Public Lecture at Engineers Ireland

on

Adjudication – The Role of the Courts

by

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Note: **This is a corrected and annotated version of a lecture delivered orally by Mr. Justice Clarke.**

Statutory Adjudication

Introduction

The backdrop to this lecture is the passage of the Construction Contracts Act 2013 which I will refer to as the 2013 Act. While the legislation has been passed, it has not yet been commenced. In addition, a code of practice is contemplated by the legislation but has not yet been finalised. The form of statutory adjudication which is at the heart of the 2013 Act is, of course, entirely new in this jurisdiction, although at least broadly similar provisions are in place in both the UK and Australia. As with all new statutory regimes where there is at least a possibility of recourse to the courts, a view as to the sort of legal issues which might give rise to litigation might be considered useful. It is to that topic that this lecture is directed. I might start by making few general observations.

General Observations

Prior to a discussion of the two primary issues which seem to me to arise, it is appropriate to make a few preliminary general observations. The first is the general point that it may well be that the effectiveness, or otherwise, of the 2013 Act may turn out to be as much about trust as about its precise legal consequences. That trust issue has a number of strands. The impression one gets from reading the literature from the UK is that adjudication has gone some way towards supplanting a lot of traditional dispute resolution methods, not least arbitration and perhaps even the courts insofar as there is not an arbitration clause in a contract. Of course, that is not a legal consequence of adjudication. An adjudication is binding only in the short term sense of requiring specific payments to be made. Ultimately, a party can have the same dispute referred to arbitration or litigated in the courts if they want. Depending on the level of trust which the players involved have in the adjudication system, however, the extent to which they will actually resort to a more elaborate final dispute resolution process may well be affected. If the parties are inclined to think that, by and large,

adjudicators get things right, will an affected party really put a lot of time and effort into a major arbitration to second guess what happened in an adjudication? Money will also have passed hands. Thus, the starting position will not be zero but rather whatever position the adjudicator has decided on. Therefore, to win an arbitration in substance, an affected party will have to do better than the adjudicator's award and equally, to lose an arbitration, a party will have do worse than that same adjudicator's award. So there are practical reasons at that level why an adjudication might have the effect of supplanting arbitration at the end of the day. However for this to be so, I do think trust is very important. Parties must ultimately get to trust the process as being both fair and delivering as good a resolution as they are likely to get in any other way.

I think there is also, perhaps, a second question of trust which arises from the perspective of the courts. The adjudication process is obviously new and it may be helpful to draw comparisons between this new process and arbitration. In my experience, the courts have become comfortable with arbitrations, not least since the commencement of the Arbitration Act 2010. A hands-off approach has become increasingly evident although this had been developing over the years anyway, even under the previous legislation. Although, strictly speaking, it is not a question of trust - either the adjudication is legally binding or it is not - it would be naïve, I think, not to take into account the fact that an overall impression on whether a system works well can have at least a subliminal effect on the attitude which the courts take to it and the extent to which the courts will be prepared to countenance interference with it. However, adjudication is new and it always takes a little while for trust to be built. The question of the courts trusting the system may, to some extent, depend on the early experiences which the courts get of considering disputes arising out of the adjudication system. Of course, such disputes are yet to arise, so it is hard to comment on exactly how that will work out.

The next general point I would like to make starts with a view I have about the law generally. There are advantages and disadvantages to a high level of specialisation. Obviously, specialists know a lot about their area. They may not know as much about other areas. People who have very wide general knowledge may consequently not have specialist knowledge in individual areas. Particularly when you encounter a new area, it can be of assistance to consider if there may be at least analogies or parallels

from other parts of the legal system - and I would hope to show later where I think those analogies are in this case. If one is thinking about how this legislation is likely to be looked at in the courts, one may need to look beyond the areas of the law which those in the construction industry may typically think of, for example, arbitration and allied areas, or perhaps contract law from time to time. There are other areas, as diverse as financial services and immigration, which it seems to me have touched on some of the same types of issues which may well arise in the context of this legislation. While they may be areas that many who are specialist in the construction field may not frequently deal with, they have the potential, I think, to have some relevance to manner in which the courts will approach adjudication issues.

