge to undertake the ENE.

71. The TCC also operates a Court Settlement process, i.e., a form of mediation carried out by TCC Judges. Adoption of the Court Settlement process requires the consent of all parties. If a settlement does not eventuate, the Settlement Judge thereafter takes no further part in the Court proceedings.

(xiv) Adjudication Business

72. The TCC is ordinarily the Court in which enforcement of an adjudicator's decision, or other business connected with the adjudication is undertaken. Adjudicators' decisions are governed by the mandatory provisions of the Housing Grants, Construction and Regeneration Act (1996) as amended. Having regard to the fast-track nature of adjudication, the TCC has moulded a rapid procedure for enforcing an adjudication decision that has not been honoured.

73. Once the Claimant has lodged the claim form, application notice and accompanying documents in the appropriate registry, suitably marked as relating to adjudication enforcement and requiring the urgent attention of a TCC Judge, a TCC Judge will ordinarily provide directions in connection with the procedural application within 3 working days of the receipt of the Application Notice at the Listing Office. The

procedural application and consequent directions will fix an abridged period of time in which the Defendant is to file an acknowledgement of service, any witness statements in opposition to the relief being sought, an early return date for the hearing of the summary judgement application and a note of the time required or allowed for that hearing, and identification of the judgement, order or relief being sought at the hearing of the adjudication claim. The order at this stage (made without the Defendant being represented) will always give the Defendant liberty to apply.

74. The Directions made on the Procedural Application will ordinarily provide for an enforcement hearing within about 6-8 weeks of the Directions being made and for the Defendant to be given at least 14 days from the date of service for the serving of any evidence in opposition to the adjudication application (or a lesser abridged period in a more straightforward case).

(xv) Disclosure

75. Disclosure in the TCC is generally subject to the Disclosure Rules set out in Practice Direction 57AD, and as provided for in the Disclosure Pilot. The Disclosure Pilot was intended to effect a culture change, which operates along different lines to the CPR and is driven by reasonableness and proportionality.

(xvi) Witness Statements

76. Evidence in the TCC is generally given by way of witness statements. A trial witness statement should contain only:-

(a) Evidence as to matters of fact that need to be proved at trial in relation to one or more of the issues of fact to be decided at the trial; and

(b) Evidence as to such matters that the witness would be asked by the relevant party to give and which he would be allowed to give in evidence-in-chief as if called to give oral evidence at the trial.

(c) Evidence as to matters of fact which the witness has personal knowledge that are relevant to the case, and the witness must identify, by list, what documents, if any, he

has referred to, or been referred to for the purposes of providing the evidence set out in his witness statement.

77. Witness statements should be as concise as possible without omitting anything of significance and refer to documents only where necessary. Even when prepared by a legal representative, the witness statement should be, as far as practicable, in the witness's own words, and must be accompanied by a Statement of Truth.

78. Witness statements should not include evidence on the basis that it might be needed depending upon what the other parties witnesses might say, and the correct procedure in such cases is for the witness to provide a supplementary witness statement limited to responding to particular matters contained in the other party's witness statements.

79. If a Witness is located outside England and Wales, or would find a journey to Court inconvenient or impracticable, his/her evidence may be given by video link with the Court's permission.

80. Expert evidence is also regularly led in the TCC and provisions in relation to expert evidence are included in CPR Part 35 and the Practice Direction supplementing Part 35. Much of the TCC procedure and PD35 will be familiar to Irish practitioners, and reflect generally the approach adopted by O.35 RSC, in particular in relation to the exchange of expert reports, expert conferral and the preparing of a Joint Expert Report.

81. One notable difference concerns the role of the TCC in limiting costs. At the first CMC or thereafter, the Court may be asked to determine whether the cost of instructing experts is proportionate to the amount at issue in the proceedings. When considering an application for permission to call an expert, the Court is to be provided with estimates of the expert's costs, and the permission may limit the issues to be considered by the expert. This permission should ordinarily be linked to the parties' costs budget. Further, the Court has power to limit the amount of the expert's fees that a party may recover from another party pursuant to CPR 35.4(4), and thus the amount recovered by the receiving party may be less than full costs reasonably incurred.

(xvii) Single Joint Experts

82. An Order may be made at the first CMC or thereafter that a Single Joint Expert should address particular issues between the parties and this Order can be made pursuant to CPR Parts 35.7 and 35.8.

83. Under the TCC Rules, Single Joint Experts are not usually appropriate for the principal liability disputes in a large case, or where considerable sums have been spent on an expert in the pre-action stage, and they are generally inappropriate where the issue involves questions of risk assessment or professional competence.

84. On the other hand, Single Joint Experts can often be appropriate:-

- In low value cases where the cost of adversarial expert evidence may be prohibitive;
- Where the Single Expert Report is intended to deal with the separate and self-contained part of the case, such as the valuation of particular Heads of Claim;
- Where there is a subsidiary issue requiring expertise of a relatively uncontroversial nature;
- Where testing or analysis is required which can be conveniently done by one laboratory on behalf of all of the parties.

85. Where a Single Joint Expert is to be appointed or directed by the Court, the TCC Guide provides that the parties should attempt to devise a protocol covering all relevant aspects of the appointment, such as any ceiling on fees, how, when and by whom fees would be paid on an interim basis pending any costs orders, what is to happen if terms of reference cannot be agreed and so forth.

86. The usual procedure for a Single Joint Expert will involve:-

- The preparation of the Expert's instructions which should clearly identify issues or matters where the parties are in conflict;
- The preparation of an agreed bundle;
- The preparation and production of the Expert's Report; and
- The provision to the Expert of any written questions from the parties.

87. The TCC Guide envisages that the Single Joint Expert's Report, supplemented by any written answers to questions from the parties will be sufficient for the purposes of trial. However, where it is necessary for the Single Joint Expert to be called to be given oral evidence, the usual practice would be for the Judge to call the Expert and allow each party the opportunity to cross examine. The TCC Guide directs that the cross examination should be conducted with appropriate restraint, since the witness has been instructed by the parties themselves.

(xviii) Meetings of Experts

88. The TCC Guide envisages the desirability of holding without prejudice meetings between the experts at all stage of the pre-trial preparation, with a view to producing a documents whose contents are agreed, and which defines the common positions, or each expert's differing position. The purpose of such meetings include inter alia:-

- Identifying the issues upon which any expert is to give evidence;
- To narrow differences on as many expert issues as possible;
- To assist in providing an agenda for the trial and for cross-examination of expert witnesses, with a view to limiting the scope and length of the trial as much as possible.

89. While the TCC Guide notes that it would be helpful for the parties' respective legal advisers to provide assistance as to the agenda and topics to be discussed at expert's meetings, the legal advisers must not attend the meeting (save in exceptional circumstances and with the permission of the Judge) and must not attempt to dictate what the experts say at the meetings.

90. The TCC Guide also recommends that it is generally sensible for the experts to meet at least once before they exchange their reports.

(xix) Experts' Joint Statements

91. Following the expert's meetings, and pursuant to CPR 35.12(3) the Judge will almost always require the experts to produce signed statements setting out the issues which they have agreed, and those on which they are not agreed, together with a short summary for the reasons for their disagreement. This statement is a critical document, and it must be as clear as possible.

