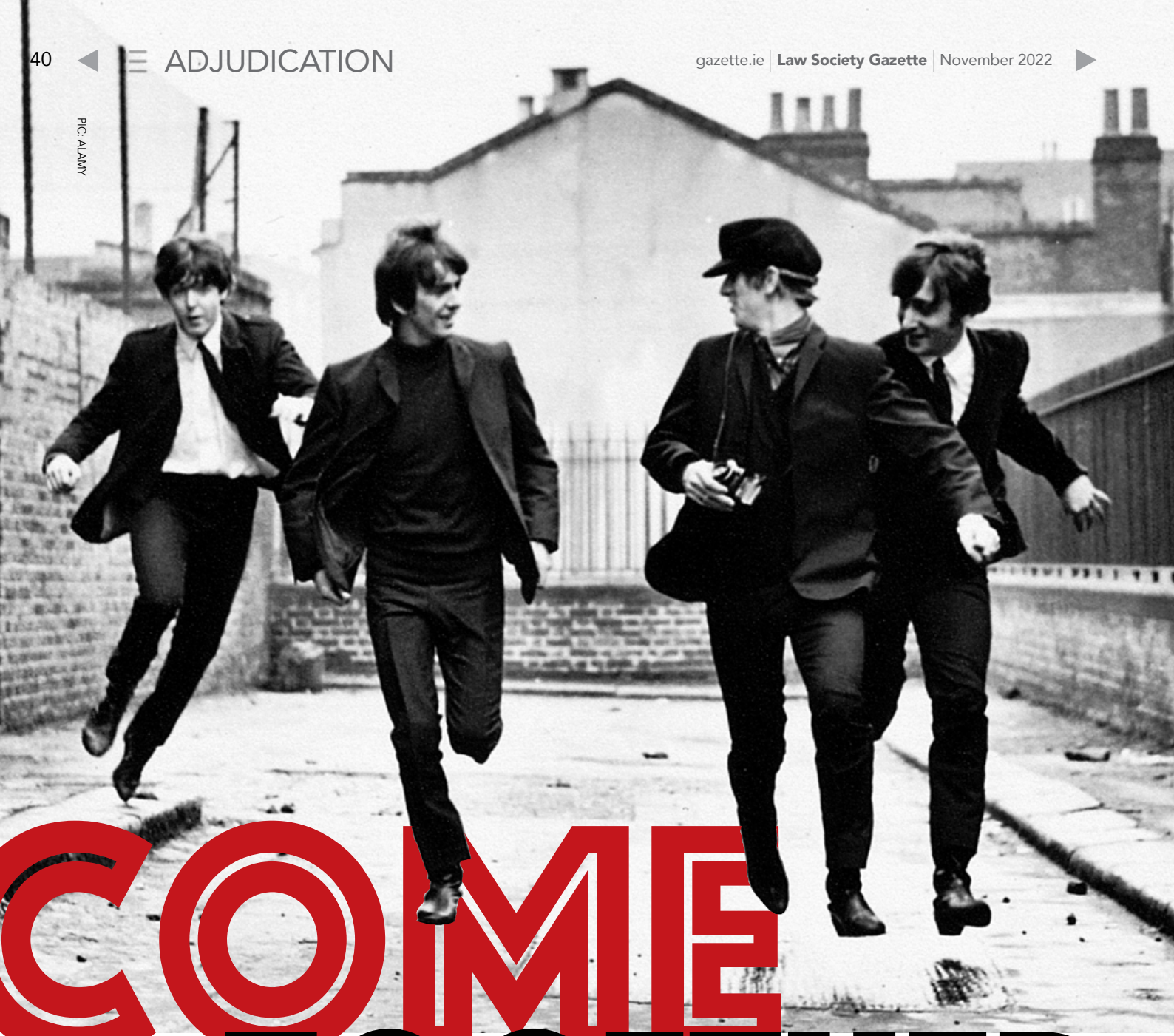

PIC: ALAMY

COME TOGETHER

The *Construction Contracts Act* and statutory adjudication in Ireland – how are we doing so far, and can we do better? Deirdre Hennessey and Éamonn Conlon SC get marking the papers

The *Construction Contracts Act 2013* came into force on 25 July 2016. We are all aware of the genesis of the act, and the fact that its primary purpose was to regulate payments in the construction industry by regulating the way in which payments are to be set out in construction contracts. The act also introduced a new statutory process for construction payment disputes in order to allow for cashflow on projects to be protected by resolving any disputes in a timely manner on an interim binding basis.

The act has been operating now for six years and, therefore, now is a good time to review how it is performing and whether there are particular changes and/or updates to the act that should be considered in order to improve its purpose for the construction industry.