The third general observation, which is one I understand my colleague, Peter Kelly, has also made, is that one has to remember, in comparing the Irish situation with the UK situation, that there is a constitutional backdrop in Ireland which does not have a parallel in the UK. In the round, what the Irish courts have considered to be the rules of natural or constitutional justice are not dissimilar to the like rules which apply in the UK but, nonetheless, in Ireland, as a matter of constitutional law, there is implied into any process which is legally binding by statute (and this is a legally binding process by statute), an obligation on the part of anyone making a decision in that process to conduct that process in accordance with the rules of constitutional justice. So this is not just a matter of statutory construction or a matter of whatever guidance may be given in respect of the statutory regime by ministerial order. It is a matter of constitutional law in Ireland. That is something which does not apply in the UK and, therefore, I do not think it can be assumed that the precise way in which the Irish courts will approach issues arising out of adjudication will be identical to the way in which similar questions might be approached in the UK. I should say that I do not think that the approach will be radically different because the broad assessment as to what is or is not a fair process is not dissimilar but one cannot ignore the existence of a constitutional backdrop. This is a longstanding proposition - it goes back to cases like East Donegal Co-operative[1] and the case involving Jock Haughey[2] and the Public Accounts Committee enquiry into funds for Northern Ireland back in early 1970s. It is a clear and consistently applied constitutional requirement that, if a statute provides

[1] *East Donegal Co-operative Livestock Mart Ltd & Ors v The Attorney General* [1970] 1 I.R. 317.
[2] *In Re Haughey* [1971] 1 I.R. 217

for a decision to be made and where such decisions can affect the rights and obligations of parties, then that decision must be made in accordance with particular constitutional safeguards. This is something which cannot be changed by legislation and, certainly, cannot be changed by any form of practice that develops or is provided for in guidelines. It is perhaps, therefore, a stronger requirement in Ireland because of its constitutional provenance than it would be in the UK. I think that this is also an important part of the backdrop.

Potential issues arising under the 2013 Act

My initial impression is that there are, perhaps, two general areas which may lead to controversy, so far as the courts are concerned, in relation to the 2013 Act. The first is the approach which the Courts may take in deciding what amounts to fair process. What appears to be envisaged under the 2013 Act is a much more inquisitorial process than would traditionally be the case in arbitration. The adjudicator will be required to find the facts himself to a significant extent. The adjudicator will obviously be influenced by what the parties offer but, nonetheless, the adjudicator's role is not anticipated to involve the traditional adversarial model which applies both in the courts and, to a large extent, in arbitrations. So, one needs to consider how the courts are likely to approach the requirement for fair process in detail in that context. I will turn to that issue in a moment.

The second question is speed. What the 2013 Act obviously envisages is a very speedy process of adjudication with a decision from the adjudicator in a very short period of time from the commencement of the process. However, what will happen if someone does not do what the adjudicator requires? For instance, an adjudicator requires an employer to give a contractor €526,000. It does not get paid. It is not of much benefit to have the bit of paper from an adjudicator saying you are to get the €526,000 if it is not legally enforceable. Clearly, the backdrop to the question of whether you are likely to be paid or whether there may be wriggle room from the point view of the person who does not want to pay or can not pay, depends on a perception of how enforcement is likely to operate and its ability to operate quickly. Will it operate in an effective way? If one knows it is going to take 35 days from the beginning of the process to get to an adjudicator's award, but that it will also take a further 9 months to get some kind of a useful court order to enforce it, then it slightly

defeats the purpose. So I also want to say a few things about that. I do not think there are any easy answers to this issue as the 2013 Act is quite unspecific about it and there are perhaps things that need to be considered to see how it can be made efficient.

The fair process requirement

Turning to the first of those broad issues, that is, the question of fair process. It is important to look at the way the courts have approached not totally dissimilar issues in other areas. The first question is to characterise the status in law of an adjudicator's award. To what extent can it be said to be final and binding? It can be said that an adjudicator's award is binding in the sense that it has to be paid but it is not irrevocably binding in the sense that a party can still have its dispute ultimately determined by an arbitrator or, if arbitration is not an available option, by the courts. The question then arises as to whether adjudication is really the kind of finally binding decision that requires the full range of constitutional justice entitlements? I suspect the answer to that question is, unfortunately, that "it depends", or "in some circumstances", or "to some extent", but I will try and tease that out.

