APPROVED **[2026] IEHC 5**

THE HIGH COURT

2025 308 MCA

IN THE MATTER OF THE CONSTRUCTION CONTRACTS ACT 2013

BETWEEN

TENDERBIDS LTD
TRADING AS BASTION

APPLICANT

AND

ELECTRICAL WASTE MANAGEMENT LTD

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 12 January 2026

INTRODUCTION

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

NO REDACTION REQUIRED

2. The resolution of these proceedings requires the court to address three aspects of the Construction Contracts Act 2013 as follows. The first issue concerns the definition of a "*payment dispute*" for the purposes of the Act. The second issue concerns the nature and extent of the arguments which can be put forward in opposition to an application to enforce an adjudicator's decision. This issue entails consideration of the question of whether a party is entitled to resist enforcement on grounds which were not articulated at adjudication, as the forum of first instance. The third issue concerns the payment claim notice procedure. This issue entails consideration of the question of what consequences, if any, follow for a paying party if it fails to deliver a response to a payment claim notice.

NOMENCLATURE

3. The following naming conventions have been adopted in this judgment. The parties will be described by reference to their status under the construction contract. The applicant will be described as "*the contractor*"; the respondent will be described as "*the employer*".

4. The shorthand "*default decision*" or "*default direction to pay*" will be used to describe what the contractor contends is the consequence for a paying party of failing to respond to a payment claim notice, namely, that the payee is entitled, by default, to an adjudicator's decision directing payment in the amount specified in the payment claim notice.

5. It should be explained that there is express provision made under the equivalent UK legislation for a default decision of this type. An adjudication which seeks such a default decision is sometimes referred to in the English case law as a

"*smash and grab*" adjudication. For the reasons explained in *Aakon Construction Services Ltd v. Pure Fitout Associated Ltd* [2021] IEHC 562 (at paragraphs 39 to 46), the English case law must be approached with a degree of caution and cannot simply be "*read across*" to the Construction Contracts Act 2013. The starting point for any exercise of statutory interpretation must be the language of the legislation itself.

OVERVIEW OF THE CONSTRUCTION CONTRACTS ACT 2013

6. The Construction Contracts Act 2013 has put in place a statutory scheme whereby payment disputes under construction contracts can be referred to mandatory adjudication. An adjudicator's decision is *provisionally* binding on the parties and is subject to summary enforcement. This approach is sometimes referred to informally as "*pay now, argue later*".

7. The logic of the "*pay now, argue later*" principle is that the appropriate remedy for a party, who is aggrieved by an adjudicator's decision, will normally be to pursue the underlying dispute in subsequent arbitral or court proceedings. Such proceedings will entail a fresh hearing of the underlying dispute, untrammelled by anything said or done by the adjudicator. The arbitral or court proceedings do not take the form of a challenge to, or review of, the adjudicator's decision. Rather, they are standalone proceedings and the outcome of same will supersede the adjudicator's decision (which is only *provisionally* binding). In the interim, the losing party is expected to discharge the sums awarded in the adjudicator's decision: these payments can be recouped if the arbitral or court proceedings are ultimately successful.

8. Leave to enforce an adjudicator's decision will generally be allowed once the formal proofs, as prescribed under the Construction Contracts Act 2013 and Order 56B of the Rules of the Superior Courts, have been established.

9. The nature and extent of the High Court's discretion to refuse to enforce an adjudicator's decision has been described as follows in *John Paul Construction Ltd v. Tipperary Co-Operative Creamery Ltd* [2022] IEHC 3 (at paragraphs 9 to 12):

> "Importantly, the High Court retains a discretion to refuse leave to enforce an adjudicator's decision. This is so notwithstanding that, on a narrow literal interpretation of section 6 of the Construction Contracts Act 2013, there might appear to be an automatic right to enforce once the formal proofs have been met.
>
> The High Court will not lend its authority to the enforcement of an adjudicator's decision, even on a temporary basis, where there has been an obvious breach of fair procedures. This restraint is necessary to prevent an abuse of process and to uphold the integrity of the statutory scheme of adjudication. It would, for example, be inappropriate to enforce a decision in circumstances where an adjudicator had refused even to consider a right of set-off which had been legitimately asserted by the respondent. It would be unjust to enforce such a lopsided decision.
>
> The existence of this judicial discretion represents an important safeguard which ensures confidence in the statutory scheme of adjudication. It should be reiterated, however, that once the formal proofs as prescribed under the Construction Contracts Act 2013 and Order 56B of the Rules of the Superior Courts have been established, then leave to enforce will generally be allowed. The default position remains that the successful party is entitled to enforce an adjudicator's decision *pro tem*, with the unsuccessful party having a right to reargue the underlying merits of the payment dispute in subsequent arbitral or court proceedings. The onus is upon the party resisting the application for leave to demonstrate that there has been an obvious breach of fair procedures such that it would be unjust to enforce the adjudicator's decision, even on a temporary basis. The breach must be material in the sense of having had a potentially significant effect on the overall outcome of the adjudication.

> One inevitable consequence of the existence of this judicial discretion is that parties, in an attempt to evade enforcement, will seek to conjure up breaches of fair procedures where, in truth, there are none. At the risk of belabouring the point, the discretion to refuse to enforce is a narrow one. The High Court will only refuse to enforce an adjudicator's decision on the grounds of procedural unfairness where there has been a blatant or obvious breach such that it would be unjust to enforce the immediate payment obligation. The court will not be drawn into a detailed examination of the *underlying merits* of an adjudicator's decision under the guise of identifying a breach of fair procedures."

10. The court will also refuse to enforce an adjudicator's decision where the underlying dispute is not one which is properly amenable to statutory adjudication. The legislation confers a special status upon an adjudicator's decision, and it would undermine the legislative intent were the "*pay now, argue later*" principle to be erroneously extended to disputes other than those identified in the Construction Contracts Act 2013. Accordingly, one of the first matters to be considered by the court, in determining an application to enforce an adjudicator's decision, is whether the adjudicator had jurisdiction over the underlying dispute. See, generally, *Connaughton v. Timber Frame Projects Ltd* [2025] IEHC 469.

PRINCIPLES OF STATUTORY INTERPRETATION

11. The resolution of the present proceedings entails the interpretation of a number of concepts under the Construction Contracts Act 2013. It is salutary, therefore, to recall the principles governing statutory interpretation.

12. The proper approach to statutory interpretation has been restated by the Supreme Court in *Heather Hill Management Company v. An Bord Pleanála* [2022] IESC 43, [2024] 2 IR 222, [2022] 2 ILRM 313 ("*Heather Hill*").