Parties were initially slow to take up the adjudication option pursuant to the act but, gradually, more and more cases are now referred to adjudication. Between July 2020 and July 2021, a total of 51 cases were referred to the Construction Contracts Adjudication Panel seeking the appointment of adjudicators. It is likely that further cases were also referred to adjudication that were not referred to the panel.

Of the parties in dispute during that period (which was 'year five' of the operation of the act), 19 of the cases were between subcontractors and main contractors, while 12 were between the main contractor and employer. The bulk of the disputes related to either interim or final payments.

Both the regulation of the payment process and the adjudication process were a welcome introduction for the construction industry, whereby payments were often bogged down for lengthy periods of time in dispute processes, holding off cashflow on projects.

The industry has embraced the adjudication process to a greater extent in recent years. But how are the act and the adjudication process operating – and are there any improvements that could be made to them, based on current experience, in order to allow the act to better service the industry?

Payment disputes

The definition of 'payment dispute' in section 6(1) of the act is vague and circular: "any dispute relating to payment arising under construction contracts". This wording could be interpreted broadly or narrowly. The broad meaning could include any dispute where someone is seeking a payment – and this could, therefore, broaden the dispute from progress of final payments to claims for indemnity, liquidated damages, damages for defects, etc.

A narrow interpretation would mean that the payment dispute would arise only on a payment claim made by the executing party.

The purpose of the act and the adjudication process thereunder was to protect the cashflow for work done and, therefore, we would suggest that the narrower interpretation of the definition of payment dispute would serve the industry better.

Extending the process to cover more complex disputes would stretch the process beyond its useful purpose, turning it into a lengthier and more costly process. Already we have seen some very lengthy and complex disputes referred to adjudication where they would be better served in another forum.

Complex disputes

Where the whole purpose of the act is to provide an efficient and timely decision (which is binding only an interim basis) in order to allow the parties to move on with the project and for payments to be made, allowing complex disputes in adjudication negates the timely nature

of the process and can lead to unfairness, particularly for parties with less resources.

Further, the adjudicator may not have all the skills required to decide on the complex issues whereas, in other forums, they would have more access to expert advice to assist them in the process.

Section 6 of the act requires the adjudicator to reach a decision within 28 days, beginning with the day on which the referral is made, or such longer period as is agreed by the parties after the payment dispute has been referred. The adjudicator may extend the period of 28 days by up to 14 days, with the consent of the referring party.

Where complex disputes are referred, it will often be impossible for the adjudicator to keep to the 28-day period and still give due regard to all the issues. This could lead to bad decisions that might be challenged in addition to being referred onwards to another forum for a final decision, with the adjudication process simply becoming an added layer of expense in the resolution of the dispute.

Having a timely interim binding process for payment disputes is a valuable and useful resource for parties, but its value is only diminished if the scope of the issues before the adjudicator is widened. We would suggest, therefore, that the value of the adjudication process for parties to construction contracts would be better achieved by the narrower interpretation of the definition of payment disputes, and this should be made explicit in the act.

Payment response

Under section 4(2) of the act, if the other party contests the amount claimed in a payment claim notice, they must deliver a response stating the amount proposed to be paid, how it is calculated, and reasons for any difference between that and the claimed amount. This response must be delivered within 21 days after the payment claim date, but there is no provision in the act specifically as to what happens if there is no response notice issued.

> HAVING A TIMELY INTERIM BINDING PROCESS FOR PAYMENT DISPUTES IS A VALUABLE AND USEFUL RESOURCE FOR PARTIES, BUT ITS VALUE IS ONLY DIMINISHED IF THE SCOPE OF THE ISSUES BEFORE THE ADJUDICATOR IS WIDENED

In the recent *Aakon Construction Services* case, the adjudicator had found that the amount claimed must be paid in the absence of a response, and Mr Justice Simons in the High Court on an enforcement application held that it was for the adjudicator to decide whether to take this approach.

The issue itself, therefore, has not been conclusively decided, albeit it would appear from recent decisions that the court may enforce an adjudicator's decision that a response must be delivered or the full amount of the payment claim will be payable, and equally uphold an adjudicator's decision to the opposite effect. This is one issue where the act could usefully be amended to clarify and resolve the uncertainty. We would suggest that it would be logical for the act to provide that the amount claimed in the payment claim notice must be paid where there is a default in issuing a response notice within a particular time period. This is the approach adopted in the UK. If the amount is paid, then the paying party should be able to raise a new adjudication on the 'true value' of the amount owed.

