

Eighth Annual Report
of the
Chairperson of the
Construction Contracts Adjudication Panel,
Mr. Bernard Gogarty,
to
Ms. Emer Higgins T.D.,
Minister of State for Business, Employment
and Retail

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Eighth Annual Report
of the Chairperson of the Construction Contracts Adjudication Panel
since the commencement of the Construction Contracts Act, 2013

1. Introduction

- 1.1** My role as the Chairperson of the Construction Contracts Adjudication Panel includes a requirement to report annually to the Minister of State at the Department of Enterprise, Trade and Employment, who has responsibility for the Construction Contracts Act, 2013.
- 1.2** The following is the Eighth Annual Report since the commencement of the Construction Contracts Act, 2013, which covers the period from the 26th of July 2023 to the 25th of July 2024.

2. Enactment and commencement of the Construction Contracts Act, 2013

- 2.1** The Construction Contracts Act, 2013 came into force for certain construction contracts which are entered into after the 25th of July 2016 in accordance with the 'Construction Contracts Act, 2013 (Appointed Day) Order 2016' (Statutory Instrument No. 165 of 2016).

3. Summary of the main provisions of the Construction Contracts Act, 2013

- 3.1** The purpose of the Construction Contracts Act, 2013 is to regulate payments under a construction contract covered by the Act. It applies to both written and oral contracts. Certain contracts are exempt under the Act. These exemptions include a contract for not more than €10,000 in value; a Public Private Partnership contract; and a contract for a dwelling with a floor area not greater than 200 square metres, where one of the parties to the contract occupies or intends to occupy it as their residence.
- 3.2** The Act provides legal rights and obligations on the parties to a relevant construction contract. The legislation imposes minimum contractual provisions relating to payments, particularly with regard to the timing of payments, and the parties to a relevant construction contract may not opt out of the Act's provisions. The Act also prohibits the practice of 'pay-when-paid', a provision in a construction contract which provides that payment of an amount due under the contract, or the timing of such a payment, is conditional on the making of a payment by a person who is not a party to the construction contract, except when the third party becomes insolvent.
- 3.3** A construction contract covered by the Act shall include the following:
- (i) the amount of each interim and final payment or an adequate mechanism for determining those amounts;
 - (ii) the payment claim date for each amount due or an adequate mechanism for determining those dates; and

(iii) the period between the payment claim date and the date on which the amount is due.

3.4 If a main construction contract does not include the terms outlined in paragraph 3.3 above, the following payment claim dates will apply to the contract:

(i) 30 days after the commencement date of the construction contract;

(ii) 30 days after the payment claim date referred to in (i) above and every 30 days thereafter up to the date of substantial completion; and

(iii) 30 days after the date of final completion.

In addition, the date on which payment is due in relation to an amount claimed under the contract shall be no later than 30 days after the payment claim date.

3.5 The Act provides important statutory protections for subcontractors in the construction industry. Subcontracts must at least include the following payment claim dates:

(i) 30 days after the commencement date of the construction contract;

(ii) 30 days after the payment claim date referred to in (i) above and every 30 days thereafter up to the date of substantial completion; and

(iii) 30 days after the date of final completion.

The date on which payment is due in relation to an amount claimed under a subcontract shall be no later than 30 days after the payment claim date.

3.6 The Act requires an Executing party (a main contractor or subcontractor who is doing the work under the contract) to deliver a payment claim notice to the Other party (or to a person specified under the construction contract who is acting for the Other party), no later than 5 days after the relevant payment claim date.

3.7 If that Other party contests the amount claimed by the Executing party, the Other party is required to respond to the Executing party, not later than 21 days after the payment claim date setting out the following:

(a) the reason(s) why the amount claimed by the Executing party in the payment claim notice is disputed, including any claim for loss or damage arising from an alleged breach of any contractual or other obligation of the Executing party; and

(b) the amount, if any, that is proposed to be paid to the Executing party and the basis of how that amount is calculated.