Murray J., writing for the Supreme Court, emphasised that the literal and purposive approaches to statutory interpretation are not hermetically sealed. In no case can the process of ascertaining the legislative intent be reduced to the reflexive rehearsal of the literal meaning of words, or the determination of the plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and purpose for which, it was enacted. Rather, it is necessary to consider the context of the legislative provision, including the pre-existing relevant legal framework, and the object of the legislation insofar as discernible.

13. The words of the section are the first port of call in its interpretation, and while the court must construe those words having regard to (i) the context of the section and of the Act in which the section appears, (ii) the pre-existing relevant legal framework, and (iii) the object of the legislation insofar as discernible, the onus is on those contending that a statutory provision does not have the effect suggested by the plain meaning of the words chosen by the legislature to establish this. The "*context*" that is deployed to that end, and "*object*" so identified, must be clear and specific, and, where wielded to displace the apparently clear language of a provision, must be decisively probative of an alternative construction that is itself capable of being accommodated within the statutory language.

14. Finally, having regard to a specific submission made on behalf of the employer, which invites the court to draw certain inferences from the parliamentary history of the Construction Contracts Bill, it is appropriate to cite the following passages from *Heather Hill* in full (at paragraphs 117 to 119 of the reported judgment):

> "First, 'legislative intent' as used to describe the object of this interpretative exercise is a misnomer: a court cannot peer

> into minds of parliamentarians when they enacted legislation and as the decision of this court in *Crilly v. T. & J. Farrington Ltd.* [2001] 3 I.R. 251 emphatically declares, their subjective intent is not relevant to construction. Even if that subjective intent could be ascertained and admitted, the purpose of individual parliamentarians can never be reliably attributed to a collective assembly whose members may act with differing intentions and objects.
>
> Second, and instead, what the court is concerned to do when interpreting a statute is to ascertain the legal effect attributed to the legislation by a set of rules and presumptions the common law (and latterly statute) has developed for that purpose (see *D.P.P. v. Flanagan* [1979] I.R. 265 at p. 282 per Henchy J.). This is why the proper application of the rules of statutory interpretation may produce a result which, in hindsight, some parliamentarians might plausibly say they never intended to bring about. That is the price of an approach which prefers the application of transparent, coherent and objectively ascertainable principles to the interpretation of legislation, to a situation in which judges construe an Act of the Oireachtas by reference to their individual assessments of what they think parliament ought sensibly to have wished to achieve by the legislation (see the comments of Finlay C.J. in *McGrath v. McDermott* [1988] I.R. 258 at p. 276).
>
> Third, and to that end, the words of a statute are given primacy within this framework as they are the best guide to the result the Oireachtas wanted to bring about. The importance of this proposition, and the reason for it, cannot be overstated. Those words are the sole identifiable and legally admissible outward expression of its members' objectives: the text of the legislation is the only source of information a court can be confident all members of parliament have access to and have in their minds when a statute is passed. In deciding what legal effect is to be given to those words their plain meaning is a good point of departure, as it is to be assumed that it reflects what the legislators themselves understood when they decided to approve it."

15. The submission on behalf of the employer is addressed at paragraphs 78 and onwards below.

PROCEDURAL HISTORY

16. The present proceedings come before the High Court by way of an application to enforce an adjudicator's decision. This is the second such application brought between the parties. An attempt had been made to enforce an earlier adjudicator's decision but same failed in circumstances where this court ruled that the adjudication process was a nullity by reason of the failure to serve the notice of referral in the manner prescribed. See *Tenderbids Ltd v. Electrical Waste Management Ltd* [2025] IEHC 139.

17. The events leading up to the present proceedings can be summarised as follows. These proceedings relate to a contract in respect of the construction of a metal waste recycling facility at Tay Lane, Greenogue, Rathcoole, Dublin ("*the construction contract*"). The construction contract was in the form of an RIAI Blue Form, with a contract sum of €6,986,339.73 plus VAT.

18. The contractor had previously served a payment claim notice on 17 May 2024. The employer failed to deliver any response to this payment claim notice. Following the refusal of the application to enforce the first adjudicator's decision, the contractor served a (fresh) notice of intention to refer a payment dispute for adjudication on 18 March 2025. Insofar as relevant, the dispute is described as follows in the notice:

> "The failure of the Responding party to issue a response to the Payment Claim Notice validly issued, results in the full value of the validly issued Payment Claim Notice falling due for payment on the payment due date in line with the Construction Contracts Act 2013.
>
> The failure by the Responding party to pay, (and continued failure to pay), the full value of the validly issued Payment Claim Notice on the payment due date is the payment dispute that is now the subject of Adjudication under this Notice of Intention.

> The Referring Party will be seeking the following decisions:
>
> a. A decision that the Referring Party are entitled, on the basis of no response to the payment claim notice, to payment for the full amount of the validly issued Payment Claim Notice in the sum of €1,402,457.13 excluding VAT.
>
> […]"

19. As appears, the claim in adjudication was predicated, exclusively, on the failure to respond to the payment claim notice. The contractor contended that, by virtue of this failure, the employer was precluded from defending the claim on the merits. Crucially, the employer accepted that this represented the legal position. The adjudicator's decision expressly records that the employer did not deny the interpretation of section 4(3) of the Construction Contracts Act 2013 contended for by the contractor. As discussed shortly, this concession assumes great significance in the present proceedings: the contractor contends that it is not now open to the employer to seek to argue that this does not represent the legal position. See paragraphs 45 and onwards below.

20. The dispute was referred to the adjudicator on 1 April 2025. The adjudicator made his decision on 25 April 2025. The operative part of the adjudicator's decision, insofar as relevant, reads as follows:

> "(a) The Respondent did not issue a payment claim response notice within the required 21 days under the Construction Contracts Act 2013.
>
> (b) The Referring Party is therefore entitled to payment in full for the outstanding amount included in the Payment Claim Notice that remains due and owing in the sum of €1,402,457.13 plus VAT.
>
> […]"

21. As appears, the adjudicator applied a form of default decision-making whereby the non-response to the payment claim notice was treated as determinative of the

payment dispute and resulted in a default direction to pay. This is also evident from the adjudicator's refusal to rule upon the employer's contention that the works, the subject-matter of the payment claim, were variations which had not been authorised under clause 13 of the construction contract.

22. The contractor commenced these enforcement proceedings before the High Court on 2 July 2025. The proceedings were heard on 15 October 2025.