I do not think that it can be argued that constitutional justice does not apply at all for a number of reasons. Take an example from a different area, the NAMA legislation. This legislation was challenged by companies associated with Mr Patrick McKillen and Mr. McKillen himself; a challenge which ultimately succeeded in the Supreme Court[3]. It is interesting to note what the State's case in that litigation was. The State argued that the transfer of a loan into NAMA did not make a huge amount of difference to the borrower from a legal prospective, whatever about the reputational issue. The State's argument was basically that the money is owed to a bank and all that NAMA does is take over the loan, so that the borrower then owes the money to NAMA rather than the bank but on the same terms. Whatever was to be paid back to the bank, still has to be paid back but now to NAMA. The financial position is unchanged. Most relevant bank loans had terms which would have allowed the bank to sell the loan to another bank without reference to the borrower, so the State's argument was that the transfer does not really make a great deal of difference at least from a legal point of view. It just means you owe a different entity the money on the

[3] *Dellway Investment Ltd & Ors v National Asset Management Agency & Ors* [2011] 4 I.R. 1

same terms. There were some marginal differences – NAMA had some powers that an ordinary bank would not have been likely to have under its lending contract - but, all in all, the State said it was rather marginal. On that basis it was argued that constitutional justice did not apply. The Supreme Court ultimately said otherwise. The Court held that such a transfer does affect a borrower's legal rights and, therefore, a borrower is entitled to some degree of constitutional justice to the extent of being heard about the proposed loan transfer.

Another example which goes back to an earlier era was the *MacPharthalain* case[4] in the environmental field. The case arose out of a plan to develop a landing strip/airport in Connemara. Prior to the introduction of the now elaborate EU arrangements in respect of the protection of areas of conservation, and the like, there was an informal embryonic version of same which introduced a similar approach on a non-statutory basis in Ireland. However, government departments began to act as if the relevant areas were legally designated in a particular way and, for example, there was evidence in the case that the Department of Forestry had refused to give grants for forestation to applicants in one of these areas. The Supreme Court, again, held that, although it was very light touch, such designation still affected a person's rights because, as a matter of practice, the State treated lands as being designated with its attendant consequences – an applicant could not get forestry grants, planning permission, etc. - and therefore some level of constitutional justice had to apply. So, perhaps, the starting point is that the constitutional requirement of fair process necessarily applies in the adjudication process despite the fact that there is a degree of lack of finality about the adjudication decision.

There is, however, a second element to that point. What I think is sometimes missed is that the courts have recognised that the precise type of constitutional justice required can vary significantly depending on the kind of issue which is involved. For example, in *MacPharthalain*, all the Supreme Court said would have to be done by the State was that there had to be some opportunity or means for anyone affected to dispute in advance that an area should be designated. The court did not seem to suggest that there needed to be a hearing as such or any kind of elaborate process.

[4] *MacPhartalainn v Commissioners for Public Works* [1992] 1 I.R. 111 (HC); [1994] 3 I.R. 353

Likewise, the Supreme Court commented in the NAMA case that it was not necessary that there had to be a full hearing involving the question of whether someone's loans went into NAMA. There had to be some process or opportunity for the borrower to put forward whatever case they wanted as to why it should not happen. So, I think it is important to remember that constitutional justice is a slightly moveable feast. It does not necessarily mean the same thing in every type of situation and what is regarded as adequate to deliver a fair process in one type of situation may not be necessary in another. A case, for example, where someone is going to be dismissed from the Civil Service on the grounds on an allegation of corruption may involve a different level of process than a question of whether there should be a designation of an area in a particular way under a particular statute.

I suppose in one sense that is a comfort on this issue but in another sense it makes it difficult to predict with precision what kind of minimum process the courts will say is implied into adjudication in order for it to meet the constitutional obligation of fair process. One may get some hints from other areas. Some guidance, perhaps, can come from the UK decisions. As I have indicated earlier, it seems that this process is at least significantly inquisitorial rather than adversarial – an adjudicator is required to go and find out what the answer is.