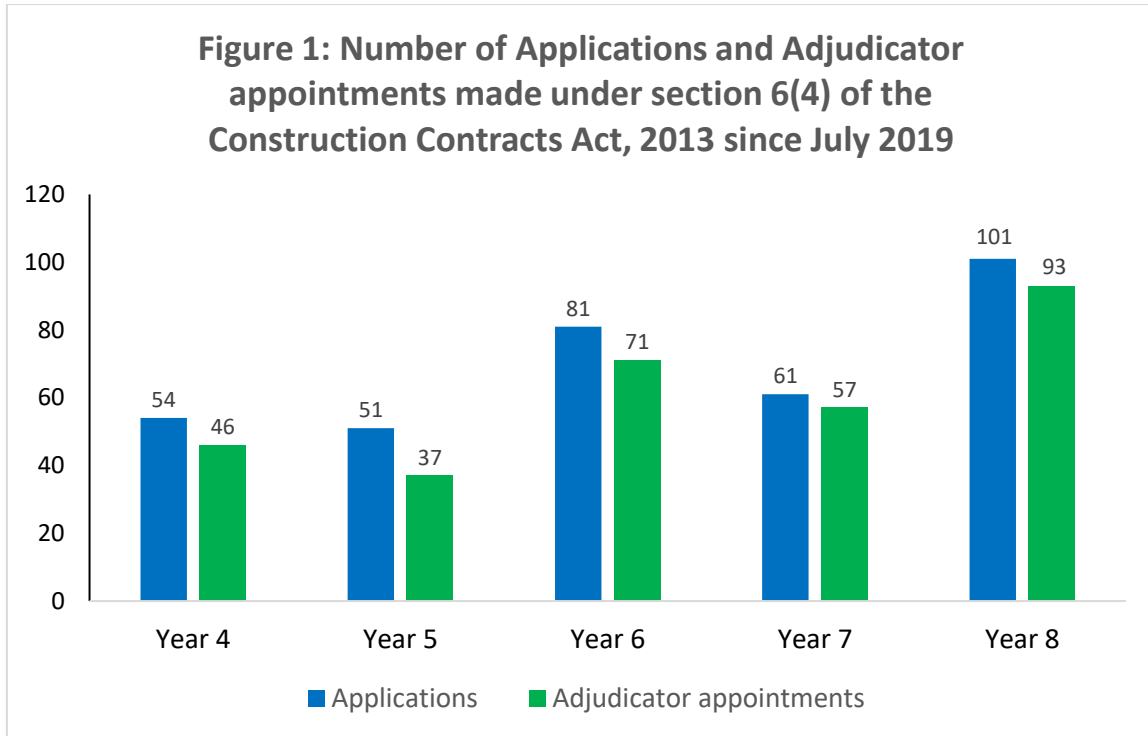
3.8 In the event of a contested payment claim, the parties to the construction contract may be able to reach an agreement as to the amount to be paid to the Executing party. However, if no such agreement is reached by the payment due date, the Other party is required to pay the Executing party the amount, if any, which the Other party proposed to pay in its response to the contested payment claim. This payment shall be made by the payment due date in accordance with Section 4(3)(b) of the Act.

- 3.9** Section 5 of the Act stipulates that if any amount due under a construction contract is not paid in full by the Other party by the payment due date, the Executing party may suspend work under the construction contract by giving a notice in writing to the Other party.
- 3.10** The Act also provides a right for a party to a construction contract, as defined under Section 1 of the Act, to refer a payment dispute for adjudication as a means of resolving that dispute. The Act envisages that an adjudication will be concluded within a short timeframe, i.e., 28 days from the date of referral of the dispute to an Adjudicator. This period may be extended in certain circumstances.
- 3.11** If the parties to a construction contract cannot agree as to whom to appoint as Adjudicator, a party may apply to me, in my capacity as the Chairperson of the Ministerial appointed Panel of Adjudicators, seeking the appointment of an Adjudicator. The full list of the members of the Construction Contracts Adjudication Panel is at Appendix 1.
- 3.12** Further detailed information on the Construction Contracts Act, 2013 Act is available on the website of the Department of Enterprise, Trade and Employment, at www.enterprise.gov.ie.

