

THE HIGH COURT

[2021] IEHC 575
[2020/872 JR]

BETWEEN

**KEVIN O'DONOVAN
AND**

THE CORK COUNTY COMMITTEE OF THE GAELIC ATHLETIC ASSOCIATION

PLAINTIFFS

AND

NAEL G. BUNNI

AND

JAMES BRIDGEMAN

AND

OCS ONE COMPLETE SOLUTION LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 29th day of July, 2021.

A. Background

1. The Construction Contracts Act 2013 is designed to provide building contractors with a relatively speedy and efficacious way to obtain payment for their services. The Act is commendably short, running to twelve sections (including the section providing for the expenses of the relevant Minister incurred in the administration of the Act, and the section specifying the short title of the legislation and providing for its commencement). Put very briefly, the Act allows a party to a construction contract to refer a payment dispute for adjudication. Very tight time limits are specified in the legislation for the conduct of the adjudication. Unless otherwise agreed by the parties, the adjudicator is drawn from a panel of adjudicators appointed by the Minister. The adjudicator acts impartially and, if he so chooses, on his own initiative in ascertaining the facts and the law in relation to the payment dispute. Each party bears their own costs of the adjudication. The decision of the adjudicator is binding "until the payment dispute is finally settled by the parties or a different decision is reached on the reference of the payment dispute to arbitration or in proceedings initiated in a court in relation to the adjudicator's decision."; section 6(10) of the Act. The decision of the adjudicator "if binding" is enforceable either by action or in the same manner as an Order of the High Court (if this court grants leave for such form of enforcement); section 6(11).
2. The Construction Contracts Act 2013 (Appointed Day) Order 2016 provides for the commencement of this legislation. The Order specifies (at paragraph 2):-

"The 25th day of July 2016 is appointed pursuant to section 12(2) of the Construction Contracts Act 2013 [...] and that Act shall apply in relation to construction contracts entered into after that date."
3. Of the several issues before me in this application, the fundamental one is whether the construction contract governing the relations between the Applicants and the Notice Party postdates the 25th of July 2016, and is therefore capable of reference to adjudication under the 2013 Act.

4. The first Applicant is the chief executive officer and secretary of Cork GAA. The second Applicant is the Cork County Committee of the Association. I will refer to the Applicants as 'Cork GAA'. The Respondents are, respectively, the Chairperson of the Construction Contracts Adjudication Panel (the panel to which I referred at paragraph 1) and the adjudicator appointed to this dispute. The Notice Party ('OCS') is a contractor which carried out electrical works for Cork GAA in connection with the redevelopment of the Pairc Ui Chaoimh stadium.
5. On the 24th of September 2020 OCS served on Cork GAA a notice of intention to refer a payment dispute (arising from the Pairc Ui Chaoimh electrical works) to adjudication pursuant to the provisions of the 2013 Act. On the 9th of October 2020 OCS requested Dr. Bunni to appoint an adjudicator to the dispute. Cork GAA objected to the dispute being referred to adjudication on both procedural and substantive grounds. The substantive ground was that the relevant contract for the works was made on the 10th of June 2016, when the parties agreed on the terms of a Letter of Intent ('the LOI'). The relevant contract was not therefore one entered into after the commencement date of the 2013 Act, which as we have seen was the 25th of July 2016. The 2013 Act therefore did not apply, according to Cork GAA.
6. OCS agreed that the LOI was entered into by the parties, but argued before Dr. Bunni (and, later, Mr. Bridgeman) that the LOI had been replaced by a subsequent contract of the 12th of May 2017. OCS maintained that this subsequent contract ousted the LOI, that the 2017 contract was the relevant agreement governing the relations between the parties in respect of the relevant works carried out by OCS, and that (as this post-dated the commencement date of the Act) the dispute is one which may be referred to adjudication.
7. Notwithstanding the arguments of Cork GAA, Dr. Bunni appointed Mr. Bridgeman to act as adjudicator in respect of the dispute referred by OCS. This decision to appoint was made on the 20th of October 2020. After submissions to him by both Cork GAA and OCS, on the 2nd of November 2020 Mr. Bridgeman delivered a 'View of Adjudicator on Jurisdiction'. Mr. Bridgeman concluded that he could not decide on his own jurisdiction but nonetheless had formed the view (set out at paragraph 54) that:-