Perhaps one area where there has been a fairly elaborate consideration of how constitutional justice applies in an area where the process is partly inquisitorial is the area of immigration law. One might immediately ask what has immigration law got to do with statutory adjudication? However, this is an area where the courts have had to think about how to apply rules which developed in an adversarial system to a partly inquisitorial system and, therefore, if the courts are asking the same sort of question in respect of statutory adjudication, it may well be that the approach, while not necessarily identical, is going to be somewhat similar.

An explanation of the process in immigration is necessary in order to fully understand the point. A person who wishes to apply for asylum must make an application to the Refugee Applications Commissioner. That process is entirely inquisitorial. Interviews are conducted, the Applications Commissioner takes a view on whether the person is

entitled to refugee status and either recommends that it be granted or not. There is then a second layer of appeal to the Refugee Appeals Tribunal, where the process is little bit more adversarial. In particular, a lot of issues have arisen over what is called "country of origin" information. Unlike most legal processes which happen in Ireland, the refugee process is ordinarily concerned with conditions in faraway countries about which we may not know very much and, therefore, the process takes into account reputable information about the country from which the refugee asserts that they came as part of the process of deciding whether their account is credible. There may be UN papers or papers from Amnesty International or reports from other reputable international bodies which confirm that, in this region of that country, people of that ethnicity are subject to adverse treatment by the government or by others, and, therefore, an account that is consistent with that in its detail is more likely to be accepted. The Refugee Appeals Tribunal accumulated a lot of this type of information on many countries, enabling it to consult this information as necessary, whether it be on female genital mutilation in Nigeria or attacks on Christians in some part of world. However, an issue arose as to the extent to which the RAT had to share that information with the person about whom it was making a decision. Essentially, while there are some variations in the decisions of different judges, in the round, I think it is fair to say that the conclusion which has been reached is that, if the decision maker, whether it be the Refugee Applications Commissioner or the Refugee Appeals Tribunal, is going to have significant regard to some piece of information, then they are under an obligation to let the party who could potentially be adversely affected by that information know of same, and give that party an opportunity to make whatever case they want to make on that information in attempt to convince the decision maker that it should not affect their case adversely. For example, an applicant may want to contend that conditions have worsened since that information was compiled. Of course, it is possible that there will not be an answer. Maybe, in truth, the country of origin information makes it clear that they are telling a totally false story; but the important point is that they have to be given a chance.

It seems clear that, even in inquisitorial processes in other areas, the courts have taken the view that there is a constitutional duty on the decision maker to inform those potentially affected by the decision of any materials which are potentially going to affect the judgment. How that works in detail in a construction adjudication process is

something that perhaps needs to be worked out, but, I think it likely that the overall principle will be applied. There is no reason in principle why it would apply in one area and not apply in another area. So that means that if the adjudicator either obtains information, him or herself, or perhaps takes advice from a third party of some sort, which might be useful, and assuming that whatever has been found out is potentially going to have an effect on the view of the adjudicator, I think there is clearly an obligation on the adjudicator to share that information with any potentially affected parties, and give them some opportunity to deal with it. Exactly how the adjudicator does that, as I say, may take a bit of time to work out but I think, and this is echoed in some of the UK cases as well, that if it appears that the adjudicator came to a decision influenced by either his or her own discoveries or information which has been obtained from a party who is either not one of the disputing parties or indeed obtained from only one of the disputing parties, (without it being shared with the other), then that is a potential flaw in the adjudication process which can lead to the process being set aside. It is, however, important to distinguish between actual information not shared and the application of the adjudicator's own general expertise.

Certainly in the asylum area, the courts have taken a practical attitude to importance. If something is of no real importance to the decision, then the fact that the tribunal or the commissioner did not share it has not been found to be a problem. In effect, there is a materiality threshold. But if it is sufficiently material that the adjudicator considers that it might affect the decision in some material way, then there is an obligation to share it. Similarly, there is an obligation to share material information coming in from one of the disputing parties with the other.

The interaction between the statutory time limit and the constitutional requirement for fair process

That leads to, perhaps, another fair process issue, which is as to how the adjudication process will get completed within the 28 day period which the 2013 Act provides for the adjudicator reaching a decision[5]? As I read it, this period can be extended but only with the agreement of the party who sought the adjudication in the first place. So if

[5] Section 6(6) of the 2013 Act

that person refuses, the adjudicator is required to come up with a decision within 28 days.