'At any time'

The act provides at section 6(2) that a payment dispute may be referred to adjudication 'at any time'. This serves to contradict the purpose of the act, which is to provide a rapid procedure in order to speed up cashflow on the project. The provision that a payment dispute can be referred to adjudication 'at any time' does not assist this process and can also be unfair, giving the referring party unlimited time to prepare its referral at its leisure, but leaving the responding party very little time to respond to it. In one example, in the case of *O'Donovan v Bunni*, a payment dispute was referred to adjudication more than two-and-a-half years after completion, while an arbitration was in progress.

Secondly, the wording of the act would permit adjudication following a final binding award, and this cannot be what was originally contemplated. We would suggest, therefore, that specific time limits should be provided to allow for a referral in *x* number of days (possibly 42 days) after the payment claim date, or 21 days after the due date when a payment has not been made in accordance with the response, or in the case of a response default.

The party who has to pay because of its own response should be given a time period thereafter (for example, 21 days) to initiate their true-value adjudication. In this way, it is clear to the parties at which point they must refer to adjudication.

Leaving the general term of 'at any time' unchanged allows parties to refer disputes to adjudication on matters that have long been completed, and where parties may no longer have access to all the documents required in order to mount a proper defence.

Such adjudications would make the assessment of the dispute

extremely difficult for the adjudicator, and certainly raises the risk of unfairness for at least one of the parties.

Decisions transparency

The code of practice requires adjudicators to keep information disclosed in an adjudication confidential. We do not see the value of this provision. There does not appear to be anything to prevent the parties from making a decision public, unless they have separately agreed not to, either as a term of the construction contract or otherwise. Transparency would allow for numerous advantages:

- It would increase consistency in quality of decisions,
- It would provide a body of decisions that parties and adjudicators could refer to, providing a bank of precedents allowing more certainty for parties to assess their payment claims and how they would be dealt with in an adjudication, and
- It would be fairer to the parties, since all parties would have the same information. At present, the information is very unevenly spread among advisers who have experience in adjudications, and who will often trade on their knowledge about adjudicators and how they deal with procedural issues, etc. This is unfair to a party who is preparing a claim for the first time and has not previously been involved in an adjudication, or where their advisers have not previously been involved. We would suggest that all adjudication decisions should be published in order to allow for a valuable source of information for construction parties, and firmly believe that this would enhance the process, improve it and, in general, save costs for parties.

Arbitration costs

The current *Arbitration Act 2010* allows parties to make such provision as to the costs of the arbitration as they see fit. The reason for the 2010 change to arbitration law on costs was to give effect to the principle of party autonomy, which underlies the 2010 act and the *UNCITRAL Model Law on International Commercial Arbitration*. But we are well past party autonomy in construction contracts — as the *Construction Contracts Act* and similar legislation throughout the world shows. This legislation imposes a compulsory regime for payments and adjudication because, in many parts of the construction industry, bargaining power is so unequal that party autonomy is not a reality.

In those circumstances, we would suggest that this pre-dispute allocation of costs is unfair, and the *Arbitration Act* itself should be amended to deprive the parties of the effect of any pre-dispute allocation of costs.

In summary therefore, we see five main amendments, which we believe should be considered in order to improve and develop the act and the statutory adjudication process in Ireland and to make it more effective for construction payment disputes:

1) The definition of 'payment dispute' should be defined specifically as a dispute arising from a payment claim notice, rather than the general description currently in the act.
2) The act should specify that the amount claimed in a payment claim notice must be paid in full if there is no timely response notice.
3) The act should impose a time limit for the referral to adjudication and remove the provision of 'at any time'.
4) Adjudication decisions should be published so that a bank of precedents can be available to all parties, and parties can better assess how their payment dispute will be dealt with or is likely to be dealt with. This will allow parties to assess the success and/or failure of their claim prior to the referral.
5) There should be no more pre-dispute allocation of arbitration costs in domestic construction contracts.

The *Construction Contracts Act* and its adjudication process are positive additions to the construction dispute arena in Ireland, but having operated the system for the past six years, we believe it could be further improved and be of better use to parties involved in payment disputes and the construction industry if the above amendments were considered and implemented.

In this way, we believe that parties in the Irish construction market would have available to them a very efficient interim binding process, with clear parameters as to timing and entitlements, which would better serve the original intended purpose of the act.

We are aware that this matter is open to discussion by all, and we believe the industry should strive to continue to improve the act and the adjudication process as it evolves. g

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Deirdre Hennessey and Éamonn Conlon SC are both members of the Law Society's Alternative Disputes Resolution Committee.

LOOK IT UP

CASES:

- *Aakon Construction Services Ltd v Pure Fit Out Associated Ltd* [2021] IEHC 562
- *O'Donovan v Bunni* [2020] IEHC 623

LEGISLATION:

- *Arbitration Act 2010*
- *Construction Contracts Act 2013*
- *UNCITRAL Model Law on International Commercial Arbitration* (1985)