"[OCS] is entitled [to] prosecute this Adjudication pursuant to s. 6 of the Construction Contracts Act 2013."
8. By then, on the 28th of October 2020, Cork GAA had withdrawn from the adjudication process "with immediate effect".
9. On the 26th of November 2020 Cork GAA commenced these proceedings for Judicial Review, seeking the following Orders:-
 - "(i) Order of *certiorari* by way of judicial review quashing the decision made by the first respondent on the 20 October 2020 to appoint the second respondent pursuant to

the Construction Contracts Act 2013 ("the 2013 Act") as adjudicator in respect of a dispute between the applicant and the Notice Party ("Decision to appoint").

- (ii) An Order of *certiorari* by way of judicial review quashing the decision of the second respondent of the 2 November 2020, determining that he has jurisdiction pursuant to the 2013 Act to hear and determine the adjudication ("Decision to proceed").
 - (iii) Declarations that the notice of intention to refer the matter to adjudication dated 20 September 2020 and the referral notice, dated the 26 October 2020 are defective and of no legal effect.
 - (iv) Declarations that the first respondent and second respondent erred in law in making their respective decisions.
 - (v) A stay on the implementation and reliance on the Decisions to appoint and proceed and a stay on further progression of the adjudication ending the final determination of these review proceedings."
10. I will deal firstly with the substantive issue between the parties, as both Cork GAA and OCS have invited me to determine this essential difference between them.

B. Can a Reference to Adjudication be made by OCS?

11. This involves the construction of the LOI and the 2017 contract in order to determine exactly what the parties agreed. While both counsel for Cork GAA and counsel for OCS referred me to a limited number of authorities, these essentially involved examples of how courts have, in other circumstances, interpreted different (if similar) contractual provisions. While certain of these authorities were of some limited assistance, the more relevant case law is that from this jurisdiction stipulating how contracts are to be interpreted. This line of authority is so well known, and so settled, that it was not the subject of any real dispute between counsel and does not need to be set out (once again) in any detail in this judgment.
12. The starting point for the analysis of the contractual arrangements entered into between Cork GAA and OCS is the LOI of the 10th of June 2016.
13. To put it in context, before the LOI was issued OCS had submitted a tender on the 7th of July 2015. There was an engagement, at least according to the LOI, between OCS and Cork GAA and with the design team in Value Engineering engaged in respect of the project. All of this led to a revised tender which is attached to the LOI as a link.
14. The LOI then goes on to say:-

"We confirm Cork County GAA Board's acceptance of your revised Tender of €6,799,850 exclusive of VAT, subject to the criteria as listed below and subject to the circumstance and provisions outlined below re the commitment of the Government Grant to Cork County GAA Board. This is a fixed price lump sum figure."

15. The LOI continued:-

“In the unlikely event of the Project ceasing, it is agreed that the Employer will pay to the Contractor, within three months, subject to agreement of all reasonable costs incurred by the Contractor in connection with the Project, together with an allowance for overheads and profit, consistent with the figures entered by the Contractor in the Bill of Quantities in respect of the following: [...]”

A number of matters are then listed.

16. Very importantly, the next section of the LOI reads:-

“Your appointment is subject to compliance with the following

- Conditions of Contract as per the attached Draft Document, dated June, 2016. You received Conditions of Contract at Tender Stage. The Contract cannot be formally signed until EU funding is received.”

17. The appointment of OCS as electrical contractor was subject to a number of other matters, but none of these are suggested to be relevant with the exception of one. The project was to be completed “on or before 2nd June, 2017.”

18. I will return to the Conditions of Contract appended to the LOI shortly. However, before I do so there are two other relevant terms in the LOI to which I was referred.

19. Firstly, there was a requirement that a Bond be provided by OCS. However, it was also stated that a Guarantee of Funding from OCS’s parent company would be acceptable unless “at a later stage” the sponsoring department (the Department of Transport, Tourism & Sport) requests a Bond.