What if the adjudicator takes the view that it just can not be done in accordance with fair process within that time? I know that in one of the Australian models, there is a provision which allows the adjudicator to simply say that it is impossible to complete the process in the time available and, thereby, extend the time, but there does not seem to be a similar provision here. Exactly what the courts would do in such a situation, where an adjudicator feels that it would be impossible to properly complete the process within the statutory time limit, is an interesting question.

Analogies can be drawn from other situations. One of the few areas where there is an absolute and short end date in a legal process is the examinership process - the corporate recovery process – where there is a 70 day time limit for the process of rescuing the company[6]. It can be extended to 100 days but there is no provision in the legislation for the extension of that 100 day time limit. If the court is considering whether to approve a scheme, it can take time after the expiry of the time limit to reach its decision but the absolute end date for the presentation of a scheme by an examiner is 100 days. If this can not be done, then that is the end of the company as it were.

There was a very difficult, but legally interesting, issue which arose during the examinership of the O'Brien's sandwich franchise[7] where, not unlike many cases in recent times, the real problem was the rent being paid on retail premises and the famous upwards only rent review provisions. The underlying difficulty of the firm, or at least one of them, was that it was paying rents fixed at the height of the boom and they were not sustainable on the current level of business. There is provision in the examinership legislation[8] for the courts to allow, on terms of compensation, parties to get out of leases if appropriate. Given that the landlord normally then becomes only an unsecured creditor, even an award of €1m in compensation may well mean the landlord only gets €100,000 at 10% or €75,000 at 7½%, and so it can be an effective

[6] Section 5(1) of the Companies (Amendment) Act 1990, as amended by section 14 of the Companies Amendment (No.2) Act 1999
[7] *O'Briens Irish Sandwich Bars Ltd v Companies Acts* [2009] IEHC 465
[8] Section 20 of the Companies (Amendment) Act 1990

remedy for the company. But the problem that arose in the O'Brien's case was that, before it got the necessary approval, there were about, if memory serves me right, ten or twelve hearings required to allow different landlords a fair opportunity to be heard as to why their leases should not be surrendered in return for compensation or to fix the amount of compensation. The Court ultimately took the view that it did not have the necessary time to conduct all these hearings in a fair way before the time limit ran out. There was insufficient time to allow each of those hearings to be conducted in accordance with fair process. I suppose what is relevant here is that the court took the view that it could not dispense with fair process. The consequence was that the examinership process came to an end and the company was liquidated. So it seems that the need to comply with fair process overrides practicality. One cannot simply say "I do not have time to do it properly, so I am going to do it a lesser way". One either has to find a way, otherwise the difficult question arises as to what a court is, or the parties are, to do, if an adjudicator comes back and simply says "I can not do this in a fair way within the timeframe allowed".

There are just two other things I would like briefly add about the fair process point. One thing that may be worth thinking about, again as an analogy, is an interlocutory injunction application. (One always has to be wary of analogies because they can always be pushed too far and people can always point to distinctions between what is being compared. I fully accept this is a long way short of an exact analogy and I am not suggesting that a court would necessarily treat it as anything more than just a very vague hint.) What is an interlocutory injunction about? It is about a situation where the court knows that it is going to take some time before the court can finally decide who is in the right or in the wrong, but where it is necessary to decide what is going to happen in the meantime, appreciating that a decision on this may cause someone harm one way or the other. If someone is told to comply with an alleged obligation for the next, say, year and they eventually win the case, then that person will have been made do something which they should not have had to do. Likewise, if a court decides that it is not going to make a party do something pending trial and the other side eventually wins, the successful party has not had the benefit of whatever it sought for a year. That risk arises because a court will not immediately be able to make a final binding decision as the resolution of the full dispute is going to take time.