DETAILED DISCUSSION

SEQUENCE IN WHICH ISSUES WILL BE ADDRESSED

23. As flagged earlier, the contractor contends that the employer is precluded from raising the question of whether the Act provides for a "*default decision*" or a "*default direction to pay*" by reason of its having conceded this point in front of the adjudicator. The employer seeks to overcome this (potential) difficulty by counterarguing that the referral to adjudication was itself invalid. The employer's counterargument is somewhat circular. In essence, it is contended that in circumstances where, or so it is said, the Construction Contracts Act 2013 does not allow for a "*smash and grab*" adjudication, an attempt to refer a dispute to adjudication on this basis is invalid as it does not constitute a properly founded payment dispute.

24. This judgment will address the employer's counterargument first, ahead of any consideration of the contractor's argument in respect of the implications of the concession. This sequence is adopted because if the employer's counterargument were held to be well founded, this might be dispositive in that it would imply that the adjudication process was a nullity.

(1). VALIDITY OF REFERRAL / DEFINITION OF "PAYMENT DISPUTE"

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

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

26. On their plain meaning, the words "*relating to payment*" read as qualifying words, delimiting the range of matters which may be referred to adjudication. The qualifying words indicate that not every dispute arising under the construction contract is amenable to adjudication. Rather, the dispute must be one relating to payment. The concept of a "*payment dispute*" has been discussed in detail in *Connaughton v. Timber Frame Projects Ltd* [2025] IEHC 469.

27. The employer contends that the referral to adjudication was invalid in that it did not constitute a "*payment dispute*". The employer makes two arguments as follows. First, it is said that the supposed right asserted by the contractor, i.e. a right to a default decision in its favour by reason of the employer's failure to respond to the payment claim notice, is one which arises under the Construction Contracts Act 2013 alone and not under the construction contract itself. It is said to follow that the contractor's claim falls outside the definition of a "*payment dispute*", i.e. a dispute relating to payment arising under the construction contract. Second, it is said that—on the assumption that the employer succeeds on its substantive argument that there is no provision made under the Act for a default decision—the contractor's claim for a default decision cannot be characterised as relating to a payment arising under the construction contract.

28. The first argument was not pressed in full at the hearing before me. Counsel for the employer refined the argument to posit that the payment claimed must be one which is expressed or stipulated in the contract or implied into the contract by the Act. This refinement was sensibly made for the reasons which follow. The scheme of the Act is that the terms prescribed under the schedule thereto are to apply to a construction contract if and to the extent that it does not make provision for the matters (relating to the amount of, and timing of, payments) specified in section 3. Section 4 also confers "*rights*" additional to any conferred by the terms of the construction contract. For the purpose of the definition of a "*payment dispute*", it is immaterial whether the terms under the schedule and the rights under section 4 are to be characterised as contractual rights (albeit ones which have been imported into the construction contract by statute), or whether, alternatively, same should be characterised as statutory rights which are intended to supplement the rights enjoyed under the construction contract. Irrespective of how same are to be characterised, it is apparent that the terms of the schedule and the rights under section 4 were intended to be enforceable by way of adjudication. The Act advances two related but not identical purposes: (a) to regulate the timing of interim and final payments under construction contracts with a view to ensuring prompt payments, and (b) to put in place an expeditious dispute resolution mechanism which exists in parallel with arbitral and court proceedings. It would be absurd to interpret the Construction Contracts Act 2013 so as to exclude the very rights, which the Act itself confers, from the scope of the adjudication process created under the same Act. Rather, the proper interpretation is that the newly conferred terms and rights are enforceable by way of adjudication.

29. It follows, therefore, that the formulation in *Connaughton v. Timber Frame Projects Ltd* (cited above) should now be read subject to a gloss which reflects this. The controversy in *Connaughton* had been whether a claim for common law damages came within the definition of a "*payment dispute*". The contrast had been between common law damages and a payment which is provided for under the construction contract. It had not been necessary, for the resolution of *Connaughton*, to advert separately to a statutorily conferred right to payment (assuming that is how the terms of the schedule and the rights under section 4 are to be characterised). The logic of the judgment dictates that a claim for such payment also comes within the definition of a payment dispute. The amplified formulation of the concept of a payment dispute should read as follows.

30. The right to refer a dispute to statutory adjudication is confined to circumstances where the dispute relates to a payment which is provided for under the construction contract and/or under the Construction Contracts Act 2013. The referring party must either be asserting or resisting a claim to a payment which is expressed or stipulated in the terms of the construction contract (including any terms implied into the construction contract by the Act) or is provided for under the Act. This element is a prerequisite to a valid referral to statutory adjudication.

31. Turning now to the employer's second argument, this was the principal focus of the submissions at the hearing before me. This argument ran to the effect that because there is no right to a default decision in adjudication, it follows, as a corollary, that a referral which seeks relief in the form of a default decision must be invalid. Here, the contractor had pursued its claim exclusively on the ground that it had a right to a default decision directing the payment of the amount

specified in the payment claim notice. This right was said to derive from the failure of the employer to deliver a response to the payment claim notice.

32. Counsel for the employer submitted that there is no such right conferred by either the construction contract or the legislation. It is further submitted that a claim to a payment to which there is no right cannot comprise a dispute relating to payment arising under the construction contract.

33. The difficulty with the employer's argument is that it posits that the *threshold issue* of whether a dispute is amenable to adjudication can only be answered by the making of a *final determination* on the underlying merits of the dispute. On the employer's argument, the court must first determine whether there is a right to a default decision prior to answering the question of whether the dispute can be referred to adjudication. With respect, this is to invert the statutory scheme. The concept of a "*payment dispute*" is intended to function as a gateway: it delimits the type of disputes which are amenable to adjudication. The gateway ensures that the dispute resolution mechanism is kept within its proper bounds. The Act has been designed to address the need for prompt payments in the construction industry. To this end, an adjudicator's decision is afforded a privileged status: it is capable of enforcement in the same manner as a judgment or order of the High Court. The legislature considered that such a statutory scheme is justified by the exigencies of the construction industry. It did not intend same to be extended beyond payment disputes as defined.

34. The question of whether a referral can pass through the gateway is logically anterior to any assessment of the underlying merits of the dispute. It is a question which is capable of being answered by a consideration of the claim as pleaded. The question is whether the referring party is asserting (or resisting) a claim for

a payment which is said to be provided for under the construction contract and/or under the Construction Contracts Act 2013. If so, then the dispute is amenable to adjudication. This remains the position even if the adjudicator ultimately decides that no payment is due. The adjudicator might have decided, for example, that the claim is time-barred under the terms of the construction contract. The fact that the claim to payment fails does not rob it of its character as a claim for payment, still less does it retrospectively invalidate the referral to adjudication.