20. Secondly, it was provided that OCS would submit its Progress Claim at the end of the third week of each month to the office of Malachy Walsh and Partners (“MWP”), the engineers acting on behalf of Cork GAA in respect of the project and the authors of the LOI.

21. The LOI concludes with this statement:-

“This Letter of Intent is deemed to be satisfactory to allow you to proceed, pending signing of the Contract.”

22. At the time the LOI was signed, the works on Pairc Ui Chaoimh were about to begin. According to the Grounding Affidavit of Kevin O’Donovan, sworn on behalf of Cork GAA, the authorisation from the European Commission to the Government permitting funding to be granted to the project was approved on 26th of June 2016 and issued the following day. Again, according to Mr. O’Donovan, the Notice Party entered onto the site in early August 2016 and began work.

23. The Conditions of Contract appended to the LOI specified a completion date for the works of the 2nd of June 2017. It also specified a Date for Possession on the 13th of June 2016. That term is defined in the Conditions of Contract (at clause 1) as:-

“The date identified in the Appendix being the date by which the Contractor is to be given non-exclusive possession of the Site for the purpose of carrying out the Works.”

24. In other words, the intention of the parties at the time the LOI was signed was that OCS would enter on site in the very near future, namely three days after the date of the LOI. As it happens, OCS went on site about 8 weeks after the LOI issued. In either of those time periods, the parties understood that final contracts were not going to be in force and this is reflected in the tone and content of the LOI. However, the parties intended and agreed, from the date of the LOI onwards, that a final form of contract would be signed by them.
25. These facts explain the final sentence of the LOI, which I have quoted. Given the imminent commencement of the works, the LOI was enough (or was “satisfactory”) to allow OCS begin work, but the LOI was only enough “pending the signing of the Contract”.
26. Consistent with this interpretation of the LOI is the inclusion in the Conditions of Contract appended to that letter of clause 42. This clause, in its entirety, reads as follows:-

“42 – Interpretation and Administration

The following shall apply in respect of the application and interpretation of this Contract and the parties’ administration thereof:

This Contract and any claim arising hereunder or in connection with this Contract, shall, subject to Clause 38, be subject to and construed in accordance with the laws of Ireland.

Either party hereto may specifically waive any breach of this Contract by the other party, but no such waiver shall be deemed to have been given unless such waiver be in writing, signed by the waiving party and specifically designating the breach waived, nor shall any such waiver constitute a general waiver or a continuing waiver of similar or other breaches of the Contract.

In the event of any provision of this Contract is declared void or unenforceable or becomes unlawful, such provision shall not affect the rights and duties of the parties with regard to the remaining provisions of this Contract which shall continue as binding.

These Conditions of Contract represent the entire agreement between the Parties in connection with the subject matter hereof and it shall supersede and replace any and all prior agreements or understandings, representations or communications

(including any letter of intent) relating to the same subject matter. The Contractor declares that it has not relied on any representations except as expressly set out herein.

This Contract may be amended or modified only in writing by the parties hereto.

The headings and notes herein are for reference only and shall not affect the construction of this Contract.

Any notice required to be given hereunder by either party to the other shall be in writing and shall be served by sending the same by registered or recorded delivery post to the address of the other party and given in the Articles of Agreement herein or to such other address as that party may have previously notified to the party giving notice as its address for such services.

The Contractor shall be deemed to have carefully reviewed the Contract Documents and to have satisfied itself prior to executing this Contract that there were no conflicts and/or inconsistencies and/or ambiguities and/or discrepancies within or between any of the documents forming the Contract Documents, the resolution of which might have a bearing on the Contract Sum and/or the Dates/s for Completion.

In the event of any such ambiguity, conflict, inconsistency and/or discrepancy being discovered in or between the said documents subsequent to the parties entering into this Contract, the Party which has discovered the said discrepancy, ambiguity, conflict and/or inconsistency shall notify the other party in writing as soon as practicable after it becomes aware of such discrepancy, ambiguity, conflict and/or inconsistency and the Employer shall be entitled at its absolute discretion, to determine and Direct the Contractor as to which of the conflicting, ambiguous, inconsistent and/or discrepant obligations and or provisions is/are to prevail.