92. Importantly, the TCC Guide stipulates that, whist the parties legal advisers may assist in identifying issues which their statements should address, those legal advisers must not be involved in either negotiating or drafting the expert's Joint Statement, and should only invite the experts to consider amending any draft Joint Statement in exceptional circumstances, such as where there are serious concerns that the Court may misunderstood or have been misled by the terms of the Joint Statement.

(xx) Experts Reports

93. The TCC Guide stipulates that it is the duty of an expert to help the Court on matters within his expertise, which duty overrides any duty to his client, and each expert's report must be independent and unbiased. The Pre-Action Protocol for Construction and Engineering Disputes contains provisions as to experts in TCC cases and accordingly Annex C to the Practice Direction – Pre-Action Conduct does not apply.

94. The parties must identify the issues with which each expert should deal with in his/her report, but thereafter, it is for the expert to draft and decide upon the detail, contents and format of the report. The Guide notes that it is appropriate for the party instructing an expert to indicate that the report should (a) be as short as is reasonably possible, (b) not set out copious extracts from other documents, (c) identify the source of any opinion or data relied upon and (d) should not annex or exhibit more than is reasonably necessary to support the opinions expressed in the report.

(xxi) Presentation of Expert Evidence

95. The Guide notes that the purpose of expert evidence is to assist the Court on matters of a technical or scientific nature. In complex cases where the evidence is developed through a number of Experts' Joint Statements and reports, it is often helpful for the expert at the commencement of their evidence to provide the Court with a summary of their views on the main issues. This can be done orally or by way of a PowerPoint or similar presentation.

96. The way in which expert evidence is to be given is a matter that is considered at the Pre-Trial Review ("PTR"). Where there are a number of experts of different disciplines, the Court will consider the best way for the expert evidence to be given. The usual practice in the TCC now is for all expert evidence to follow the completion of the witness evidence from all parties and this can be done in various ways:-

- For one party to call all its expert evidence, followed by each party calling all of its expert evidence;
- For one party to call its expert in a particular discipline, followed by the other parties calling their expert in that discipline;
- For one party to call its expert to deal with a particular issue, following by the other party calling their expert to deal with that issue;
- For the experts of all parties to be called to give concurrent evidence, i.e. *"hot-tubbing",* where this method is adopted there is generally need for experts to be cross-examined on general matters and key issues before they are invited to give evidence concurrently on particular issues. A number of possible variations of the procedure may be involved here e.g.,:-
    (i) A party may ask its expert to explain his/her view on an issue, then ask the other party's expert for his/her view on that issue, and then return to that party's expert for a comment on that view;
    (ii) Alternatively, or in addition, the questions may be asked by the Judge;
    (iii)Alternatively, the experts themselves may ask each other questions.
- The giving of concurrent evidence may be consented to by the parties and the Judge will consider whether, in the absence of consent, any modification is required to the procedure for giving concurrent evidence set out in the CPR at PD 35, Para. 11.

(xxii) The Pre-Trial Review ("PTR")

97. Per the TCC Guide, the TCC undertakes a Pre-Trial Review, which is usually fixed for a date 4-6 weeks in advance of the commencement of the trial. It is vital that Counsel to conduct the trial should attend the PTR.

98. The PTR is usually conducted by way of an oral hearing (in person, remote or hybrid), or at the very least by telephone conference, so that the Judge can raise matters of trial management even if the parties can agree beforehand outstanding directions and the detailed requirements for the management of the trial.

99. There may be some cases where the Judge will dispense for the need for a PTR so long as a request is made in sufficiently good time before the PTR to enable the decision to be made.

100. The parties must complete a PTR questionnaire (the form of which is included at Appendix C to the TCC Guide), and return it in good time to the Court. In addition, the Judge may order the parties to provide other documents for the particular purposes of the PTR.

101. In all cases the Counsel for each party should each prepare a Note for the PTR which:-
- addresses any outstanding directions or steps to be taken;
- explains the issues for determination of the trial and the evidence required to determine those issues;
- addresses the most efficient way in which those issues might be dealt with at the trial, including all questions of timetabling of witnesses and speeches.

102. In any case proceeding in the High Court, Counsel's Pre-PTR Notes should be exchanged and provided to the Court at the latest by 2:00pm two working days before the PTR to enable the other parties to have a reasonable opportunity to deal with the points raised in the PTR itself.

103. The parties are required to ensure that the Court has an up-to-date Permanent Case Management Bundle, together with a Bundle of the Factual and Expert Evidence exchanged, to be provided to the Court by 4:00pm one clear day before the PTR.

104. If there are still outstanding interlocutory steps to be taken at the time of the PTR (usually because one of the parties has not complied with an earlier direction of the Court), the Court may require prompt compliance and make cost orders to reflect the delays.

105. Sometimes a party will wish to make an application to be heard at the same time as the PTR. The TCC Guide notes that such practise is unsatisfactory, and it is always better for a party, if possible, to make all necessary applications well in advance of the PTR. Alternatively, the Court should be asked to allocate additional time for the PTR to accommodate specific applications.

106. The parties should provide the Judge at the PTR with an agreed list of the main issues for the forthcoming trial, agreed if possible, to include, where appropriate, a separate list of technical issues to be covered by the experts. If an agreed Issue List is not possible, the parties should provide to Court their respective formulations.

107. Much of the PTR will be devoted to a consideration of the appropriate timetable for the trial, and other logistical matters. Such directions would commonly include:-
    - Directions in respect of the timing and formatting of the oral and written openings and closings and any necessary reading time for the Judge;
    - Sequence of all evidence (e.g., factual evidence before expert evidence as per the usual TCC Practice);
    - Timetabling of oral evidence;
    - The manner in which expert evidence is to be presented;
    - Whether time limits should be imposed (which the Court normally seeks to direct by agreement);
    - Directions in respect of the Trial Bundle;
    - Whether there should be a Core Bundle;
    - Directions relating to the use of electronic document management.

(xxiv) Trials before the TCC

(a) Arrangements prior to the Trial – Witnesses

108. Prior to the Trial, the parties' legal representatives are required to seek to agree a number of matters, if not resolved at the PTR, including the order in which witnesses are to be called, which witnesses are not required for cross examination, the timetable for the trial etc.

109. TCC Trials normally take place on Mondays to Thursdays, with Fridays reserved for applications.

(b) Opening Notes, Trial Bundles and Oral Openings

110. Unless the Court has ordered otherwise, each party's advocate should provide an Opening Note, which outlines that party's case in relation to each of the issues identified at the PTR including, where relevant, issues of law. The Claimant's Opening Notes should include a neutral summary of the background facts, a neutral chronology and a cast list. The other party's Opening Notes should usually be shorter and should assume familiarity with the factual background. All Opening Notes are to be served two clear working days before the start of the Trial, and each party should provide a Word version to the Judge's Clerk for the benefit and use of the Judge.

111. Subject to any specific Directions of the PTR, the Trial Bundles should be delivered to the Court at least 3 working days before the hearing and the party delivering the Trial Bundles should liaise in advance with the Judge's Clerk to discuss practical arrangements. The parties should provide for the Court an agreed Index of all Trial Bundles.

112. The TCC Guide gives detailed instructions in relation to the preparation of the Trial Bundle, the ultimate objective of which is to create Trial Bundles which are user friendly and in which any page can be identified with clarity and brevity.