35. The threshold issue merely ascertains whether the dispute is one which an adjudicator has jurisdiction to determine. For example, if an adjudicator purported to entertain a dispute which falls outside the concept of "*payment dispute*", e.g. a claim for personal injuries brought by a construction worker, then the adjudication process would be a nullity.

36. The employer's argument mistakenly conflates (i) subject-matter jurisdiction over a dispute with (ii) the underlying merits of the dispute. The two concepts are distinct. This point can be illustrated by the following hypothesis.

37. Suppose that the executing party to a construction contract claims that it is entitled to a payment under the terms of the relevant construction contract. The paying party responds to the claim by saying that any claim to payment is time-barred by reference to a contractual time-limit. The question of whether the executing party is entitled to payment is one which comes within the definition of a "*payment dispute*". Next suppose that—on the proper interpretation of the construction contract—the claim is indeed time-barred. If the adjudicator correctly applies the contractual time-limit and dismisses the claim accordingly, there could be no possible basis for suggesting that the referral to adjudication

had been a nullity. This is so notwithstanding that the payment claim was always unmeritorious.

38. The same analysis holds good in the opposite scenario where the adjudicator *misinterprets* the contractual time-limit and makes a decision directing payment. This mistake in interpreting the construction contract constitutes, at most, an error of law which might, in principle at least, be relied upon as a potential ground for resisting an application to enforce the adjudicator's decision. However, the error of law would not *retrospectively* invalidate the referral to adjudication. The dispute had always been amenable to adjudication and was properly admitted through the "*payment dispute*" gateway.

39. A payment claim may be time-barred, overstated or misconceived; but none of that deprives it of its character, at the threshold stage, as a payment claim. Were it otherwise, what is intended as a gateway would collapse into an advance-determination of the underlying merits of the dispute. To elaborate: on the employer's theory, an adjudicator would only ever have jurisdiction to entertain a meritorious payment claim. An adjudicator would not have jurisdiction even *to dismiss* an unmeritorious claim. This theory inverts the statutory scheme. The "*payment dispute*" gateway is intended to identify the *type* of dispute which is amenable to adjudication. It merely confirms whether an adjudicator has jurisdiction to embark upon the determination of the dispute. Thereafter, the assessment of the underlying merits is a matter for the adjudicator. An adjudicator's jurisdiction to embark upon the assessment of a dispute is not contingent on the adjudicator only ever reaching the legally correct decision nor on the payment claim being a meritorious claim.

40. On the facts of the present case, the contractor at all times asserted a right to a payment under the construction contract read in conjunction with section 4 of the Act. Accordingly, the dispute met the definition of a "*payment dispute*". The payment claim was properly referred to adjudication. Rightly or wrongly, this claim was framed as a right to payment of the full amount specified in the payment claim notice by reason of the employer's failure to respond to that notice. The referral to adjudication cannot be *retrospectively* invalidated—and the adjudicator's decision treated as a nullity—on the basis that the payment claim is one, which on the employer's contended-for interpretation of the Act, could never have succeeded.

41. In conclusion, therefore, the payment claim constituted a "*payment dispute*" for the purpose of the gateway and was properly referred to adjudication. The adjudication process is not a nullity. This is so irrespective of whether the adjudicator's decision is correct or incorrect.

42. Having regard to the findings above, it is not necessary, strictly speaking, to address the separate question of whether the employer's participation in the adjudication process might have constituted a *waiver* of any jurisdictional objection. For completeness, however, the point is addressed briefly below.

43. As explained in *McGill Construction Ltd v. Blue Whisp Ltd* [2024] IEHC 205, a party, who has made an outward representation that they would be bound by a decision of the adjudicator on a jurisdictional issue, should not normally be permitted to resile from that representation. Here, the employer, by expressly conceding the "*default direction to pay*" point, represented that it would be bound by the concession and by the adverse decision which inevitably followed from the concession.

44. The employer seeks to rely on *Tenderbids Ltd v. Electrical Waste Management Ltd* [2025] IEHC 139. This reliance is misplaced in that the responding party in that case (on the facts, the same company as in this case) did not participate in the adjudication process at all. Accordingly, no question of waiver or representation can have arisen. This is because, perhaps paradoxically, a party who adopts the high-risk strategy of not participating in an adjudication avoids the potential pitfall of waiver or representation. Here, the employer not only participated in the (second) adjudication but expressly conceded the "*default direction to pay*" point. It follows, therefore, that even if—contrary to the finding above—the subject-matter of the referral trespassed beyond a "*payment dispute*", the parties would be regarded as having waived any jurisdictional objection by their conduct and/or as having conferred an *ad hoc* jurisdiction upon the adjudicator.

(2). NEW ARGUMENTS AT ENFORCEMENT STAGE

45. The employer objects to the enforcement of the adjudicator's decision on the ground that same is erroneous in law in circumstances where—or so it is said—there is no provision made under the Construction Contracts Act 2013 for a default direction to pay.

46. However, no such objection was ever articulated before the adjudicator at first instance. Indeed, the employer had actually *conceded* before the adjudicator that the contractor's interpretation of the legislation was correct. This is a serious failing. Generally, the failure to raise a point before the adjudicator will be fatal to any attempt to rely on that point to resist subsequent enforcement proceedings. There is both a principled and a pragmatic reason for this.

47. The principled reason is that it would undermine the purpose of the legislation, i.e. to provide an expeditious dispute resolution mechanism, were the enforcement stage of the process to become mired in a *de novo* hearing of the merits of the payment dispute, with all the attendant delay and cost. The role of the High Court, on an enforcement application, is a narrow one. The High Court is concerned, primarily, with confirming that the referral was in respect of a "*payment dispute*" and that the formal proofs have been met.

48. The pragmatic reason is that it will be very difficult for a party to demonstrate that there had been a breach of fair procedures or an error of law by the adjudicator unless they had sought to raise the issue in the context of the adjudication. A party who has, for example, conceded a particular legal issue in the adjudication cannot sensibly complain thereafter that the adjudicator should have decided the issue differently.

49. The parties are expected to present their case in full to the adjudicator. This is because the Act envisages that the payment dispute will, initially, be heard and determined by the adjudicator alone. The High Court's role is confined to considering whether an adjudicator's decision should be enforced on a provisional basis, i.e. pending any arbitral or court proceedings. The enforcement procedure provided for under the legislation is *summary* in nature. The High Court is not acting as a court of review, still less as a court of appeal, from the adjudicator's decision.

50. The general position is that, provided the formal proofs have been established, the High Court will make an order enforcing the adjudicator's decision. It is only in exceptional cases—for example, where it has been demonstrated that the adjudicator lacked jurisdiction to embark upon consideration of the payment

dispute or where there has been an obvious breach of fair procedures—that the High Court will exercise its discretion to refuse to enforce.

