

Construction Adjudication in Ireland

Anthony Hussey

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The Construction Contracts Act 2013 introduces adjudication for the construction industry in Ireland for the first time. The essence of adjudication is in providing a means whereby disputes as to payment under a construction contract are resolved quickly and cheaply. The key feature distinguishing adjudication from other processes is that the money found due by the adjudicator must be paid pending the outcome of arbitration or litigation. Its primary function, therefore, is to ensure cash flow for contractors and sub-contractors.

Leading construction lawyer Anthony Hussey's new book is the first to provide a section by section analysis of the Act itself, an analysis of the Code of Practice, and a discussion of the likely constitutional issues to which the legislation will give rise.

This practical legal reference is aimed at all those involved in construction contract disputes, be they lawyers, architects, engineers, quantity surveyors, contractors or sub-contractors.

Anthony Hussey specialises in Construction Law and acts mainly for contractors and sub-contractors. His expertise in this regard is predominantly in the area of dispute resolution but he also advises on/drafts contract documents and issues of procurement law. He has previously lectured in the law of Contract and Tort for a postgraduate course at Trinity College, Dublin, Ireland, and was also external examiner to the postgraduate Construction Law course run by the engineering faculty of Trinity College.



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Preface

The text of this book has been changed on a number of occasions to allow for different drafts of the Code of Practice and ultimately the Statutory Instruments giving legal force to the Code published on the 5th July 2016 and revoked and republished on the 25th July 2016.

As of the 26th July 2016 the Act is in force and applies to all contracts entered into after the 25th July 2016. The Code of Practice is in force and new Rules of Court have been introduced. Six years after inception, and three years after being signed by the President, the legislation is finally ready to make its impact. On the whole it is being welcomed by the industry, albeit more warmly by sub-contractors than main contractors. The industry desperately needs a mechanism for resolving disputes other than arbitration or litigation. Disputes in the industry are inevitable and common place. The industry cannot afford to have arbitration or litigation as the final resort. Although adjudication is not final in theory, in practice it does provide the final solution in the vast majority of cases.

The legislation is in many respects flawed in its detail. The big challenge for the industry is to persuade the Courts to uphold and support the legislation notwithstanding these flaws and the inherent resistance to a system which openly provides for rough justice albeit, in theory at any rate, on a temporary basis.

Throughout the text I have used abbreviated descriptions for legislation and reports. These are listed in an appendix. I have also for brevity described the laws of England and Wales and those of Scotland in relation to adjudication in a generic manner given that there is, on this issue, very little difference between the two.

This book is intended for a wide audience comprising of developers, contractors, sub-contractors, engineers, architects, quantity surveyors, lawyers and others involved in construction projects. In so far as it necessarily involves issues of legal interpretation, it does rely to some extent on comparative analyses of the case law of other jurisdictions. I hope however that I have succeeded in applying a light touch in that regard.

I would like to thank Niall Lawless for the inspiration and encouragement. I would also like to thank my colleagues at Hussey Fraser, Simon Fraser and Siobhan Kenny for their research and contribution and Sandra Shanahan for her patience and exceptional competence in pulling it all together. Last, but by no means least, my thanks to my wife Ursula for her constant support and tolerance.

August 2016
Anthony Hussey

Foreword

The Construction Contracts Act 2013 introduces into the Irish legal landscape a new method of resolving certain payment disputes arising out of construction contracts. When new legislation is introduced, it is always helpful for both legal practitioners and parties working in the relevant field to have access to an informed commentary on the new enactment with helpful guidelines as to how it might operate by reference to other comparable jurisdictions where similar schemes are in place. The author of this text, Mr Anthony Hussey, is an experienced lawyer and arbitrator in the field of construction contracts. He brings his knowledge and expertise to bear on the subject by presenting the reader with a helpful overview of the new legislation and a comprehensive analysis and commentary on each section of the Act. In the absence, as yet, of any Irish jurisprudence on the Act, he makes good use of case law and other materials from jurisdictions with comparable legislation, so as to inform the reader as to the likely effects of the legislation in this state.

The importance of early payment of building contractors and sub-contractors and an efficient and cost-effective resolution of disputes surrounding payment cannot be overestimated. Sadly, it is not uncommon for efficient and capable contractors and sub-contractors to go out of business, because they have not been paid for their work in a timely manner. This has far-reaching consequences for not only the parties concerned and their employees but has a wider knock-on effect on the general economy, which depends on an efficient and productive construction industry. The Irish legislation draws a distinction between main contractors and sub-contractors in so far as measures for determining the timing and amount of payments are concerned. This is different to the legislation in the UK and other jurisdictions and is one of a number of important topics, which are addressed by the author in the text.

In this work, Mr Hussey deals with the scope and ambit of the Act in a comprehensive way. The text sets out in a clear and logical manner references to the Act, with informed commentary and helpful references to guide the reader through the new regime with confidence. From the scope of the Act to the enforcement by the courts of adjudicators' decisions, the new legal landscape

is mapped out clearly and precisely. Mr Hussey has done a great service to the legal profession and to all involved in the construction industry in bringing this work to publication.

Brian J. McGovern
High Court
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July 2016

Abbreviations

The UK Act means The Housing Grants, Construction and Regeneration Act 1996;

The Amending Act of 2009 means the Local Democracy, Economic Development and Construction Act 2009;

The Scheme means The Scheme for Construction Contracts (England and Wales) Regulations 1998, The Scheme for Construction Contracts (England and Wales) 1998 (Amendment) (England) Regulations 2011, The Scheme for Construction Contracts (Scotland) Regulations 1998, the Scheme for Construction Contracts (Scotland) Amendment Regulations 2011;

The New South Wales Act or NSW Act means the Building and Construction Industry Security of Payment Act 1999 as amended most recently in 2014;

The Victorian Act means the Building and Construction Industry Security and Payment Act 2002;

The New Zealand Act means the Construction Contracts Act 2002;

The Isle of Man Act means the Construction Contracts Act 2004;

The Northern Territory Act means the Construction Contracts (Security of Payments) Act 2004;

The Singapore Act means the Building and Construction Industry Security of Payment Act 2004;

The Western Australian Act means the Construction Contracts Act 2004;

The Queensland Act means the Building and Construction Industry Payments Act 2004 as amended by legislation up to 2013;

The Tasmanian Act means the Building and Construction Industry Security of Payments Act 2009;

The Australian Capital Territory Act means the Building and Construction Industry Security of Payment Act 2009;

The Malaysian Act means the Construction Industry Payment and Adjudication Act 2012;

The Irish Act means the Construction Contracts Act 2013.

Reports

The Wallace Report means Discussion Paper – Payment Dispute Resolution in the Queensland Building & Construction Industry, Final Report, Andrew Wallace, Barrister at Law, May 2013.

The Collins Report means The Final Report of the Enquiry into Construction Industry Insolvency in New South Wales, Chaired by Mr Bruce Collins Q.C., January 2013.

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