113. Subject to any Directions made at the PTR, each party will be permitted to make an opening speech, which should be prepared and presented on the basis that the Judge will have pre-read the opening notes and the documents identified by the parties for pre-

reading. The Claimant's advocate may wish to highlight the main features of the Claimant's case and/or to deal with matters raised in the other party's opening notes. The other party's advocates would then make shorter opening speeches emphasising the main features of their own case or responding to matters raised in the Claimant's opening speech.

114. It is not usually necessary or desirable to embark upon legal argument during opening speeches, though it may be helpful to foreshadow those legal arguments which (a) explain the relevance of a particular parts of the evidence or (b) assist the Judge in following if that party's case has to be presented during the trial. If the legal issues are at the heart of the dispute, it may be appropriate for more in-depth legal analysis to be included within the opening speech.

115. Experience shows that often the issues between the parties progressively narrow as the trial advances. Some signs this process begins is during the course of opening speeches, where weaker contentions may be abandoned and responses to those contentions may become irrelevant.

(c) Simultaneous Transcription

116. Many trials in the TCC are conducted with simultaneous transcripts of the evidence and it is now common for a system to be used involving simultaneous transcription onto screens situated in Court. Systems involving the production of the transcript in hard or electronic form at the end of the day (or even after a longer period) are also used. The parties are required to make the necessary arrangements with one of the companies who provide this service.

117. The TCC Guide notes that simultaneous transcripts enable all but the shortest trials to be conducted efficiently since the Judge does not have to note the evidence or submissions in longhand as the trial proceeds. A simultaneous transcript makes the task of summarising a case in closing submissions, and preparing the judgement, somewhat easier and reduces the risk of error or omission and the amount of time required for reserved judgements.

118. If possible, the parties should have agreed at or before the PTR whether a simultaneous transcript is to be employed. Usually the costs will be agreed but sometimes a party

cannot, or will not, agree to an interim costs management arrangement. In such a case, it is permissible for the other party to bear all the costs of the transcript, but the court cannot be provided with a transcript unless all parties have equal access to the transcript. There is no available means of obtaining from public funds the cost of the transcript for use at the trial, unlike transcripts for use during an appeal.

(d) Time Limits

119. The TCC has developed the practise of imposing flexible guidelines in the form of directions as to the sharing of the time allotted for the trial. These are not mandatory, but an advocate is ordinarily expected to comply with them.

120. The practise of imposing a strict guillotine on the examination or cross-examination of witnesses is not normally considered appropriate. Flexibility is encouraged, but the agreed or directed time limits should not ordinarily be exceeded without good reason.

121. An alternative form of time limit, sometimes agreed between the parties and approved by the Court, is the *"Chess Clock Arrangement"* under which the available time is divided equally between the parties to be used as they see fit. The Judge has discretion to *"stop the clock"* in exceptional circumstances.

(e) Oral Evidence

122. Evidence in chief is ordinarily adduced by the witness confirming on oath the truth and accuracy of the previously served witness statement or statements. A limited number of supplemental oral questions will usually be allowed (a) to give the witness an opportunity of becoming familiar with the procedure and (b) to cover points omitted by mistake from the witness statement or which have arisen subsequent to its preparation.

123. In some cases (particularly those involving allegations of dishonest, disreputable or culpable conduct), or where significant issues of fact are not evidenced in writing, it may be desirable that the core elements of a witnesses evidence in chief are given orally. This will often assist the Court in assessing the credibility or reliability of a witness.

124. If any party wishes such evidence to be given orally, a direction should be sought either at the PTR or during the openings to that effect.

125. In preparing witness statements, lawyers may discuss the evidence to be given with the witness. However, the coaching of witnesses, or the suggestion of answers that may be given, either in the preparation of witness statements or before a witness starts to give evidence, is not permitted. In relation to the process of giving evidence, witness familiarisation is permissible, but witness coaching is not. Once a witness has started giving evidence, that witness cannot discuss the case or their evidence either with the lawyers or with anyone else until they have finally left the witness box.

126. Where a party is represented by more than one advocate at the trial, the advocates may share the oral advocacy, including submissions and examination of witnesses. The Court encourages oral advocacy to be undertaken by junior advocates. However, the permission of the Court is required for more than one advocate for a party to cross-examine the same witness.

(f) Submissions during the Trial

127. Submissions and legal argument should be kept to a minimum during the course of trials in the TCC. Where necessary (a) they should take place when a witness is not giving evidence and (b) the Judge should be forewarned of the need for submissions or legal argument.

(g) Closing Submissions

128. The appropriate form of Closing Submissions may already have been addressed at the PTR, but if not, will be determined during the course of the trial.

129. Closing Submissions may take the form of (a) oral closing speeches, (b) written submission alone or (c) written submission supplemented by oral closing speeches.

130. In giving directions as to how oral and/or closing written submissions should be provided, the Judge will have regard to the circumstances of the case and the overriding objective of the CPR, namely, the disposal of cases in the most cost-efficient manner possible.

131. The TCC Guide recommends that the parties agree on the principal topics or issues to be covered in advance of preparing closing submissions and that each parties submission should be structured to cover those topics in the same order.

132. It is both customary and helpful for the Judge to be provided with electronic or hard copies of each authority and statute provision cited in closing submissions.

(h) Views

133. It is sometimes necessary or desirable for the Judge to be taken to view the subject matter of the case. In normal circumstances, such a view is generally best arranged to take place immediately after the openings and before the evidence is called. However, if the subject matter of the case is going to be covered up or altered prior to the trial, the view must be arranged earlier. But, in that event, it becomes particularly important to avoid a change of Judge.

134. The matters viewed by the Trial Judge form part of the evidence and may be relied upon in deciding the case. However, nothing said during the view to (or in the earshot of) the Judge has any evidential status unless there has been an agreement or order to that effect.

(i) Judgements

135. Depending on the length and complexity of the case, the Judge may (a) give Judgement orally immediately after closing speeches (b) give Judgement orally on the following day or soon afterwards, or (c) deliver a reserved Judgement in writing at a later date.

136. Where Judgement is reserved, the Judge will normally indicate what arrangements will be followed in relation to (a) the making available of any draft reserved judgement and (b) the handing down of the reserved judgement in open Court. The Judge will normally provide any reserved Judgement in draft and will endeavour to do so within 3 months of the conclusion of the trial. Any enquiries as to the progress of a reserved judgment are required to be addressed in the first instance to the Judge's Clerk, with notice of that enquiry being given to other parties.

137. If, as is usual, the Judge releases a draft Judgement in advance of the formal hand down, the draft Judgement is confidential to the parties and their legal advisers and subject to an embargo as set out on the front page of the draft, and neither the draft itself nor its substance may be disclosed to any other person or made public in any way.

138. The draft Judgement is only to be used to enable the parties to make suggestions for the correction of errors, or to prepare submissions on consequential matters and draft orders and to prepare themselves for the publication of the Judgement. A breach of any of these obligations may be treated as a contempt of court.

139. The TCC Guide sets out the terms of the embargo to be set out in the first page of the draft Judgement and this includes a clear indication that a breach of the party's obligations will be treated as a contempt of court.

140. The embargo note will set out the time by which the parties are to submit to the Clerk of the Judge any typing corrections and other obvious errors and this should, if possible, be agreed between the solicitors and Counsel on each side. Their note of errors is not to be taken as an opportunity to reargue the issues in the case.