51. It will not normally be possible for a party, who has participated in the adjudication process without objection, to resist enforcement proceedings by raising an objection for the first time before the High Court. For example, a participating party who makes no objection to the adjudicator's jurisdiction to embark upon consideration of the payment dispute will generally be regarded as having waived any objection. Equally, it will be difficult for a party to assert that there has been an obvious breach of fair procedures unless the breach relates to an attempt by them to make a submission during the course of the adjudication process.

52. It would defeat the "*pay now, argue later*" principle, which underpins the Act, to treat an enforcement application as a *de novo* hearing wherein the court entertains new arguments for the first time. The intent of the legislation is that the adjudication process and subsequent summary enforcement proceedings allow for an expeditious determination, on a *provisional* basis, of the dispute between the parties which triggers an immediate payment obligation. The parties remain at large to litigate the underlying dispute by way of arbitral or court proceedings thereafter. Nothing in the adjudication process confines or limits the parties in the arguments that they can make in any such subsequent arbitration or litigation. It is neither necessary nor appropriate for the High Court to carry out a *de novo* hearing, in the context of an enforcement application, in circumstances where there is an adequate alternative remedy available to the parties, i.e. by way of arbitration or litigation. To allow the parties rerun the

adjudication process in the context of an enforcement application would create inevitable delay and defeat the legislative objective of expedition.

53. Accordingly, it is only in exceptional circumstances that the High Court will entertain an argument which was not made at first instance. For the reasons which follow, the present proceedings meet this requirement for exceptionality.

54. The question of whether a default direction to pay arises under the Construction Contracts Act 2013 is one which transcends the facts of this particular case. The question goes to the very core of the statutory scheme of adjudication. Whereas it is open to the legislature to circumscribe the extent of the procedural rights afforded at first instance (where there is a right to a full hearing by way of arbitral or court proceedings thereafter), it is not open to an adjudicator to deny a right of defence *without* legislative authority. If, on the proper interpretation of the Act, it does not provide for a default direction to pay, then it is imperative that this be declared now rather than have the contended-for error replicated in other adjudications. The question has been fully and carefully argued by experienced counsel in these proceedings and it is, therefore, appropriate to decide the point.

55. It should be acknowledged that there is something unattractive about allowing a party, who had conceded a point before the adjudicator, to commit a *volte-face* and to argue the self-same point in enforcement proceedings. However unattractive this may seem, it serves the greater good to permit this to happen in the exceptional circumstances of the present case having regard to the fundamental significance of the legal point now raised. In this regard, it should be recalled that part of the rationale for the presumptive rule against permitting a party to raise new arguments in enforcement proceedings is to ensure the effectiveness of the overall system of adjudication and enforcement. In the

exceptional circumstances of the present case, this has to yield to another principle of systemic importance, namely that adjudications be carried out in accordance with fair procedures to the extent required under the Act. The legality of an approach which involves denying a right of defence in certain circumstances should be subject to scrutiny by the courts.

56. On this one occasion, a party will be permitted to raise a new argument in the interests of ensuring the integrity of the overall system of adjudication and enforcement. Any windfall to the recalcitrant party might be balanced by an appropriate costs order. The court may exercise its discretion in relation to the awarding of legal costs to ensure procedural discipline. The court might decide, for example, that the party who, exceptionally, has been permitted to raise a new argument should be required to pay the other side's costs, in whole or in part, to reflect the delay and disruption caused by the eleventh-hour nature of the argument.

57. For these reasons—and these reasons alone—this court will, exceptionally, permit the employer to raise the default-decision issue at the enforcement stage. In almost any other case, a party who conceded a point at adjudication would be held to that concession. The present exception is justified only because the issue goes to the architecture of adjudication itself.

(3). DEFAULT DIRECTION TO PAY?

58. Section 4 of the Construction Contracts Act 2013 allows the payee under a construction contract to notify a payment claim to the paying party. A "*payment claim notice*" is defined as a notice specifying (a) the amount claimed (even if the amount is zero), (b) the period, stage of work or activity to which the

payment claim relates, (c) the subject matter of the payment claim, and (d) the basis of the calculation of the amount claimed.

59. If the paying party contests the amount claimed, then they are expected to deliver a response to the payment claim notice within twenty-one days. Given that the principal disagreement in the present proceedings centres on the consequence, if any, of the failure to deliver a response, it is appropriate to set out the sub-sections in full:

> "(3) If the other party or specified person referred to in subsection (1) contests that the amount is due and payable, then the other party or specified person—
>
> (a) shall deliver a response to the payment claim notice to the executing party, not later than 21 days after the payment claim date, specifying—
>
> (i) the amount proposed to be paid,
>
> (ii) the reason or reasons for the difference between the amount in the payment claim notice and the amount referred to in subparagraph (i), and
>
> (iii) the basis on which the amount referred to in subparagraph (i) is calculated,
>
> and
>
> (b) if the matter has not been settled by the day on which the amount is due, shall pay the amount referred to in paragraph (a) to the executing party not later than on that day.
>
> (4) Where a reason for the different amount in the response is attributable to a claim for loss or damage arising from an alleged breach of any contractual or other obligation of the executing party (under the construction contract or otherwise), or any other claim that the other person alleges against the executing party, the response shall also specify—
>
> (a) when the loss was incurred or the damage occurred, or how the other claim arose,
>
> (b) the particulars of the loss, damage or claim, and

(c) the portion of the difference that is attributable to each such particular."

60. The purpose which the exchange of a payment claim notice and the paying party's response is intended to serve has been described as follows in *Connaughton v. Timber Frame Projects Ltd* [2025] IEHC 469 (at paragraphs 22 to 24):

> "To elaborate: the scheme of the Construction Contracts Act 2013 is to enhance the position of the party executing the contract works by regulating the timing and enforcement of payment claims. This is achieved, first, by stipulating that a construction contract must make provision for the amount of each payment, the payment claim date, and the date upon which payment is due. The Act then regulates the making of, and response to, payment claims. The paying party may seek to resist a payment claim by raising any defence or set-off which would reduce or exclude the liability to make the contractual payment. The paying party should, in the first instance, provide particulars of the asserted defence or set-off in its response to a payment claim notice. Thereafter, the Act puts in place a mandatory dispute resolution mechanism whereby, in the event of a payment dispute between the parties, these matters can be agitated by way of adjudication.
>
> There is an organic link between the provisions of section 4 which regulate the making of, and response to, a payment claim notice; and those of section 6 which provide for adjudication in the event of a payment dispute. The legislative intent in obliging the paying party to particularise its reasons for not discharging a payment claim notice (in full or at all) is two-fold. First, it allows the executing party to understand the rationale upon which its payment claim is being resisted. If the executing party accepts the rationale and does not pursue the payment claim, then there will be no payment dispute between the parties. Second, in the event that the executing party does not accept the rationale, the parameters of the payment dispute between the parties will have been delineated in the exchange of notices and this will assist in the formulation of a referral to adjudication.
>
> The purpose of the analysis above is to illustrate the organic link between the provisions regulating payment claim notices and those establishing a dispute resolution mechanism by way of statutory adjudication. This reflects the principle of statutory interpretation that regard must be