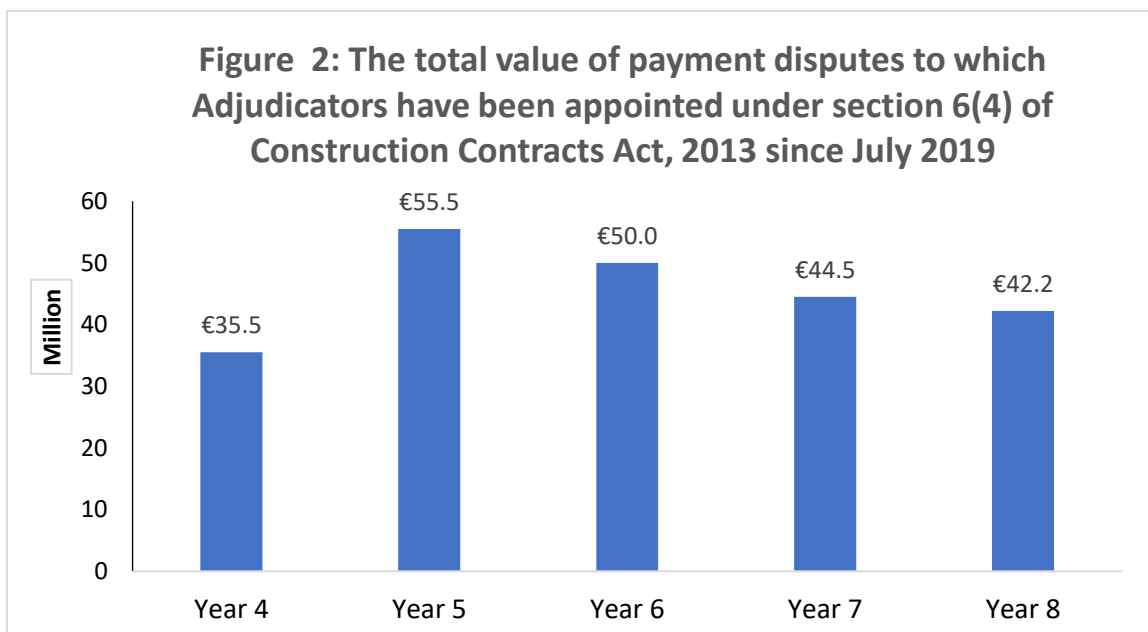
4. Applications under section 6(4) of the Construction Contracts Act, 2013

- 4.1** I am required to assign an Adjudicator from the Ministerial appointed Panel of Adjudicators following an application made under section 6(4) of the Construction Contracts Act, 2013 which complies with paragraph 15 of the '*Code of Practice Governing the Conduct of Adjudications*'.
- 4.2** The appointment of an Adjudicator by me usually takes place within seven days after the receipt of a written application, unless further information is required from the applicant relevant to the nature of the dispute, in accordance with paragraph 16 of the Code of Practice.
- 4.3** During the period covered by this Annual Report, there were 101 applications seeking the appointment of an Adjudicator received by the Construction Contracts Adjudication Service of the Department of Enterprise, Trade and Employment, which provides me with the necessary administrative support in processing such applications.
- 4.4** I made 93 Adjudicator appointments under section 6(4) of the Construction Contracts Act, 2013 from the 101 applications. Seven applications were withdrawn and three of those applications were re-entered a second time. I appointed an Adjudicator in those three re-entered cases and those appointments are included in the number of appointments referred to earlier. Another of the withdrawn cases was a result of the parties settling their dispute. In addition, there was one application which could not be processed as the services provided by the applicant company did not come within the definition of "construction operations" in section 1 of the Construction Contracts Act, 2013.

4.5 Figure 1 provides information on the number of applications and the number of Adjudicator appointments made under section 6(4) of the Construction Contracts Act, 2013 in each of the last five years. Year 8 has seen the highest number of applications and Adjudicator appointments made under section 6(4) of the Act since it commenced in July 2016.