The Contractor shall comply with whatever provisions it is directed are to prevail and shall be excused compliance with any provisions which it is directed are to be disregarded. The Contractor shall not be entitled to any additional payment (whether by way of adjustment of the Contract Sum or otherwise) and/or any extension of time to the Date/s for Completion as a consequence of having to comply with the prevailing provisions."

27. While the clause does deal with an eclectic mix of topics, its heading ("Interpretation and Administration") and (more importantly) its content makes it plain that at least in part the clause addresses how the Contract is to be interpreted.
28. The relevant portion of the clause, upon which OCS place heavy reliance, clearly provides for the Conditions of Contract to "supersede and replace any and all prior agreements or understandings, representations or communications (including any letter of intent) relating to the same subject matter."

29. Counsel for Cork GAA consistently referred to this as an "entire agreement clause". I am not sure that this assists Cork GAA in any way. If, as Counsel argues, this provision is an entire agreement clause it means that the parties have agreed that the document in which the clause appears constitutes the entire agreement between the parties to the exclusion of every other dealing. When we look at the 2017 Contract, therefore, the appearance of clause 42 in that Agreement means that the 2017 Agreement constitutes the "entire agreement" between the parties to the exclusion of everything else, including the LOI. Describing clause 42 in this way retards rather than advances the case made by Cork GAA.
30. It is submitted by Counsel for Cork GAA that an entire agreement clause should be construed strictly. Reliance is placed on paragraph 26.14 in *McMeel on the Construction of Contracts*:-
- "Whilst the issue has not been explicitly addressed it appears that the general approach of the courts to both entire agreement and non-reliance clauses is to construe them strictly, in the same way that the courts approach exemption clauses sceptically. This is seen in the leading case on the subject. For example, the courts have been reluctant to construe an 'entire agreement' provision standing alone as doing anything more than reducing the scope for arguing that there has been a collateral agreement or term. Furthermore, the court may construe the subject-matter of the agreement to which the 'entire agreement' clause relates restrictively. It must be borne in mind that whilst the construction of the contract, and clauses within it, are a matter of law, the question of what are the terms of the contract (and whether a contract is exclusively a contract in writing) is a question of fact in respect of which the courts must review all the evidence."
31. None of the cases referred to in the footnote of the relevant paragraph are opened to me, though it does appear on considering the description of those cases in the footnote that they dealt with specific contractual arrangements in particular cases. In addition, no submission was made to me as to how a strict construction of clause 42 would differ from a more permissive one. It was (correctly) not argued by Cork GAA that a strict construction allows me in this case to depart from the plain meanings of the words used in the clause.
32. The clear meaning of the clause is that the Contract in which it appears sets out the entire agreement between the relevant parties and that such Contract will supersede and replace any prior agreement.
33. I believe that clause 42 has this meaning both in the LOI and the 2017 Contract.
34. We have seen that, shortly after the LOI was executed, the relevant preconditions set out in that document were met and OCS began work on the site. However, parallel with the work proceeding there was an ongoing exchange of communications between the parties about the contractual arrangements.

35. On the 4th of July 2016 Ms. Anne Horgan of MWP (Cork GAA's engineers on the Project and the authors of the LOI) wrote to John Joyce (of OCS) in the following terms:-

"Good afternoon John,

Further to your request to Declan, attached is the word version of the Conditions of Contract in relation to the above. Please make any changes in red and your contact for agreement to changes, if any, is Seamus Kelly."

36. On the 21st of July 2016 Mr. Joyce replied to Ms. Horgan, enclosing a copy of proposed changes to the Contract.

37. When Mr. Kelly (also of MWP) replied to Mr. Joyce on the 22nd of July 2016, saying that he was on holiday until the 9th of August and would revert then, Mr. Joyce replied that same day, saying:-

"Current plans are that we will have men working on site in four weeks' time. My pressure point is ensuring that we have the important points boxed off on this before then. If this can be kicked off by somebody at your end while you are away it will ensure that we don't have any delays when we need to be on site."

38. Twenty minutes later, Mr. Kelly replied saying:-

"The letter of intent satisfies until the formal contract is signed."