> had to the context of the section and of the Act in which the section appears, and to the object of the legislation insofar as discernible. Adopting this approach, it is apparent that the term "*payment*" has a specific meaning under the Construction Contracts Act 2013 and contemplates a payment provided for under a construction contract. The object of the Act is to enhance the protections available to the party executing works under a construction contract, i.e. the contractor or sub-contractor, by putting in place an expedited procedure for the resolution of payment disputes by way of statutory adjudication. The term "*payment*" bears the same meaning throughout sections 3, 4, 5 and 6."

61. The question which arises for determination in the present proceedings is what are the consequences, for the paying party, of its *failing* to serve a response to a payment claim notice. More specifically, the question is whether the sanction for this failure is that the paying party forfeits any entitlement to defend a claim in adjudication on its merits.

62. The analysis requires consideration of the wording of the section itself and of the broader context of the Construction Contracts Act 2013 as a whole.

63. The section provides that if a party "*contests*" that the notified amount, i.e. the amount stated in the payment claim notice, is due and payable, then that party "*shall*" deliver a response specifying the prescribed information. The response should state the amount which the paying party proposes to pay.

64. The section is silent as to what is to happen in the event that no response is delivered to a payment claim notice. It is nowhere expressly stated that—in the absence of having delivered a response to the payment claim notice—the paying party is required to pay the amount specified in the notice. This is to be contrasted with the approach taken under the section to the contingency of the paying party having proposed to pay a lesser amount in its response to the payment claim notice. It is expressly stated that the paying party "*shall pay the amount*" by the day on which the amount is due.

65. The legislation thus expressly regulates the position where a response is delivered proposing a lesser amount: the paying party is required to pay the nominated amount by the due date. Yet the Act contains no equivalent express provision addressing the contingency of a complete failure to respond.

66. Of course, the fact that the Act is silent on the question is not necessarily determinative. The exercise of statutory interpretation is not confined to attributing meaning to the express language; on occasion, it may also entail consideration of what may properly be *implied* from the language used and the legislative context. This is especially so in instances where a statute prescribes a particular procedural requirement, but does not expressly state what the consequences of non-compliance are to be.

67. The controversy in the present proceedings centres on whether, in order to give effect to the purposes of the Construction Contracts Act 2013, it is proper to imply the following terms into the legislation. First, an obligation to pay the amount specified in a payment claim notice *unless* a response has been delivered within time. Second, and as a corollary of the first, an entitlement on the part of the payee to a default decision in the amount specified in the payment claim notice.

68. The argument in favour of the implication of these terms is elegant in its simplicity. A paying party, who "*contests*" that the amount stated in the payment claim notice is due and payable, is required under statute to deliver a response. It is said to follow, as a logical corollary, that a paying party who elects *not* to deliver a response must be taken as *not* contesting the claim, i.e. as admitting that they are obliged to pay the notified amount. If the paying party fails to discharge the notified amount, the payee is entitled to proceed to adjudication

and to obtain an award in the notified amount. The only basis upon which the paying party might seek to resist an award is by establishing that the payment claim notice is invalid: the paying party cannot contest the claim on the underlying merits. It is said that any other interpretation would undermine the object of the Act to enhance the protections available to the party executing the works under a construction contract, i.e. the contractor or sub-contractor, by putting in place an expedited procedure for the resolution of payment disputes by way of statutory adjudication.

69. It has to be acknowledged that this argument has its attractions. If its analysis of the Act were correct, this would have the virtue of ensuring that the statutory requirement to deliver a response to a payment claim notice cannot be ignored with impunity. The difficulty with the argument, however, is that it necessitates attributing to the Oireachtas an intention which cannot be ascertained from the Act itself.

70. The worthy sentiment that there should be some consequence for the failure to comply with the statutory imperative to respond to a contested payment claim is not a legitimate guide to statutory interpretation in circumstances where it is not possible to ascertain what the Oireachtas intended that consequence should be. It is unclear whether the supposed consequence, i.e. a preclusion on contesting the underlying merits of the amount specified in the payment claim notice, extends to court and arbitral proceedings, or whether, alternatively, it is confined to an adjudication. There are a number of policy choices open as to what the consequence for non-response should be. At one end of the spectrum, the consequence might simply be to allow the payee to invoke the adjudication process immediately once the prescribed twenty-one day period has passed

without a response. Put otherwise, the failure to respond would be regarded as crystallising a dispute. At the other end, the consequence might be that a paying party who fails to respond to a payment claim notice should be precluded from ever contesting the underlying merits in any forum, i.e. the consequence would extend beyond adjudication and would also infect arbitral or court proceedings.

71. The contractor contends that the consequence should be short-lived and confined to an adjudication which seeks an award in the amount specified in the payment claim notice. The contractor disavows any suggestion that the failure to respond should infect any subsequent arbitral or court proceedings. Indeed, the contractor accepts that the failure to respond does not even preclude the employer from pursuing a subsequent adjudication which seeks to measure the true value of the works the subject of the first adjudication. This is subject to the proviso that the employer must discharge the amount payable under the first adjudicator's decision. It is suggested that this interpretation is proportionate to the purpose of the legislation and the underlying policy of "*pay now, argue later*". As a result of its own default in delivering a response to the payment claim notice, the employer suffers a short-lived detriment in that it is subject to an immediate payment obligation. The employer's entitlement to a determination on the merits of the underlying payment dispute remains intact.