(j) Disposal of Judge's Bundle after conclusion of the Case

141. The TCC Guide notes that the Judge will have made notes and annotations on any hard copy bundle during the course of the trial. Accordingly, the normal practice is that the entire contents of the Judge's bundle are disposed of by confidential waste by the Court itself. The empty ring files can then be recovered by arrangement with the Judge's Clerk. If any party wishes to retrieve any particular items of value (e.g., plans or photographs) a request for these items should be made to the Judge's Clerk promptly at the conclusion of the case and these will be released to the requesting party if the Judge has not made annotations on those particular items.

(k) Costs and Costs Management

142. The TCC Guide sets out detailed provisions in relation to costs and costs management.

143. The usual approach taken by the Court in relation to costs is to seek to determine which party can be properly described as *"the successful party"* and then to investigate whether there are any good reasons why that party should be deprived of some or all of their costs.

144. It is not proposed in this paper to discuss further the arrangements adopted by the TCC in relation to costs and costs management, which is set out in Section 16 of the TCC Guide.

(l) The TCC Judge as Arbitrator

145. A slightly anomalous provision of the TCC Guide, implementing S.93(1) of the UK Arbitration Act, 1996, is that a Judge of the TCC (previously an Official Referee) may, *"... if in all the circumstances he thinks fit, accept appointment as a sole Arbitrator or as an umpire by or by virtue of an Arbitration Agreement"*.

146. The 1996 Act does not limit the appointments to arbitrations with their seat in England or Wales.

147. However, a TCC Judge cannot accept such an appointment unless the Lord Chief Justice *"has informed him that, having regard to the state or (TCC) business, he can be made available"*. In exceptional cases, a Judge of the TCC may also accept an appointment as a member of a three-member panel of arbitrators if the Lord Chief Justice consents, but such arbitrations cannot be under S.1993 of the 1996 Act.

148. Application should be made in the first instance to the Judge whose acceptance of the appointment is sought. If the Judge is willing to accept the appointment, he will make an application on behalf of the appointing party or parties, through the Judge in charge of the TCC, to the Lord Chief Justice for the necessary approval.

149. Subject to the workload of the court and the consent of the Lord Chief Justice, TCC Judges will generally be willing to accept such requests, particularly in short cases, or where an important principle or point of law is concerned. Particular advantages have been noted by both TECBAR and TeCSA in the appointment of a TCC Judge to act as arbitrator where the dispute centres on the proper interpretation of a clause or clauses within one of the standard forms of building and engineering contracts.

150. The Judge sitting as an Arbitrator will sit in the TCC courtroom (suitably rearranged) unless the parties and the Judge-Arbitrator agree to some other arrangement.

151. Fees are payable to the Court Service for the Judge/Arbitrator services and for any accommodation provided. The appropriate rate for the Judge/Arbitrator, being a daily rate, is published in the Fees Order and is to be paid through the TCC Registry.

(d) What is the TCC's Output?

152. The TCC produces an Annual Report on its activities.

153. The most recent report covers the work of the TCC in England and Wales for the period from 1 October 2020 to 30 September 2021. The Annual Report notes a number of matters:-

(a) In recent years, the Court has seen an increasing number of disputes which require technical input of which it is appropriate for the Court to deal with because of familiarity with the subject matter, including complex computer and IT infrastructure disputes and renewable energy disputes. Following the Grenfell Tower fire, there has been a steady increase in cases concerning flammable cladding and other materials, together with more general fire protection issues.

(b) Despite this, the Court maintains an impressive throughput of cases and most cases that go to fully contested trials are resolved in less than about 12-18 months from issue to final judgement, though obviously this varies. In 2020 and 2021, against the background of changing lockdowns and restrictions in response to Covid, the Courts were required to adjust to a combination of in-person, remote and hybrid working,

assisted by communication platforms such as MS Teams, CVP (Cloud Video Platform) and Zoom. Following consultation with court users, in September 2021 a BPC Protocol for remote and hybrid hearings was introduced, providing for continuation of this more flexible approach to hearings.

(c) During the period, 7 High Court Judges sat regularly on TCC business, with Mrs. Justice O'Farrell as Judge in Charge from March 2020.

(d) During October 2020 to September 2021, there were 521 new claims brought to the London TCC, up 7% from the previous year (when 487 new claims were registered).

(e) A continuing feature for the TCC is that a substantial number of cases are settled shortly, or sometimes very shortly, before trial.

(f) During the year, there were 107 trials listed at TCC, of which 41 were eventually contested. Thus, 62% of cases started were settled before Judgement (compared with 68% during 2020/2021)

(g) For the London TCC, the average length of trial in the period has been 5 days (excluding reading times, down from the average of 8 days in previous years).

(h) The TCC noted a significant number of settlements, noting that, in the period March 2021 – September 2021, 386 hearings were listed but only 177 heard, i.e., 45% down slightly from the similar period (March – September 2020), when, of 504 cases listed, 256 were heard (51% cases settled), and the previous period of March – September 2019, where 421 cases were listed and 227 were heard (46% settled).

(i) 343 applications were dealt with at oral hearing, including case management conferences, pre-trial reviews and specific applications, reflecting a 19.5% decrease from the previous year, when 426 applications were dealt with at oral hearing.

(j) The Annual Report also gives similar figures for the Central London Civil Justice System (which deals with all County Court TCC claims brought in London) and in respect of TCC Centres outside London (Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester, Newcastle).

(k) With regard to the overall division of cases, statistics recorded from TCC London, Central London, Bristol, Cardiff, Leeds and Manchester where, of the total 778 cases listed, 452 relate to Adjudication and Construction, namely 58%.

(l) In addition to the specialist TCC Judges (of which 9 were listed as at 1 October 2021) in London (along with other TCC Judges in the other TCC Centres), the report notes a further 12 specialist King's Counsel as Deputy High Court Judges/Recorders who are also available to take TCC cases as appropriate.

(e) The CBA Visit to the TCC on 23 March 2023

154. A delegation from the CBA[3] arranged to visit the TCC and on 23 March 2023 and were met at the Rolls Building, London, by the Judge in Charge, Mrs. Justice Finola O'Farrell, at circa 10:30am. While it had been our hope to witness a case being heard in the TCC, all of the cases listed for that day were settled. However, this turned out to be an enormous stroke of good luck, as Mrs. Justice O'Farrell received us extremely generously and spent the entire of the morning outlining in detail how the TCC worked. Having brought us to lunch at one of the nearby Inns of Court, Mrs. Justice O'Farrell arranged for us to be given a tour of the Rolls Building and the various courts in which the TCC sat. Thereafter, she arranged to further meet with us with 3 other Judges from the TCC, Judges Nerys Jefford, Adam Constable and David Waksman (in effect, we spoke to 4 of the 6 appointed specialist TCC Judges assigned to the London TCC Court) where further aspects of the TCC procedure were discussed. We were also provided with a number of Standard Directions Forms, including the current Pre-Action Protocol, and some forms relating to Case Management Directions, and Disclosure[4]. Among the points discussed were the following:

[3] Led by Jonathan Fitzgerald BL, accompanied by John Trainor SC, Jarlath Fitzsimons SC, Barra McCabe BL, James Bourke BL, Martin Waldron BL, and Alan Brady BL.
[4] These will be appended to the electronic version of this document which will be available in due course from the CBA Codex.