4.6 Figure 2 provides information on the total value of payment disputes to which Adjudicators have been appointed under section 6(4) of the Construction Contracts Act, 2013 in each of the last five years (excluding the value of any cases re-entered a second time). The combined total value for the last five years is €227.7 million.



5. Statistical data returns from Adjudicators

- 5.1 There are requirements set out in the '*Code of Practice Governing the Conduct of Adjudications*' for Adjudicators to provide information to the Construction Contracts Adjudication Service following an appointment (paragraph 12); following a resignation (paragraph 30); and on the outcome of adjudication cases (paragraph 39), for the purpose of compiling anonymised statistical data on the operation of the Act.
- 5.2 This section of the report provides detailed information on the outcome of adjudication cases, on which anonymised information was provided by the appointed Adjudicators. During the period covered by this Annual Report, the Construction Contracts Adjudication Service received 96 data returns from Adjudicators. This includes information on cases where the parties agreed on the appointment of an Adjudicator, as well as cases where I appointed an Adjudicator under section 6(4) of the Act to the payment dispute. As the data received on these cases is anonymised, it should be noted that the information set out in this part of the report does not refer exclusively to cases where the Adjudicator was appointed by me under section 6(4) of the Act.
- 5.3 The primary professional qualification of the Adjudicators in these 96 cases are set out in Table 1 and the principal site locations of the payment disputes concerned are listed in Table 2.