72. It is not at all clear that this is the only proper implication to be drawn from the Act. On at least one view, the terminus of the contractor's argument, if followed through to its logical conclusion, is that a paying party who fails to respond to a payment claim notice should be precluded from ever contesting the underlying merits in any forum. This is because there is nothing in the wording of section 4 of the Act which indicates that the payment claim notice procedure is intended

to have relevance *only* in the context of an adjudication. The Act advances two related but not identical purposes: (a) to regulate the timing of interim and final payments under construction contracts with a view to ensuring prompt payments, and (b) to put in place an expeditious dispute resolution mechanism which exists in parallel with arbitral and court proceedings. It is open to debate as to whether the payment claim notice procedure is directed principally to the first of these two legislative purposes. The procedure applies to all construction contracts. It is correct to say that the procedure will assist in the formulation of a referral to adjudication in that the parameters of the payment dispute between the parties will have been delineated in the exchange of the payment claim notice and the response thereto. But it can equally be said that the procedure will assist in the formulation of a claim in arbitral or court proceedings. It should be explained that whereas one party can compel the other party to submit to adjudication, there is nothing in the Act which mandates that the parties are obliged to pursue an adjudication if neither wishes to do so. The parties are at liberty to pursue arbitral or court proceedings alone. It would seem to follow, therefore, that the payment claim notice procedure might be the prelude to arbitral or court proceedings without there having been any adjudication. It is not immediately obvious as to why, on the contractor's argument, a failure to deliver a response to the payment claim notice should have no consequence for the defence of arbitral or court proceedings but is fatal for an adjudication. This distinction is not apparent from the wording of either the section which creates the payment claim notice procedure nor the section which creates the right to refer a payment dispute to adjudication.

73. The contractor has, for sensible reasons, structured its argument in an attempt to confine the loss of the right to defend a claim on the merits to cases of adjudication. This argument seeks to avoid the very real difficulties which a greater loss would entail. It would be challenging to persuade a court that—absent express statutory language to like effect—a party should be precluded from ever contesting the underlying merits of a payment dispute in any forum by reason of their having failed to deliver a response to a payment claim notice.

74. The courts, in the interests of justice, lean in favour of a determination of litigation on the *merits* (rather than preventing a party from having access to the courts for procedural reasons including culpable delay) (*McGuinn v. Commissioner of An Garda Síochána* [2011] IESC 33, *per* Murray J.). Whereas the Rules of the Superior Courts ("*RSC*") do make provision for the entry of judgment in default of appearance or defence, this is subject to procedural safeguards such as the requirement for a warning letter and the potential for setting aside a default judgment in exceptional circumstances. These rules cannot, of course, simply be read across to the payment claim notice procedure under the Construction Contracts Act 2013. What can be said, however, is that the RSC reflect a more general principle that fair procedures dictate that a party should not be shut out from having a claim against them determined on the merits without good cause and without advance warning. It is at least arguable that this requires that the consequence be spelt out in the legislation and not left to be inferred.

75. In a sense, however, the contractor's argument proves too much. The argument illustrates the breadth of the consequences which *might* have been prescribed for the failure to respond to a payment claim notice. These range from having to

suffer a decision by default in an adjudication, at one end, to the loss of the right to defend the payment dispute on the merits in any forum, at the other. It can be said that each form of consequence advances the purpose or object of the legislation in that each acts as a deterrent against non-compliance. In each instance, the defaulting party suffers some degree of sanction. The flaw in the contractor's argument is that there is nothing within the Act which makes it possible to ascertain which of the potential forms of consequence the Oireachtas has chosen. In the absence of any such guidance, it would represent judicial law-making for the court to choose one over the others. As explained in *Heather Hill* (at paragraph 116 of the reported judgment), it is impermissible to impose upon legislation an outcome simply because it appears reasonable or sensible to an individual judge or aligns with his or her instinct as to what the legislators would have said had they considered the problem at hand.

76. It is necessary to distinguish between (i) construing statutory language in its proper context, and (ii) supplying, by judicial choice, a consequence which the statute has not expressed and for which no clear and specific legislative intention can be inferred. Where a statute prescribes a procedure but does not specify the consequence of non-compliance, the court may, in an appropriate case, imply a consequence that is decisively supported by the statutory language and context. But where multiple, materially different consequences are plausible, and in the absence of textual or contextual guidance, it would represent judicial law-making for the court to make the policy choice.

77. This is especially so in circumstances where the Act provides for payment of the amount proposed in a response to a payment claim notice (section 4(3)(b)) but contains no corresponding provision addressing the contingency of the paying

party failing to deliver any response. The absence of any corresponding express obligation to pay the amount specified in the payment claim notice, in circumstances where no response has been delivered, is a strong indicator that the court should not supply such an obligation by implication.

ATTEMPT TO RELY ON PARLIAMENTARY HISTORY

78. Counsel for the employer invited the court to draw certain inferences from the parliamentary history leading up to the enactment of the Construction Contracts Act 2013. Counsel drew attention to the following three matters. First, the Bill as initiated had made express provision to the effect that the paying party may not withhold any part of a payment of a sum due under a construction contract unless they have given effective notice of intention to withhold payment. This express provision was subsequently deleted from the Bill in consequence of a government-sponsored amendment. Second, the explanatory memorandum accompanying the Bill had stated, in substance, that absent an effective notice of intention to withhold, the amount claimed was to be paid in full. Third, an amendment was made to the long title: the Bill's reference to regulating payment "*and certain other matters under construction contracts*" does not appear in the Act.

79. Counsel submitted that these matters support an inference that the Oireachtas had carefully considered—but ultimately rejected—the notion of introducing some sort of default payment obligation in circumstances where the paying party failed to respond to a payment claim notice. The logic of the submission being that section 4 of the Construction Contracts Act 2013 should not now be

interpreted so as to introduce, by stealth, the very thing which the legislature had rejected.

80. With respect, this submission cannot be accepted. It is long since established that the task of statutory interpretation is to ascertain the meaning of the enacted words, objectively, in their statutory text, context and purpose. As was noted in argument before me—and consistent with *Crilly v. T. & J. Farrington Ltd* [2001] IESC 60, [2001] 3 IR 251 and the passages from *Heather Hill* (cited at paragraph 14 above)—the court should not rely on debates or sponsors' explanations to construe a statute.

81. Having regard to these principles of statutory interpretation, the following three observations can be made. First, the employer is correct that the Act, unlike the Bill, contains no *express rule* to the effect that a failure to deliver a response to a payment claim notice should eventuate in a default direction to pay. That omission is not determinative. The question remains whether the enacted text of section 4, read as a whole and against the scheme of the Act, implicitly gives rise to a default direction to pay.

82. Second, the explanatory memorandum cannot be regarded as a reliable guide to what the Oireachtas intended. At the very most, the explanatory memorandum reflects the initial views of the Bill's sponsor, the late Senator Feargal Quinn, at the time he introduced the Bill. It does not necessarily reflect the settled compromise embodied in the Act which was reached after the Bill had been carefully considered by both Houses of the Oireachtas and in Committee. The proper inquiry is whether the words which the Oireachtas enacted support the implication contended for. If an implication is said to arise, it must be plainly

required by the statute's text and structure; mere appeal to what the sponsor once proposed will not suffice.