(a) The importance of the Pre-Action Protocol in ensuring that the parties have sought to explore the consequences of any prospective TCC litigation, considered settlement, and the relevant issues;

(b) The fact that, once the trial date has been fixed at the Case Management Conference, it will hardly ever be vacated. The refusal of unworthy applications to vacate trial dates often resulted in cases settling shortly thereafter.

(c) The importance and usefulness at the Case Management Conference, and of having the parties focus on the need for disclosure and the extent of same.

(d) The importance and usefulness of the Court's review of the parties' costs budgets and the approval of same.

(e) Most importantly of all, the allocation of *"TCC tickets"* to Judges with specialist experience and expertise in the type of cases that the TCC is regularly asked to hear;

(f) The benefit of the TCC of being able to draw on a pool of Deputy High Court Judges also of the required expertise and experience in TCC type cases, though noting that, in the allocation of cases, priority is given to allocating cases to full time formally appointed TCC Court Judges, and only using the Deputy High Court Judge resource as, in effect, *"backup"*, where the Court Lists cannot be managed by the usual TCC allotment, due to a multiplicity of cases, a backlog or for other reasons.

(f) The Case for a TCC in Ireland

155. So what can be learned from the TCC, and is there a case to be made for establishing a similar TCC in Ireland?

156. There are a number of points to be made:-

(i) There are a number of significant differences between the caseload being currently heard in the Superior Courts in Ireland from those in the UK. In particular, at present:-

– We have a very active Commercial Court division, which takes commercial cases with a value of €1M or greater, along with other specified types of cases. In practise, all significant construction cases, with any degree of urgency, will secure admission to the Commercial List and will fall to be managed in accordance with the procedure set out in O.63A. Most Irish practitioners would say that the Commercial List functions very efficiently.

– The Irish High Court Commercial List deals both with cases which, in the UK, would come separately before the TCC, and which would be admitted to the UK Commercial List. Pursuant to Part 58 of the CPR, (*"Commercial Court"*) a *"Commercial Claim"* means any claim arising out of the transaction of trade and commerce and includes any claim related to:-

(a) A business document or a contract;
(b) The export and import of goods;
(c) The carriage of goods by land, sea, air or pipeline;
(d) The exploitation of oil and gas reserves or other natural reserves;
(e) Insurance and re-insurance;
(f) Banking and financial services;
(g) The operation of markets and exchanges;
(h) The purchase and sale of commodities;
(i) The construction of ships;
(j) Business agency; and
(k) Arbitration.

While a number of the above categories (in particular (a) could in practice relate to a construction contract, in practice, all disputes concerning construction contracts, to the extent *"technically complex"* per Rule 60.1 of the CPR, are dealt with by the TCC. So, in Ireland, our *"Commercial Court List"* does allow for all significant construction disputes to be admitted thereto.

– Nevertheless, admission to the Commercial List in the Irish High Court is ultimately at the discretion of the Commercial List Judge hearing the entry application, and cases can be refused admission to the Commercial List for a

variety of discretionary factors which would not disqualify entry from the TCC List in the UK;

– But a significant difference between the Irish Commercial Court and the UK TCC Court appears to lie in the fact that the TCC Judges have particular expertise and experience in TCC type cases, possibly more so than the Irish High Court Commercial Court Judges who, of necessity, will be likely to have been drawn from practitioners with a broader range of expertise.

(ii) A number of classes of cases regularly dealt with by the TCC, if heard in Ireland, would be assigned to their own specialist lists eg the strategic infrastructure list, and the Intellectual Property and Technology List in the High Court, being a sub-division of the Commercial List, currently operated under the recently amended O.63A.

(iii) The potential pool from which TCC cases in the UK can emerge is very large. Inevitably this will give rise to a greater number of construction disputes. Further, the TCC Guide encourages overseas parties to bring their disputes to the UK. Despite all this, in 2020/2021, per the TCC Annual Report, there were only 521 new cases brought to the London TCC, with 107 cases listed for trial, and 41 eventually contested. Compared to the possible pool, one might this this is a relatively small number. The equivalent number of cases in Ireland would also be much less.

(iv) The High Court in Ireland also has an Adjudication List and a specialist nominated Adjudication Judge, namely Judge Simons. Adjudication cases in the High Court are currently being disposed of very quickly and the intention of Judge Simons appears to be to ensure that such cases are disposed of within the very tight time limits provided for by O.56B. Anecdotally, the *"word on the ground"* is that adjudication decisions are being honoured promptly, mainly in the belief that delay in payment will be given short shrift in the High Court, and that adjudication decisions will be enforced unless gravely deficient for one reason or another. So far, Irish adjudicators have demonstrated a very high degree of competence and application, and the circumstances where arguments can be advanced to seek to defeat an adjudicator's decision appear few and far between.

(v) A feature of construction contracts in Ireland, is that they invariably contain an arbitration clause, thus meaning that construction disputes will only rarely come before the Irish Courts.

(vi) In general, professional negligence cases tend to be dealt with in the High Court through the usual non-jury lists and the nature of those cases, which often involve insurance companies, is such that they generally don't display the requirement for urgency that would justify them being included in a TCC-type list in Ireland. There may also be a question mark as to why professional negligence cases involving say, construction personnel, should be afforded a degree of priority not afforded to other types of professional negligence cases such as cases involving medical practitioners or solicitors.

157. So, is there a case for a specialist construction list in Ireland? The present position would appear to be broadly as follows:-

(a) There does not presently appear to be a pressing need or requirement for a specialist construction list in Ireland. Adjudication cases are being adequately dealt with through the Adjudication List, and significant high value and urgent construction cases will get ready admission to the Commercial List and can be disposed of in a prompt period of time.

(b) Intellectual Property type cases are being dealt with adequately through the Intellectual Property and Technology List, and likewise through the Strategic Planning List .

(c) However, it is inevitable that, over time, more and more significant value construction disputes are likely to litigated before the Courts, and to come before the Commercial court in due course;

(d) The adoption of TCC-type procedures and, in due course, a specialist TCC-type list, dealing with a sub-division of cases otherwise presently heard by the Commercial

Court, will be likely to make sense as part of the specialist listing system which the Irish Courts presently use to manage their case load[5];

(e) The extent to which such a specialist *"construction list"* may involve all, or only some, of the types of cases currently decided by the TCC will be a matter for debate in due course;

(f) However, it does seem inevitable that, over time, a specialist construction type list will require to be adopted and the only questions are (i) when will it be time to introduce such a list and (ii) to what extent are the current TCC practises appropriate to be adopted to regulate proceedings in such a list.

158. However, the Irish judicial landscape ahead requires consideration of three further factors:

(i) All areas of law are getting more complex. For example, in the sector of construction law, the full effects and possible outworkings of the Building Control (Amendment) Regulations 2014 have yet to be felt and it must be likely that, in the years ahead, there will be much litigation involving assigned certifiers and others responsible for implementing the more onerous requirements of the current Building Code;

(ii) The Irish Construction sector has significantly recovered from the financial crash of 2008 and it is clear that, over the years ahead, there will be a massive construction programme if the Government's targets for the building of residential units is to be achieved. When added to other infrastructural projects, such as off-shore windfarms and other climate-related projects, it is clear that the number of construction contracts being created will be likely to increase dramatically and, in due course, the opportunities for litigation also increase dramatically;

(iii) Anecdotal evidence would suggest that parties to construction contracts are becoming uneasy with arbitration under the Arbitration Act, 2010 and are removing arbitration clauses from their contracts, preferring that disputes should be resolved in Court;

[5] It should be noted that the Circuit Court has its own Practice Direction, CC08, dated 9 March 2009, for construction cases, whether for breach of contract or recovery of monies, where the quality of building works is in issue.