As I say, the analogy is not complete but there are at least some similarities. What might an adjudicator say? He might say, "in my view you should pay €750,000 now in the light of whatever arguments are put up". Again, that is not the final decision about how much you are going to have to pay even for work done to that point. It can be revisited either in arbitration or, possibly, court proceedings. So it has at least that analogy with the interlocutory injunction. It is a decision on what is to happen for the time being. It affects cash-flow; but it does not necessarily affect the ultimate rights and obligations of the parties. Obviously, everybody would have to concede that if a builder, for example, does not get the money supposedly due now, then he may have significant cash-flow problems – that is the whole point of the adjudication system. If everyone is very solvent, and if one is in relatively stable economic times, what happens today on a temporary basis may not be vital, once you can have the issues finally decided after a full process in the end. But in cases where one or other of the parties may not be completely solvent, or where economic times may be unstable, either very positive or very negative, having to pay out the money now may have a very serious effect, even if a decision to repay the money can be made in two years time. I accept that the analogy is not entirely complete, but it is at least worth noting that the courts accept that the decision at the interlocutory stage in injunction proceedings is a bit more rough and ready than the decision which would be made at end of a final trial which decides the rights or wrongs of all of the issues between the parties. For example, interlocutory injunctions are granted on the basis of the fact that a party puts sufficient affidavit evidence before the court to establish a prima facie case, not that that party will necessarily win in the end. Now I do not think the courts would accept an adjudication on that basis but, nonetheless, it is an indication that there can be at least some flexibility in the process as and between cases which irrevocably determine parties' rights and obligations and ones which are, at least, open to some level of revisiting.

The adjudicator's hearing

This leads to the final point so far as process is concerned, being the question of what kind of hearing is necessitated? Does there have to be a hearing at all? Will there be circumstances where there will have to be oral evidence? What are the limitations on the procedure and discretion of an adjudicator? Firstly, I do not think that the law requires that the process in anyway resemble a court process. The law does not

require that the rules of evidence which apply in a court necessarily also apply in other processes. All the law requires is that the process be fundamentally fair. So an exclusion of anything resembling a court type process is unlikely to be a problem. I do, however, think that an attempt to completely rule out the possibility that there might be a need for oral evidence and cross-examination might run into serious constitutional difficulties.

Some of you may be aware of the legal issues in the Commercial Court over the process which the Financial Services Ombudsman has to go through. The courts starting, I think, with a judgment of Judge Hogan[9], have made it clear that, given that the Financial Services Ombudsman is making a binding decision under statute, and that that decision may depend on deciding between the differing accounts of two people, as sometimes arises in a banking situation, then, it is not constitutionally possible to come to a legally binding decision in that type of situation without there being some ability for the parties to challenge the evidence. Now it may well be that the vast majority of the type of issues which would go to adjudication would not involve facts of that type but, theoretically, they could. Let's say that there is a factual dispute about what was agreed at a site meeting two weeks ago. I know in best practice it all should be taken down very carefully in minutes, it should be signed off by everybody, and there should not be any doubt about it. In the real world, we know sometimes it does not happen quite as neatly as it should. So, if one of the questions which the adjudicator has to decide turns specifically on whether you believe Mr A or Ms B about what happened at that meeting, and one follows the views expressed by Judge Hogan and others on this point, it is hard to see how that issue can constitutionally be resolved without cross-examination or at least the parties having an ability to cross-examine. It may not necessarily apply to all areas where cross-examination would normally happen in an arbitration or in court case, where, for example, there may be cross-examination of expert witnesses about their views. But where it comes down to a pure question of fact, like what actually happened on a particular occasion, then there may be an obligation to allow cross-examination. It is not an interpretation of a document; it is not a professional view as to the proper way to value a piece of work. It depends on who said what to whom and when and how. I

[9] *Lyons & Murray v Financial Services Ombudsman* [2011] IEHC 454

do not think that it is constitutionally permissible to exclude cross-examination in those circumstances and any attempt to do so would likely leave the decision of the adjudicator open to challenge.

That again, perhaps, leads back into the point I made earlier about time. If an adjudicator has to do that, how then is he or she going to get it all done within the timeframe that is allowed? As I say, that is a question to which there is no easy answer.