83. Third, the only *possible* relevance of the parliamentary history is that it indicates that the question of whether express provision should be made in the Bill for a default direction to pay had been canvassed. In particular, at Committee Stage Mary Lou McDonald, T.D. had proposed an amendment to section 4 which would have introduced an express obligation to pay the amount claimed in the payment claim notice in the absence of a response. See Select Sub-Committee on Public Expenditure and Reform debate, Wednesday, 12 June 2013. The Minister of State at the Department of Finance, Brian Hayes, T.D., had offered a number of reasons as to why the amendment was unnecessary. In particular, he explained that he had been advised that an obligation to make an interim payment was a *contractual matter* that could be enforced in the courts:

> "[…] I have been advised that an obligation under the contract to make an interim payment is a contractual matter that can be enforced in the courts. In the context of the current Bill, if a payment has not been made the contractor, or the subcontractor, is entitled to sue because the contract must cover staged payments. The Bill also provides the contractor, or subcontractor, with another mechanism to take action by suspending work if they so choose. For that reason we do not believe that the amendments are necessary and also given the fact that the contract is already in place and provides for obligations on all parties."

84. The point of referring to this now is not as a possible guide to the interpretation of the Act (which would be impermissible), but rather to illustrate the separate and distinct point (discussed earlier) that there were a range of *policy choices* open to the legislature as to how practical effect might be given to the payment claim notice procedure. Unless it is apparent from the text of the Act as a whole what policy choice the Oireachtas intended to make, it would represent judicial

law-making to hold in favour of any particular one of the candidate policy choices.

CONCLUSION AND PROPOSED FORM OF ORDER

85. The adjudicator erred in law in determining that the employer's failure to deliver a response to the payment claim notice triggered an entitlement, on the part of the contractor, to payment in full for the amount specified in the payment claim notice. This is not the proper interpretation of the Construction Contracts Act 2013. The Act does not provide for such a default direction to pay.

86. The contractor has invited the court to "*read in*" such a default direction to pay, contending that it would best reflect the "*pay now, argue later*" principle which is the animating principle of the legislation. For the reasons explained earlier, it is not possible to ascertain from the Act as a whole that the Oireachtas intended that a default direction to pay should be the consequence for a failure to respond to a payment claim notice. There are a number of policy choices open as to what the consequence for non-response should be. At one end of the spectrum, the consequence might simply be to allow the payee to invoke the adjudication process immediately once the prescribed twenty-one day period has passed without a response. At the other end, the consequence might be that a paying party who fails to respond to a payment claim notice should be precluded from ever contesting the underlying merits in any forum, i.e. the consequence would extend beyond adjudication and would also infect arbitral or court proceedings. There is nothing within the Act which makes it possible to ascertain which of the potential forms of consequence the Oireachtas has chosen. In the absence of any

such guidance, it would represent judicial law-making for the court to choose one over the others.

87. The "*pay now, argue later*" principle does not, in and of itself, allow the consequence to be ascertained. As discussed, there are a number of candidate consequences all of which, to a greater or lesser extent, provide a deterrent against non-response, e.g. accelerated adjudication, default direction to pay in adjudication, default direction to pay in arbitral or court proceedings. Each can be said to advance the principle to some degree.

88. The fact that an adjudicator has erred in law in reaching their decision will not normally result in the High Court refusing an application to enforce the adjudicator's decision. The statutory scheme envisages that the appropriate remedy will, generally, be for the dissatisfied party to pursue arbitral or court proceedings. Any overpayment can be recouped in such proceedings. This is reflected in the maxim "*pay now, argue later*".

89. Nevertheless, the High Court retains a discretion to refuse to enforce an adjudicator's decision by reason of an error of law. Here, the error of law goes to the very core of the adjudication process and compromises the fairness of same. The adoption of a default direction to pay has the practical effect that the paying party, who failed to respond to a payment claim notice, will be precluded from defending a claim in adjudication on the merits. This is so notwithstanding that this preclusion is not provided for under the Construction Contracts Act 2013. Such a default direction to pay cuts against the general, background principle of natural justice that a party who will be adversely affected by a decision which is enforceable under statute, albeit on a *provisional* basis only, is normally entitled to be heard on the merits. Whereas it is open to the legislature

to circumscribe the extent of the procedural rights afforded at first instance (where there is a right to a full hearing by way of arbitral or court proceedings thereafter), it is not open to an adjudicator to derogate from fair procedures without legislative authority. Accordingly, this court refuses, in the exercise of its discretion, to make an order enforcing the adjudicator's decision in this case.

90. The application to enforce the adjudicator's decision has been refused notwithstanding the concession made by the employer in front of the adjudicator. In almost any other case, the making of this concession would have been fatal to an attempt to resist enforcement proceedings. Here, however, the court's refusal to enforce is informed not by any procedural unfairness caused to the employer specifically, but rather is intended to ensure the integrity of the statutory scheme. An adjudicator cannot, by adopting an interpretation unsupported by the Act, create a form of default decision-making which excludes the possibility of any consideration of the underlying merits of the payment claim. The court should not lend its authority to enforcement of a decision whose operative premise entails a form of default decision-making that the legislature has not enacted.

91. The employer's *volte-face* should not be allowed to pass without any repercussions. The litigation conduct of a party is something which a court can have regard to in allocating costs under section 169 of the Legal Services Regulation Act 2015. My *provisional* view is that the contractor should be entitled to recover at least part of the costs of these proceedings as against the employer. Whereas the employer had been successful in resisting the application to enforce the adjudicator's decision, it did not succeed on one issue, namely, the issue in respect of the definition of a "*payment dispute*". This issue took up a significant part both of the written submissions and of the oral hearing. Further,

and as flagged at paragraph 56 above, the court may exercise its discretion in relation to costs to ensure procedural discipline as appropriate. Here, the employer, having conceded the default-decision point in front of the adjudicator, committed a *volte-face* in these enforcement proceedings. This represents a departure from the ordinary discipline of the statutory scheme and has entailed additional cost and disruption. It may be appropriate that a participating party, who, exceptionally, has been permitted to raise a new argument, should be required to pay the other side's costs, in whole or in part, to reflect the delay and disruption caused by the late argument.

92. The proceedings will be listed for submissions on legal costs and the form of the final order on 26 January 2026.

Appearances

Ailill O'Reilly SC and Conor Duff for the applicant instructed by Byrne Wallace Shields LLP
John Trainor SC and David O'Brien for the respondent instructed by AMOSS LLP