(iv) A significant increase in judicial resources in the High Court has been recently sanctioned by Government.

159. In this latter regard, the Government appears committed to increasing judicial resources following the Report of the Judicial Planning Working Group issued December 2022 which has undertaken a root and branch review of the Irish judicial system and has recommended significant improvements across a range of areas including:-
- The Judiciary and the Court system;
- Judicial resources;
- Effective use and management of judicial resources;
- Data collection and management;
- Improving services to Court users;
- Judicial skills and training;
- Costs.

160. The Report of the Working Group also drew from a study commissioned by the Department of Justice in the OECD which was published in parallel with the Report of the Working Group, and a separate report published by the European Commission for the Efficiency of Justice which published an evaluation of European Judicial Systems in October 2022, indicating that Ireland has 3.3 professional judges per 100,000 inhabitants, whereas most of the 46 Council of Europe Member States have between 10 and 20 professional judges per 100,000 inhabitants while the European average is 17.6.

161. The Report of the Working Group identified a range of possible additional judges per Court jurisdiction and it recommended increases across all jurisdictions, including, for the High Court, increases of 12 additional High Court Judges in two phases, with six appointed in Phase 1 being as soon as practicable, and another six, subject to satisfactory review, in Phase 2 before the end of 2024. Additional numbers in further phases should be determined by a review in 2025 of judicial needs up to 2028, but the Working Group envisages the possibility of anything from 6 to 30 additional High Court Judges being required in this period[6].

[6] Report of the Judicial Planning Working Group, see Para 3.14, p.71 and Table 3E thereof

162. A further important constraint in relation to the appointment of future Judges is the fact that the Working Group advised against the extending of the retirement age of 70 for the Irish Judiciary as that would not be in line with the position elsewhere in the Irish Public Service, nor would it reflect Government Policy. Importantly, it also recommended against the possibility of using other legal practitioners on a temporary basis to deal with temporary demands such as backlogs, thus effectively ruling out the appointment of Deputy High Court Judges in similar manner to that adopted by the TCC in the UK. The Working Group considered that, while *"..there is potential for arrangements for temporary part-time judges to deal with temporary or particular needs effectively..*," it recognised *"considerable constraints.. arising from constitutional provisions,"* (i.e., Article 35.3 of the Constitution which provides that *"No Judge shall be eligible to be a member of either House of the Oireachtas or hold any other office or position of emolument"*) *"public pay and pension policy and conflict of interest concerns and is not making any recommendation to introduce such arrangements currently"*.

163. Notably, the Working Group, in Chapter 6, made a variety of recommendations which included:-

- The review of pre-hearing processes;
- Investment in court and case-management techniques;
- Enhanced use of digitalisation in courts including e-documents;
- Remote and hybrid hearings;
- Review and development of case management techniques including pilots;
- Setting of goals for course and case management;
- Pilot testing of case management techniques;
- The creation of Judg- led case management teams;
- Enhanced utilisation of ADR mechanisms;
- Utilisation of non-litigation routes;

and, in Chapter 7:-

- Judicial training programmes to support the recommendations of the report in particular in relation to the use of information and digital technology, and advanced case management techniques, including in the area of case progression.

164. It can readily be seen that adoption of the TCC procedures, or similar procedures in this jurisdiction, would be consistent with the recommendations of the Working Group and it must therefore be considered likely that, over time, many, if not most, of the recommendations of the Working Group will, in fact, be adopted in Ireland in due course.

165. It is probably therefore the case that in Ireland, while at present, there may be no pressing need for a specialist TCC type Court in Ireland, there may well be likely to be such a need in the future. It is the hope that this paper, and the CBA visit to the TCC, will provide food for thought as to how the rules applicable to such specialist construction court procedures could be formulated.

(g) Conclusions

166. The main advantage of the TCC is that it ensures that cases falling within the TCC jurisdiction can be brought before a specialist TCC Judge, who will have requisite knowledge and experience of construction law and related matters, thus ensuring judicial continuity and knowledge, within a short period of time.

167. In Ireland, we do not have the type of specialist construction bar that they have in the UK, and there are no specialist Irish construction law barrister's chambers such as there are in the UK by way of Atkins Chambers, Keating Chambers and so forth. However, there is a specialist bar association, ie the Construction Bar Association of Ireland, through which barristers in Ireland are seeking to develop and nurture such expertise.

168. Further, most experienced Irish counsel will have done some construction law cases as part of their practice and most Commercial Court Judges are familiar with construction law and are well able to deal with construction type cases.

169. An example of this was the Schools Defects Case heard by Judge O'Moore in the period January – May 2022, where the Court heard evidence over 44 days. The litigation had been transferred, at the outset, to the Commercial List and was subject to Case Management Directions from Judge O'Moore involving a significant number of procedural hearings and Directions in relation to Witness Statements, Expert Reports,

meetings of Experts, Scott Schedules, and a trial period where the parties were regularly required to stipulate the times required for Evidence in Chief, Cross Examination and so forth. All parties, for the most part, kept to the schedule and the evidence in the trial concluded within the time initially advised to the Court. The case proceeded for the most part on oral evidence, but, on occasion, the hearing proceeded on a hybrid basis. In addition, the case used a document management system which greatly facilitated access to documents.

170. It is hard to see how the availability of a specialist TCC would have rendered the hearing of the evidence in that litigation more efficient.

171. Nevertheless, there are some features of the TCC procedures that are worth noting:-

(a) The emphasis on the Pre-Action Protocol is to ensure that all parties to the dispute have, at an early stage, a full understanding of the position of the other parties, and a clear understanding of the issues in dispute. This is clearly intended to ensure that parties are brought into contact at an early stage with a view to endeavouring to explore possible settlement.

(b) The Pre-Action Protocol envisages the parties meeting at least once before proceedings commence. While this is not a mandatory requirement, it is clear that early engagement between the parties does bring the issue of settlement into focus.

(c) From discussion with the Judges in the TCC, it is clear that the early provision of costs budgets and the Court's supervision over the costs of the case, has the effect of ensuring that parties are not given liberty to expend unlimited resources in bringing litigation to trial. Strict control over litigation budgets can drive efficiencies in litigation and mean that parties at an early stage appreciate that they may be at risk, even if they are successful, in not recovering all their costs. Costs supervision therefore aids settlement.

(d) Early engagement between the experts also appears to be beneficial in bringing to the attention of the parties their respective strengths and weaknesses, in terms of expert evidence, and thus alerting them to the merits of settlement at an early stage.

(e) The Case Management Conference procedure, where the Judge is encouraged to understand the issues at an early stage and to discuss the issues with the parties, means that the parties are brought into contact with the Judge at an early stage in the process. Early experience of the judicial attitude to the case may likewise assist the parties in securing settlement.

(f) The early fixing of a trial date, and the agreement on directions intended to bring matters to a hearing, also means that, at an early stage, the parties have to contemplate the full consequences of their proceedings, including commitments to trial, and an understanding as to the likely full costs of same which again is a likely driver to settlement.

