

## Judicial review and statutory adjudication

Whether statutory adjudication in Ireland is amenable to judicial review is a question that has, in absence of a definitive jurisprudential position, generated much legal debate in recent years.

One of the first cases to consider this issue was the case of *O'Donovan v Bunni* [2020] IEHC 623 where the applicants sought the continuation of a stay placed on an adjudication process pending a judicial review as to whether the adjudicator had jurisdiction to hear the dispute in question. In that instance, the High Court found that the interests of justice were best served by staying the adjudication process pending the determination of the applicants' judicial review proceedings.

In the case of *John Paul Construction Limited v Tipperary Co-Operative Creamery Limited* [2022] IEHC 3 ("*John Paul*") (which we considered in a previous [article](#)) Simons J. further considered the issue noting that while the Construction Contracts Act 2013 (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*". Simons J. also noted that the Act is "*silent on whether judicial review lies to restrain an adjudicator from reaching a decision on a pending adjudication*". On the facts of that case it was unnecessary for the Court to address the "*difficult question of whether adjudication under the Construction Contracts Act 2013 is amenable to judicial review*". The issue has therefore rumbled on, continuing to occupy the minds of those involved in adjudications in Ireland.

### Before or after?

The judgment in *K&J Townmore Construction Limited v Keogh* [2023] IEHC 509 ("*Townmore*") has gone some way towards addressing the "*difficult question*" referred to in *John Paul*. The key question for the Court in *Townmore* was whether a challenge to an adjudicator's jurisdiction should be determined by the High Court before or after an adjudication process is complete. In other words, whether the question of jurisdiction is to be decided upon by means of judicial review or as part of the enforcement proceedings envisaged by the Act.

The Applicant in *Townmore* sought leave to judicially review the adjudicator's decision on jurisdiction on the basis that the dispute before him was not a payment dispute as envisaged by the Act (the case instead involved a premature and invalid payment claim and also a damages claim arising from delay and disruption). The Applicant maintained that the adjudicator had no jurisdiction to deal with the matters referred to him and that it should not be forced to participate in an adjudicative process, which in its opinion, lacked jurisdiction. The adjudicator in this matter had refused to accede to the Applicant's calls for his resignation and instead issued a non-binding conclusion that he had jurisdiction. The adjudicator concluded that any challenge to his jurisdiction "*would be a matter for a court to rule on in any proceedings that may arise following [his] decision*".

The Respondent's position was that enforcement proceedings after an adjudicator's decision were the more appropriate forum for any challenge to the adjudicator's jurisdiction on the basis that an adjudication decision was "*not self-executing*" and but had to be enforced by the High Court pursuant to the Act (and Order 56B of the Rules of the Superior Courts).

## Clarity at last?

In deciding this key issue the Court stated that it was “*crucial to understand the rationale for the [Act] in the first place*”, being to ensure that parties to a construction contract are paid quickly in order to ensure that they do not go out of business due to cashflow difficulties caused by late payments. The Court noted that the Act embraces the “*pay now, argue later*” principle meaning that an adjudication process could lead to a party being paid monies which are subsequently found not to be due. However, it is clear that the intention of the legislature was to provide a “*quick and cheap dispute resolution procedure*” to deal with construction payment disputes. In this regard, the Court found that the expedited resolution of payment disputes by means of adjudication was in the public interest.

The Court also had regard to the fact that any adjudication decision is not enforceable until the High Court has confirmed the decision in enforcement proceedings.

Therefore if the Court permitted the Applicant to judicially review the adjudicator’s jurisdiction it would, in the Court’s view, run contrary to the prompt payment intention of the Act and the public interest.

In coming to this conclusion the Court also had regard to the following factors:

- (i) The delays likely to be caused to adjudications by allowing judicial reviews to take place prior to the adjudication process being concluded;
- (ii) The potential for “*litigation blackmail*” by a financially powerful employer or main contractor over the other party to a construction contract;
- (iii) The fact that the legislature did not provide for an adjudicator’s decision being judicially reviewed but instead the Act provided that an adjudicator’s decision may be enforced by enforcement proceedings (at which point any jurisdictional challenge could be dealt with);
- (iv) The Act does not provide for an extension to the 28-day time period for the adjudication process in the event of a judicial review challenge – meaning that if leave for judicial review was granted the adjudicator’s jurisdiction would “*automatically cease at the end of the 28-day period*”;
- (v) Allowing the jurisdiction of adjudicator’s to be judicially reviewed prior to any decision could “*incentivise employers/main contractors to*” bring such proceedings in order to delay payments to contractors;
- (vi) The adjudication process could result in an award acceptable to both parties;
- (vii) Judicial review proceedings would prevent an adjudicator from exercising the statutory role to which they were appointed;

- (viii) The enforcement process provided for in the Act and Order 56B allows the Court to consider the adjudicator’s jurisdiction prior to enforcement; and
- (ix) The Court has a discretion not to grant judicial review particularly where there is an alternative remedy available. This matter involved a dispute between two private parties and therefore a private law remedy (which included ability to challenge jurisdiction at enforcement stage) was preferable to a public law remedy.

In light of all of the above factors, Twomey J. refused to grant leave for judicial review to the Applicant and found that if it were to accept the Applicant’s arguments it “*would amount to a reversal of the ‘pay now, argue later’ principle into an ‘argue now, pay later’ principle, the exact reverse of the intention of the Oireachtas in enacting the 2013 Act*”.

## Conclusion

The judgment in *Townmore* brings some welcome clarity to the “*difficult question*” of whether an adjudication process may be challenged by way of judicial review but it is important to flag that this query in *Townmore* arose after the preliminary dispute on jurisdiction, before the substantive dispute progressed. Therefore the question remains open as to whether judicial review is an available remedy *after* the substantive dispute and after the adjudicator’s decision on that substantive dispute has been made. The enforcement process envisaged in the Act and provided for in the Rules of the Superior Courts is once again endorsed in *Townmore*. While it is clear from the judgment that the Courts will not halt or judicially review the adjudication process at an early stage in the process, after the preliminary decision on jurisdiction, the question as to whether judicial review would be available at a later stage, after a decision on the substantive dispute, remains open.

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