Timeliness of Enforcement

Before I finish, I just want to briefly touch on the other question I said I would mention, which is the question of the timeliness of enforcement of the decisions of adjudicators. The 2013 Act is relatively imprecise about this. It essentially says that the award can be enforced either by court action or with leave of the court in the same way as any court order[10]. The methods of enforcement of court orders are well known. For example, one can send it to the sheriff or one can register it as a judgment mortgage. There are other options also open. Whether they all work in any particular circumstance is a different question, but the range of available methods of enforcement is clear. What is not clear from the legislation is as to what court process is to take place before the court grants leave. The 2013 Act does not seem to deal with that question. It does not seem to me that it is a matter which would be capable of being dealt with by the Code of Practice because the Code of Practice, under section 9 of the Act, concerns the conduct of the adjudication, not the enforcement of the adjudication award, and, therefore, it does not seem to me that that gap can be filled in by the Code of Practice. It may then be a matter for Rules of Court and that perhaps identifies an area which some thought may need to be given to. As I said at the very beginning, if it is going to take a long time to get the leave of the court to enforce an adjudicator's award, it clearly defeats the purpose of the whole process. So some thought needs to be put into how to devise a very quick but fair method for applying summarily to court to get the leave of the court to turn the adjudicator's award into, effectively, a court order, and to get a decision, in a timely way, on that question if there is any dispute about it. I do not think that is impossible to achieve

[10] Section 6(11) of the 2013 Act

this. There are now a whole range of different types of court applications which are made in a very expeditious manner, but I think some thought needs to be put into the process to be applied here.

One always has to take a slightly cynical view of these things; if someone does not want to pay and there are ways in which they can delay the system, they will try to delay the system. That is a given. Although a system should allow someone who has a genuine concern about the validity of an adjudication award, an opportunity to present their argument, at the same time, that system should not allow people who have no real basis for not paying what the adjudicator has decided, to delay payment by stringing out the process and, thus, defeating the whole point of the timely payment principle which is behind the 2013 Act. And, perhaps, apart from the Code of Practice, it is that area which most needs to have early consideration given to it - what is the court process to be by which leave to treat an adjudicator's award as being the equivalent of a court order is going to be achieved?

Concluding remarks

There, doubtless, will be other problems which will emerge in respect of the legislation but I think those two are the ones which most immediately come to mind, so far at least as the court's likely involvement in the process is concerned. I am not sure there are easy answers to those questions. I have seen some of the drafts of the Code of Practice which have been wandering around. If I had to make one overall suggestion on all of them, it would be that giving greater guidance on what is meant in practice by the obligation to comply with "natural justice" could, perhaps, be useful because the problem that any adjudicator is likely to be faced with is the question – "what process am I to follow"? Am I going to follow a process which will give the parties if they are not happy with the result some real opportunity of setting it aside in court? I am not sure that there is any great guidance proposed at this stage about exactly what that process has to be. One could make a reasonable stab at it but I would have thought that, given that the Code of Practice is meant to be specifically about the conduct of the adjudication, some more detailed guidance rather than generalities might be helpful. The risk, of course, is that someone may say that such guidance is incorrect and that it does not comply with constitutional justice but, on the

other hand, I think it might be better to take the bull by the horns and have slightly more detailed guidance about how the adjudicator should carry out the process.

So if I were to leave you with two suggestions, one is that a close eye needs to be paid to whatever Rules of Court are going to be put in place to allow for the enforcement of adjudication. There certainly have been many cases in the recent past where the courts have been stuck in the very difficult position that legislation has been brought into force without any accompanying Rules of Court. That, of course, is another area where people can cause trouble if they want because the first debate then becomes "what is the court's process?" At least with Rules of Court, one knows what the Court process is meant to be. If there is no specified court process, the court has to effectively adopt and adapt from other procedures. Therefore, a strong case can be made that the Rules of Court should be ready to hit the ground running as soon as the 2013 Act comes into force because it is fairly likely, given the speedy nature of the adjudication system, that there will be early adjudications and I am sure Murphy's law will ensure that there will be early challenges to the results of those adjudications. If that begins to occur at a time before those Rules in are place, then that is a significant problem. So I think point one is that somebody needs now to be thinking about what Rules of Court should be put in place to allow for that. Secondly, perhaps, there might be some merit in trying to work out, by reference to the established jurisprudence of the courts in other similar areas, what kind of process is to be carried out by an inquisitorial adjudicator, would be sufficient to meet the constitutional requirements of fair process. That would provide guidance to an adjudicator on what needs to be done and would also allow the process the best chance of being able to be completed within the timeframe which the 2013 Act requires.