39. This exchange tells us two things. Firstly, even after the LOI was signed and issued, there were still negotiations about certain aspects of the final Contract which would define the legal rights and obligations of the parties. Secondly, and entirely consistent with the LOI itself, the LOI is seen as a temporary arrangement sufficient to allow the works to proceed, but only until the formal Contract was executed.

40. In describing the LOI as a temporary arrangement I do not want to understate its commercial and contractual significance. After some debate, it was ultimately accepted by Counsel for OCS that the LOI did create a legal relationship between the parties. Indeed, it is impossible to believe that the works would have started without that level of assurance for both sides. To that extent, the LOI is more than a statement of intent. However, the LOI itself contains (to use a phrase employed during the hearing) the seeds of its own destruction. It was always intended that it would be replaced by a subsequent contract. If the LOI had never been so replaced, a different legal scenario could arise. However, it was.

41. The changes proposed by Mr. Joyce on the 21st of July 2016 were not addressed by MWP until the 7th of October 2016, when Mr. Kelly put forward counterproposals. His email went on:-

"The final document is subject to the approval of Cork County GAA Board and it is anticipated that the Contract will be signed now as soon as possible.

Please note that the letter of intent issued to you, serves as the commitment by Cork County GAA Board until the Contract is signed. Sisk Limited, main building contractor, are also working to the same type of letter. We believe that this permits you to place all orders to meet the Contract requirements. The reason for this approach, has been explained to Sean McGrath. You will note that the main items are the Parent Company Guarantee and Insurances.”

42. On the 20th of October 2016, Kirsty McCormick (solicitor for OCS) in an email to Mr. Joyce later copied to Mr. Kelly of MWP set out the outstanding issues to be discussed with MWP and its legal adviser. She wrote:-
- “1. The Contract that I amended and sent back included wording that capped our liability to €13 million [...] whilst it would appear that this has been accepted the reference to the cap [...] has been removed. I am therefore unable to determine whether or not it has been agreed.
 2. Clause 21 [...] provided for a limitation period of 6 years; this has been replaced with 12 years. I am unable to understand the requirement here as the collateral warranties will offer the 12 year protection [MWP] requires and a breach of contract limitation for 12 years is excessive.
 3. PI cover – the reason this was removed by me is I had understood there was no onerous on us to ensure against the design. Please could you confirm with Malachy that this is in fact correct, in which case my amendment should remain.
 4. I had removed termination for convenience on 5 days notice as this is simply unreasonable in the context of the services being provided. Cork County Board have the ability to terminate for our breach and I can see no reason why they would want to terminate on 5 days notice. This would leave us with a number of staffing and supplier issues. It will be useful to understand the reasoning behind this clause.
 5. PCG – I had originally understood there was no requirement for a PCG. However, it appears that this is no longer the case. Whilst we don’t see the need for a PCG, given the size and status of One Complete Solutions Limited, should there be a real commercial desire to put one in place I would expect it not to be unconditional or on demand and I am happy to provide a draft that OCS Group Ireland would be comfortable in signing.”
43. In passing this on to MWP, Mr. Joyce stressed that he would “really like to get this resolved as quickly as possible as [he has] suppliers chasing for [purchase orders] and a Board that are reluctant to issue them without the Contract being agreed/signed [...].”
44. On the 29th of November 2016, Mr. Kelly (of MWP) responded to a letter from Mr. Joyce of the 23rd of the same month. This raised continuing issues about three aspects of clause 21 of the draft Contract. Mr. Kelly also said in this letter that the “updated Draft

Contract" was being issued separately for the comments of OCS. Prior to this letter (on the 9th of November 2016) a further marked up version of the parent company guarantee had been sent by Mr. Kelly to Mr. Joyce.

45. On the 15th of February 2017 Mr. Kelly was still writing to Mr. Joyce in the following terse terms:-

"We still don't have a signed Contract. Can we please expedite this."

46. Ultimately, on the 12th of May 2017 a Contract between OCS and Cork GAA was signed by both parties. Whatever the differences in the negotiations, and whatever about the amount of time they had taken, the changes between the conditions of Contract exhibited to the LOI and the terms of the Contract as signed in May 2017 are not earth-shaking. They include:-

- (1) There is a variation of 1.45 euro between the contract price as set out in the original documents appended to the LOI and the contract price in the May 2017 contract. Given that the price in the latter document is €6,799,848.55 this difference is commercially insignificant (to put it mildly) but it does show the attention to detail displayed by the parties in finalising the May 2017 contract.