(g) The very detailed provisions of the TCC Guide are worth considering in the context of the current Practice Directions applicable to proceedings in the Commercial Court. At present, the current Practice Directions reflect much of what is in the TCC Guide, but it could be said that elements of the TCC Guide are more detailed and would merit further consideration in Ireland.

THE CONSTRUCTION AND ENGINEERING PROTOCOL

This protocol came into force in October 2000. It applies to all construction and engineering disputes. It should be read with Pt 60 Technology and Construction court claims although Pt 60, of course only applies to the larger claims allocated to the multi-track.

The distinguishing features of this protocol are:

- D it includes professional negligence disputes against building professionals (the personal injury and clinical negligence protocols do not do so);
- parties do not have to follow the protocol before applying for interim injunctions, in cases which will be the subject of a summary judgment application or which are for enforcing a decision following an adjudication under the Housing, Grants, Construction and Regeneration Act 1996;
- the letter of claim must include the remedy sought and details of how it has been calculated;
- the claimant must also provide the names of experts already instructed on whom he intends to rely;
- the defendant has only 14 days to acknowledge;
- the defendant has only 28 days either to take objections on jurisdiction or to respond to the letter of claim, and, if doing the latter, he must set out any counterclaim and provide the names of any experts he has instructed on which he intends to rely;
- if the defendant does not acknowledge or respond in time the claimant is entitled to issue;
- if complying with the protocol will give the claimant a difficulty with issuing within limitation, he can issue and apply to the court for directions (a useful provision which could be replicated in other protocols or the Practice Direction);
- the claimant shall respond to the counterclaim also in 28 days;
- the parties must have at least one pre-issue "without prejudice" meeting; refusal to attend which can be reported to the court (Pt 5). This is a welcome innovation and, perhaps, should be incorporated in all the pre-action protocols;
- if the claim is not settled the parties should consider ADR, instruction of joint experts, and generally how the dispute is to be progressed;
- para.1.5 on proportionality emphasises that in low value claims the letters of claim and response should be simple and costs should be kept to a minimum;
- the pre-action meeting should take place within 21 days of the receipt of the defendant's letter of response;
- only flagrant or very significant disregard of the Protocol would normally lead to any costs consequences;
- a Protocol Referee Procedure which permits parties to apply to TecSA for the appointment of a referee, at a cost of £3,500, who will assist the parties to comply with the protocol proportionally, usually by giving directions on paper. This is supported by the TCC with the aim of encouraging parties not to spend very large sums, sometimes up to £1 million, on compliance with the protocol.

PRE-ACTION PROTOCOL FOR CONSTRUCTION AND ENGINEERING DISPUTES, 2ND EDITION

1 Introduction

1.1 This Pre-Action Protocol applies to all construction and engineering disputes (including professional negligence claims against architects, engineers and quantity surveyors).

2 Exceptions

2.1 A Claimant shall not be required to comply with this Protocol before commencing proceedings to the extent that the proposed proceedings (i) are for the enforcement of the decision of an adjudicator to whom a dispute has been referred pursuant to section 108 of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"), (ii) include a claim for interim injunctive relief, (iii) will be the subject of a claim for summary judgment pursuant to Part 24 of the Civil Procedure Rules, or (iv) relate to the same or substantially the same issues as have been the subject of recent adjudication under the 1996 Act, or some other formal alternative dispute resolution procedure.

2.2 A Claimant shall not be required to comply with this Protocol before commencing proceedings if all the parties to the proposed proceedings expressly so agree in writing.

3 Objectives

3.1 The objectives of this Protocol are:

3.1.1 to exchange sufficient information about the proposed proceedings broadly to allow the parties to understand each other's position and make informed decisions about settlement and how to proceed;

3.1.2 to make appropriate attempts to resolve the matter without starting proceedings and, in particular, to consider the use of an appropriate form of ADR in order to do so.

4 Compliance

4.1 If proceedings are commenced, the Court will be able to treat the standards set in this Protocol as the normal reasonable and proportionate approach to pre-action conduct. It is likely to be only in exceptional circumstances, such as a flagrant or very significant disregard for the terms of this Protocol, that the Court will impose cost consequences on a party for non-compliance with this Protocol.

5 Proportionality

5.1 The overriding objective (CPR rule 1.1) applies to the pre-action period. The Protocol must not be used as a tactical device to secure advantage for one party or to generate unnecessary costs. In many cases, including those of modest value, the letter of claim and the response can be simple and the costs of both sides should be kept to a modest

level. In all cases, the costs incurred at the Protocol stage should be proportionate to the complexity of the case and the amount of money which is at stake. The Protocol is not intended to impose a requirement on the parties to marshal and disclose all the supporting details and evidence that may ultimately be required if the case proceeds to litigation.

6 Overview of the Protocol

General aim

6.1 The general aim of this Protocol is to ensure that before Court proceedings commence:

6.1.1 the Claimant and the Defendant have provided sufficient information for each party to know the outline nature of the other's case;

6.1.2 each party has had an opportunity to consider the outline of the other's case, and to accept or reject all or any part of the outline case made against him at the earliest possible stage;

6.1.3 there is more pre-action contact between the parties;

6.1.4 better and earlier exchange of information occurs;

6.1.5 there is better pre-action investigation by the parties;

6.1.6 the parties have usually met formally on at least one occasion; and

6.1.7 the parties are in a position where they may be able to settle cases early, fairly and inexpensively without recourse to litigation; and

6.1.8 proceedings will be conducted efficiently if litigation does become necessary.

7 The Letter of Claim

7.1 Prior to commencing proceedings, the Claimant or his solicitor shall send to each proposed Defendant (if appropriate to his registered address) a copy of a letter of claim which shall contain the following information:

7.1.1 the Claimant's full name and address;

7.1.2 the full name and address of each proposed Defendant;

7.1.3 a brief summary of the claim or claims including (a) a list of principal contractual or statutory provisions relied on (b) a summary of the relief claimed including, where applicable, the monetary value of any claim or claims with a proportionate level of breakdown. The extent of the brief summary should be proportionate to the claim. Generally, it is not expected or required that expert reports should be provided but, in cases where they are succinct and central to the claim, they can form a helpful way of explaining the Claimant's position;

7.1.4 the names of any experts already instructed by the Claimant on whose evidence he intends to rely identifying the issues to which that evidence will be directed; and

7.1.5 the Claimant's confirmation as to whether or not it wishes the Protocol Referee Procedure to apply as provided at paragraph 11 below.

8 The Defendant's Response

The Defendant's acknowledgment

8.1 Within 14 calendar days of receipt of the letter of claim, the Defendant should acknowledge its receipt in writing and may give the name and address of his insurer (if any) and shall also confirm whether or not it wishes the Protocol Referee Procedure as provided at paragraph 11 below to apply. If there has been no acknowledgment by or on behalf of the Defendant within 14 days, the Claimant will be entitled to commence proceedings without further compliance with this Protocol.

Objections to the Court's jurisdiction or the named Defendant

8.2 If the Defendant intends to take any objection to all or any part of the Claimant's claim on the grounds that (i) the Court lacks jurisdiction, (ii) the matter should be referred to arbitration, or (iii) the Defendant named in the letter of claim is the wrong Defendant, that objection should be raised by the Defendant within 28 days after receipt of the Letter of Claim. The letter of objection shall specify the parts of the claim to which the objection relates, setting out the grounds relied on, and, where appropriate, shall identify the correct Defendant (if known). Any failure to take such objection shall not prejudice the Defendant's rights to do so in any subsequent proceedings, but the Court may take such failure into account when considering the question of costs.

8.3 Where such notice of objection is given, the Defendant is not required to send a letter of response in accordance with paragraph 8.5 in relation to the claim or those parts of it to which the objection relates (as the case may be).

8.4 If at any stage before the Claimant commences proceedings, the Defendant withdraws his objection, then paragraph 8.5 and the remaining part of this Protocol will apply to the claim or those parts of it to which the objection related as if the letter of claim had been received on the date on which notice of withdrawal of the objection had been given.

The Defendant's Response

8.5 Within 28 days from the date of receipt of the letter of claim, the Defendant shall send a letter of response to the Claimant which shall contain the following information:

8.5.1 A brief and proportionate summary of the Defendant's response to the claim or claims and, if the Defendant intends to make a Counterclaim, a brief summary of the Counterclaim containing the matters set out in paragraph 7.1.3 above;

8.5.2 the names of any experts already instructed on whose evidence it is intended to rely, identifying the issues to which that evidence will be directed;

8.5.3 the names of any third parties the Defendant intends to/is considering submitting to a Pre-action Protocol process.

8.6 If no response is received by the Claimant within the period of 28 days, the Claimant shall be entitled to commence proceedings without further compliance with this Protocol.

Claimant's Response to Counterclaim

8.7 The Claimant shall provide a Response to any Counterclaim within 21 days of the Defendant's Letter of Response. The Response shall contain a brief and proportionate summary of the Claimant's Response to the Counterclaim.

9 Pre-Action Meeting

9.1 Within 21 days after receipt by the Claimant of the Defendant's letter of response, or (if the Claimant intends to respond to the Counterclaim) after receipt by the Defendant of the Claimant's letter of response to the Counterclaim, the parties should normally meet.

9.2 It is not intended by this Protocol to prescribe in detail the manner in which the meeting should be conducted. However, the Court will normally expect that those attending will include:

9.2.1 where the party is an individual, that individual, and where the party is a corporate body, a representative of that body who has authority to settle or recommend settlement of the dispute;

9.2.2 a legal representative of each party (if one has been instructed);

9.2.3 where the involvement of insurers has been disclosed, a representative of the insurer (who may be its legal representative); and

9.2.4 where a claim is made or defended on behalf of some other party (such as, for example, a claim made by a main contractor pursuant to a contractual obligation to pass on subcontractor claims), the party on whose behalf the claim is made or defended and/or his legal representatives.

9.3 Generally, the aim of the meeting is for the parties to agree what are the main issues in the case, to identify the root cause of disagreement, and to consider (i) whether, and if so how, the case might be resolved without recourse to litigation, and (ii) if litigation is unavoidable, what steps should be taken to ensure that it is conducted in accordance with the overriding objective as defined in rule 1.1 of the Civil Procedure Rules. Alternatively, the meeting can itself take the form of an ADR process such as mediation.

9.4 If the parties are unable to agree on a means of resolving the dispute other than by litigation they should seek to agree:

9.4.1 if there is any area where expert evidence is likely to be required, how expert evidence is to be dealt with including whether a joint expert might be appointed, and if so, who that should be; and (so far as is practicable);

9.4.2 the extent of disclosure of documents with a view to saving costs and to the use of the e-disclosure protocol; and

9.4.3 the conduct of the litigation with the aim of minimising cost and delay.

9.5 Any party who attended any pre-action meeting shall be at liberty and may be required to disclose to the Court:

9.5.1 that the meeting took place, when and who attended;

9.5.2 the identity of any party who refused to attend, and the grounds for such refusal;

9.5.3 if the meeting did not take place, why not;

9.5.4 any agreements concluded between the parties; and

9.5.5 the fact of whether alternative means of resolving the dispute were considered or agreed.

9.6 Except as provided in paragraph 9.5, everything said at a pre-action meeting shall be treated as "without prejudice".

10 Other Matters

10.1 The parties may agree longer periods of time for compliance with any of the steps described above save that no extension in respect of any step shall exceed 28 days in the aggregate.

10.2 The Protocol process will be concluded at the completion of the pre-action meeting or, if no meeting takes place, 14 days after the expiry of the period in which the meeting should otherwise have taken place.

11 Protocol Referee Procedure

11.1 For the purposes of assisting the parties in participating in and complying with the Protocol, the parties may agree to engage in the current version of the Protocol Referee Procedure.

11.2 The Protocol Referee Procedure shall be published from time to time jointly by TeCSA and TECBAR on their respective websites.

12 Limitation of Action

12.1 If by reason of complying with any part of this protocol a Claimant's claim may be time-barred under any provision of the Limitation Act 1980, or any other legislation which imposes a time limit for bringing an action, the Claimant may commence proceedings without complying with this Protocol. In such circumstances, a Claimant who commences proceedings without complying with all, or any part, of this Protocol must apply to the Court on notice for directions as to the timetable and form of procedure to be adopted, at the same time as he requests the Court to issue proceedings. The Court will consider whether to order a stay of the whole or part of the proceedings pending compliance with this Protocol.

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The Hon. Mr Justice David Barniville

President of The High Court

David Barniville was appointed a judge of the High Court in December 2017 after almost 27 years in practice as a barrister and Senior Counsel. He was the judge in charge of the Commercial Division of that Court (2019-2021). He was also designated as the Arbitration Judge under the Arbitration Act 2010 to hear all arbitration related matters in the High Court prior to his appointment to the Court of Appeal. He assumed that role again following his appointment as President of the High Court in July 2022. He was also previously the judge in charge of the Strategic Infrastructure List in the High Court (2018-2019). David was appointed to the Court of Appeal in August 2021. He was appointed President of the High Court in July 2022. In July 2018, David was appointed as a member of Ireland's National Group on the Permanent Court of Arbitration in The Hague. He is a member of the Board of Trustees of the Academy of European Law (ERA) and of the Board of Trustees of BAILII (the British and Irish Legal Information Institute). David was the President of the Association of Judges of Ireland (2019-2021) and is Chair of the Judges Forum of the International Bar Association (IBA). Prior to his appointment to the High Court, David was Chairperson of the Council of the Bar of Ireland (2014-2016) and was Chairperson of Irish Rule of Law International (IRLI) (2015-2019). He was a member of the Bars of Ireland and of England and Wales (Middle Temple). David is a Bencher of the King's Inns in Dublin and of Middle Temple in London. David is an Adjunct Professor of Law in the University of Limerick and in the University of Galway. He was elected a fellow of the International Association of Barristers and of the International Academy of Trial Lawyers in the US in 2012 and 2014 respectively and, following his appointment to the bench in 2017, he became a judicial fellow of both bodies.

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Mrs Justice Finola O'Farrell DBE

Mrs Justice Finola O'Farrell DBE was called to the Bar in 1983 by Inner Temple and took Silk in 2002. She was appointed as a Recorder in 2007 and made a Justice of the High Court (Queen's Bench Division) in 2016, assigned to the Technology and Construction Courts, part of the Business and Property Courts. Prior to her judicial appointment, Mrs Justice O'Farrell DBE had over 30 years experience as a leading barrister in construction, engineering, energy, ship building and information technology cases. She acted regularly as counsel or arbitrator in international arbitrations and is an accredited adjudicator and mediator.

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