- (2) The contractual provisions relating to the taking out of professional indemnity insurance for the contractor and any sub-contractors differ between the two versions of the contract. In its original format (as appended to the LOI) the terms read:-

"(d) The Contractor shall take out before commencing the Works professional indemnity insurance in an amount of not less than €6,500,000 (six million five hundred thousand euro) in respect of any one claim or series of claims arising out of any one event and in the aggregate plus two full automatic reinstatements (following exhaustion of each €6,500,000 (six million five hundred thousand euro) limit of indemnity) for a period commencing now and ending 12 (twelve) years after the date/s of Practical Completion of the Works provided always that such insurance is generally available at commercially reasonable rates and terms. The Contractor shall notify the Employer if such insurances ceases to be generally available at commercially reasonable rates and terms in order that the Contractor and the Employer can discuss the best means of protecting their respective interests in respect of the Works in the absence of such insurance. The Contractor shall notify the Employer within 15 (fifteen) working days before the expiry date of any policy if such insurance ceases to be available. As and when it is reasonably requested to so by the Employer, the Contractor shall produce for inspection documentary evidence that its professional indemnity insurance is being maintained. The terms and conditions of the policy of said insurance shall not include any term or condition to the effect that the Contractor must discharge any liability before being entitled to recover from its insurers. The Contractor

- shall not without the prior written approval of the Employer settle or compromise with the insurers that which relates to a claim by the Employer against the Contractor or by any act or omission loss or prejudice the Employer's rights to make or proceed with such a claim against the insurer.
- (e) The Contractor shall ensure that each Sub-Contractor with design responsibility hereto has and maintains in force professional indemnity insurance (or such other appropriate insurance as is agreed by the parties) in respect of the Works with minimum limits of indemnity as specified in the Appendix. As and when it is reasonably requested to do so by the Employer, the Contractor shall produce for inspection documentary evidence that the professional indemnity insurance is being maintained by each Sub-Contractor."

In its executed form in May 2017 the terms read:-

- "d) The Contractor shall ensure that where he relies on Specialist Sub-Contractors for elements of design, he shall ensure that each Sub-Contractor with design responsibility hereto has and maintains in force professional indemnity insurance (or such other appropriate insurance as is agreed by the parties) in respect of the Works with limit of indemnity of €6,500,000 (Six Million Five Hundred Thousand Euro) for each and every Claim. As and when it is reasonably requested to do so by the Employer, the Contractor shall produce for inspection documentary evidence that the professional indemnity insurance is being maintained by ach Sub-Contractor. The onus is on the Contractor solely to ensure that all Sub-Contractors with design responsibility have the required level of Insurance throughout the contract.
- e) The Contractor shall take out before the commencement of the Works and maintain until the issue of the Final Certificate, Product Insurance with a limit of €6,500,000 (Six Million Five Hundred Thousand Euro) covering any liability, loss, claim or proceedings in respect of the matter referred to in Clause 21(a) which insurance shall extend to providing an indemnity to the Employer and any finding institution which provides or agrees to provide funds to facilitate the construction or purchase of the Works. The Contractor shall maintain such insurance provided the same is available to the Contractor at commercially reasonable rates. If not so available, the Contractor shall immediately advise the Employer. The onus is on the Contractor to ensure that where he relies on Specialist Sub Contractors for Product Insurance, he shall ensure that each Sub Contractor has the required minimum limit of indemnity in respect of the Works."

Counsel for OCS does not submit that these changes are significant or insignificant, but does suggest that the parties believed that these changes needed to be made to reflect the final negotiated position. I accept the argument that, even if these and other changes are not on their face particularly material, they do show that the parties took care to embody the final agreed position in a contract which was (at

least in part) studiously negotiated after the LOI was signed by Cork GAA and as the works were progressing to a very significant degree.

- (3) The Appendix to Conditions of Contract, in its original version, referred in one entry to the requirement on OCS to maintain both 'Motor Insurance' and 'Professional Indemnity Insurance' with a minimum level of indemnity of €6,500,000 for each and every claim' in respect of damage to persons or property. In the analogous appendix to the May 2017 contract, the reference to professional indemnity insurance is removed from the box referring to damage to persons and property, but the need to maintain this form of insurance reappears elsewhere in the appendix to the executed agreement. Presumably this change is designed to ensure that the required professional indemnity insurance is not confined to claims involving damage to persons or property. While counsel for OCS did not make much of this change, the clarification which it achieves could have been of some importance.
 - (4) The original parent company guarantee (as appended to the LOI) is very different to the executed version, 'at least in format and layout' in the submission of counsel for OCS. There are certainly differences, though counsel for Cork GAA submits that there is merely a 'slightly different format'. Again, no suggestion is made on behalf of OCS that the differences are material. However, what is submitted by counsel for OCS is that this is a further indication that "a significant amount of input went into the drafting and settling of the [May 2017 contract] by the GAA"; this is clearly correct, as far as both parties are concerned.
47. The original Conditions of Contract appended to the LOI were therefore varied to some extent. Regardless of whether these changes appear to me to be material, they were clearly changes which the parties felt should be made.
 48. The Contract signed between the parties also included clause 42, in exactly the same format as this had appeared in the Conditions of Contract appended to the LOI.
 49. However, leaving clause 42 to one side for the moment, there are other important provisions to the 2017 contract which have been emphasised by counsel for OCS in their written submissions (at paragraph 30):-
 - "a. The list of documents which form part of the [2017] Contract listed at clause 2 of the Articles of Agreement include, inter alia, all the Contract Drawings and Specifications and the Bill of Quantities relating to the entire of the Works and not just to the remaining works outstanding as of May 2017.
 - b. Clause 3 of the Articles of Agreement state 'for the consideration hereinafter mentioned, the Contractor will execute and complete the Works in accordance with the Contract Documents'.

- c. Clause 4 of the Articles of Agreement provides that 'The Employer will pay the Contractor the sum of 6,799,848.55...' which was the sum agreed as the Contract Sum for the entire of the Works.
- d. Clause 2.2 of the Conditions of Agreement provides that:-
- 'The Contractor shall carry out and complete the Works and ensure the Works are designed (for those elements that the Contractor is responsible for designing), carried out and completed in accordance with the Contract Documents...'
- e. The Appendix to the Conditions of Contract provided that the 'Date for Possession' was 13 June 2016, ie the date when possession was first made available to OCS under the [LOI]."
50. The written submissions then refer to Clause 42, which I have already considered. They go on to make the following argument (at paragraph 30.g):-
- "Important provisions of the May 2017 Contract in relation to the valuation of variations (clause 13), addressing issues of delays and extension of time (Clause 30), Practical Completion and Defects Liability (Clause 31), the settling of the Final Account (Clause 35), and Defects Resolution (Clause 38), and the limitation of the period for the commencement of proceedings in relation to breach of contract (12 years as the May 2017 Contract was under seal) were clearly referable to the entire of the Works, and not just the part thereof completed after the execution of the May 2017 contract."
51. Counsel further submit that "all the valuation and other provisions which the Adjudicator was required to apply are to be found in the May 2017 Contract". Put another way, it was submitted by OCS that the May 2017 contract covered all the works done by OCS, even those predating the 12th of May 2017.
52. Naturally, the earlier written submissions of Cork GAA could not be expected to deal with these submissions; however, it is notable that the oral submissions on behalf of Cork GAA did not address them in any detail. Of course, it does not follow that the submissions of OCS on the proper construction of the May 2017 contract are correct. I will now consider whether they are.
53. As I noted at paragraph 11, the principles of construction of contracts are well settled. In their written submissions, counsel for Cork GAA rely in particular on the judgment of Clarke J. in *The Law Society of Ireland v. The Motor Insurers Bureau of Ireland* [2017] IESC 31. Two paragraphs of that judgment are of especial assistance:-
- "10.4 The modern approach has sometimes been described as the 'text in context' method of interpretation. It might be said that the older approach in the common law world placed a very high emphasis indeed on textual analysis without sometimes paying sufficient regard to the context or circumstances in which the

document in question came into existence. On the other hand it is important not to lose sight of the fact that the document whose interpretation is at issue forms the basis on which legal rights and obligations have been established. That is so whether the document in question is a statute, a contract, the rules of an organisation, a patent or, indeed, any other form of document which is designed, whether by agreement or unilaterally, to impose legal rights or obligations on either specific parties or more generally. To fail to have sufficient regard to the text of such a document is to give insufficient weight to the fact that it is in the form of the document in question that legal rights and obligations have been determined. However, an over dependence on purely textual analysis runs the risk of ignoring the fact that almost all text requires some degree of context for its proper interpretation. Phrases or terminology rarely exist in the abstract. Rather the understanding which reasonable and informed persons would give to any text will be informed by the context in which the document concerned has come into existence.

10.5 Perhaps it is fair to say that the main underlying principle is that a document governing legal rights and obligations should be interpreted by the courts in the same way that it would be interpreted by a reasonable and informed member of the public who understands the context of the document in question. Such a person would, necessarily, pay a lot of attention to the text but would also interpret that text in its proper context.”

54. The context of the LOI and the 2017 contract is plain. Cork GAA signed the LOI on the basis that it provided a sufficient legal framework for the works to begin. At the time of the LOI, the commencement of activity on site was so imminent that a final contractual document was most unlikely to be agreed before OCS began work on Pairc Ui Chaoimh. This position was accepted by OCS. The LOI provided that it would ultimately be replaced by a formal, negotiated contract. The parties proceeded on this basis. OCS began work. The parties negotiated the final form of contract. As it happened, the works were at a very advanced stage when the May 2017 contract was signed. Notwithstanding that, the 2017 contract in its terms covered all the works carried out or to be carried out by OCS at the stadium. Lest it be thought that this was an oversight, it is plain from the terms of the 2017 contract that the parties had applied their minds to the detail of that document; the variation by 1.45 euro of a contract price of over 6.7 million euro in itself bears this out, but the other changes between the LOI and the 2017 contract must also be taken into account. Together, they suggest that (as one would expect) the parties had carefully considered the text of the 2017 agreement and intended it to cover all the works. This is also consistent with the context of the LOI and its intended replacement with a final contract.
55. The text of the 2017 document (for the reasons advanced by counsel for OCS, and recited in this judgment) in clear terms provides that this contract covers not just the works which remained to be done as of May 2017 but all the works done and to be done by OCS. This may seem somewhat artificial, as the works up to May 2017 were carried out

and paid for in accordance with the provisions of the LOI. However, as counsel for Cork GAA point out in their written submissions, and as Lewison L.J. observed in *First Tower Trustees Ltd. v. CDS (Superstores International) Ltd.* [2018] EWCA Civ 1396:-

“It is now firmly established at this level in the judicial hierarchy that parties can bind themselves by contract to accept a particular state of affairs even if they know that state of affairs to be untrue.”

56. Here, the parties have agreed that a document dated the 12th of May 2017 applies to works which began almost a year earlier, and which had been ongoing over that period. This is not quite accepting an untrue state of affairs, though it does involve an element of revisionism. It is however what the parties agreed.
57. Even without considering Clause 42, the proper construction of the text of the 2017 contract is that the current claim by OCS is one made under this agreement. This is because the later agreement covers the relevant works. This interpretation is strongly supported by the provisions of Clause 42. As that term provides that the 2017 agreement supersedes and replaces the LOI, the only contract upon which OCS could rely in making the current claim is the 2017 contract rather than the LOI which it had replaced.
58. Applying the “text in context” approach, which is the one urged upon me by counsel for Cork GAA, I have decided that the contract of May 2017 governs OCS’s entitlement to be paid for the works at Pairc Ui Chaoimh. As this contract postdates the commencement of the 2013 Act, OCS may seek adjudication under that legislation in respect of its claim against Cork GAA.

C. Other Matters

59. Having decided the fundamental issue between Cork GAA and OCS in favour of OCS, my preliminary view is that the other matters agitated by Cork GAA (while novel and interesting) do not need to be resolved. However, I will list the matter before me at 10:30 am on the 30th of July 2021 to canvass the views of the parties on this point and any other matters arising from this judgment.