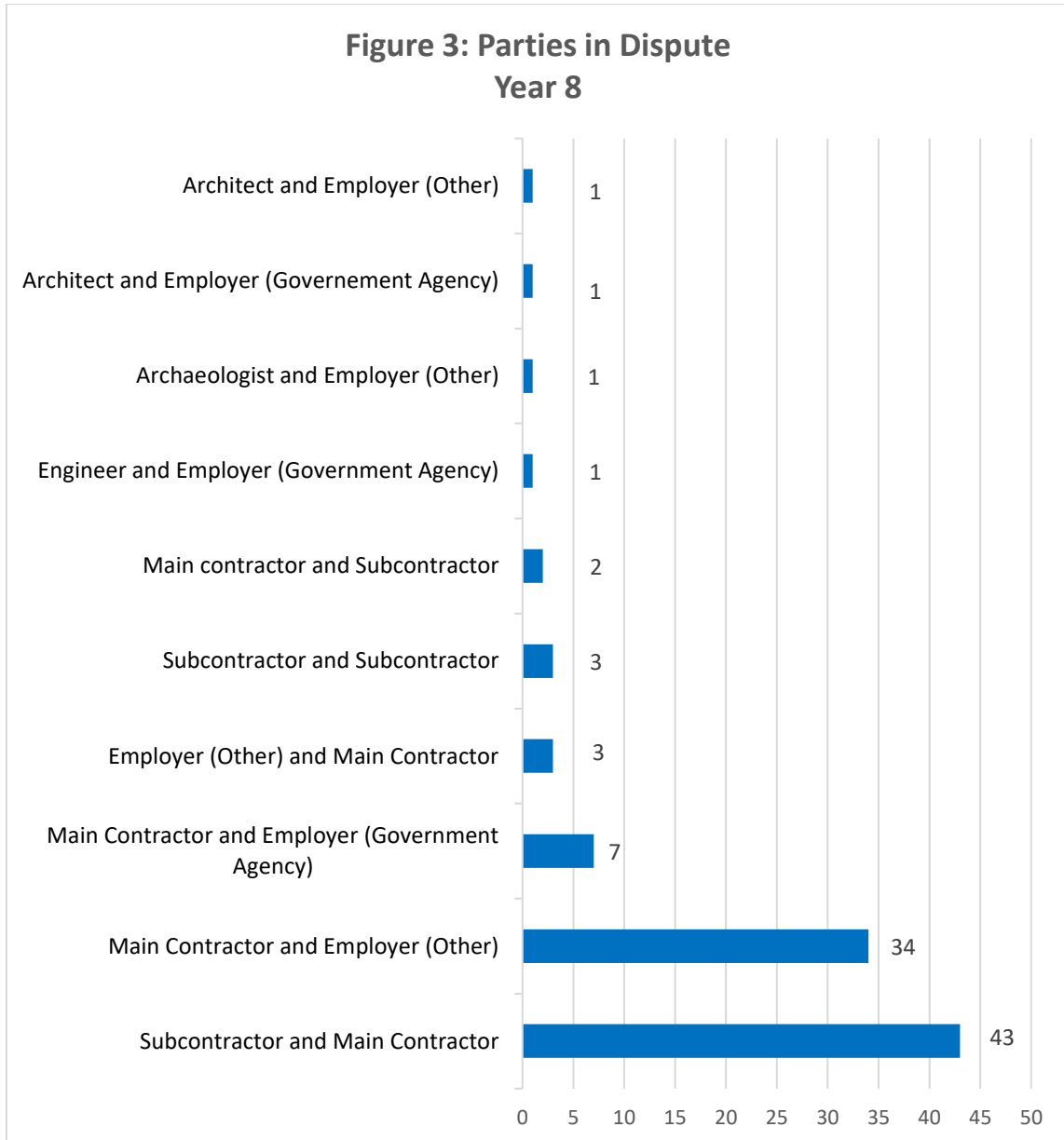
Table 1

| Primary Professional Qualification of Adjudicator | Number |
|--|---------------|
| Quantity Surveyor | 33 |
| Barrister | 16 |
| Architect | 14 |
| Fellow of the Chartered Institute of Arbitrators | 14 |
| Solicitor | 13 |
| Engineer | 6 |

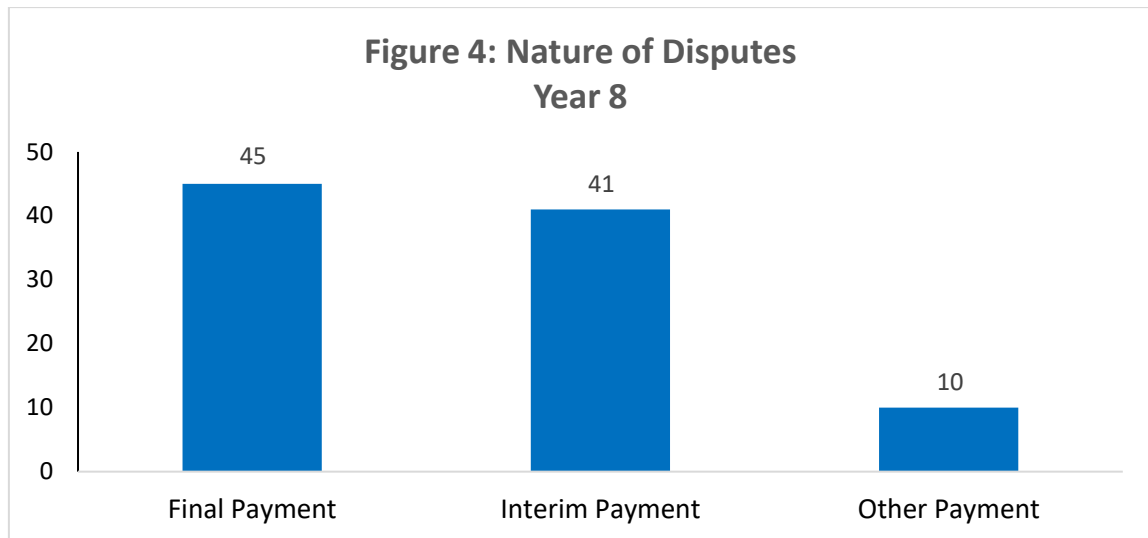
Table 2

| Principal Site Locations of Payment Disputes by County | Number |
|---|---------------|
| Dublin | 53 |
| Kildare | 12 |
| Cork | 6 |
| Limerick | 5 |
| Meath | 4 |
| Wexford | 3 |
| Louth | 2 |
| Monaghan | 2 |
| Tipperary | 2 |
| Waterford | 2 |
| Carlow | 1 |
| Galway | 1 |
| Kilkenny | 1 |
| Laois | 1 |
| Wicklow | 1 |

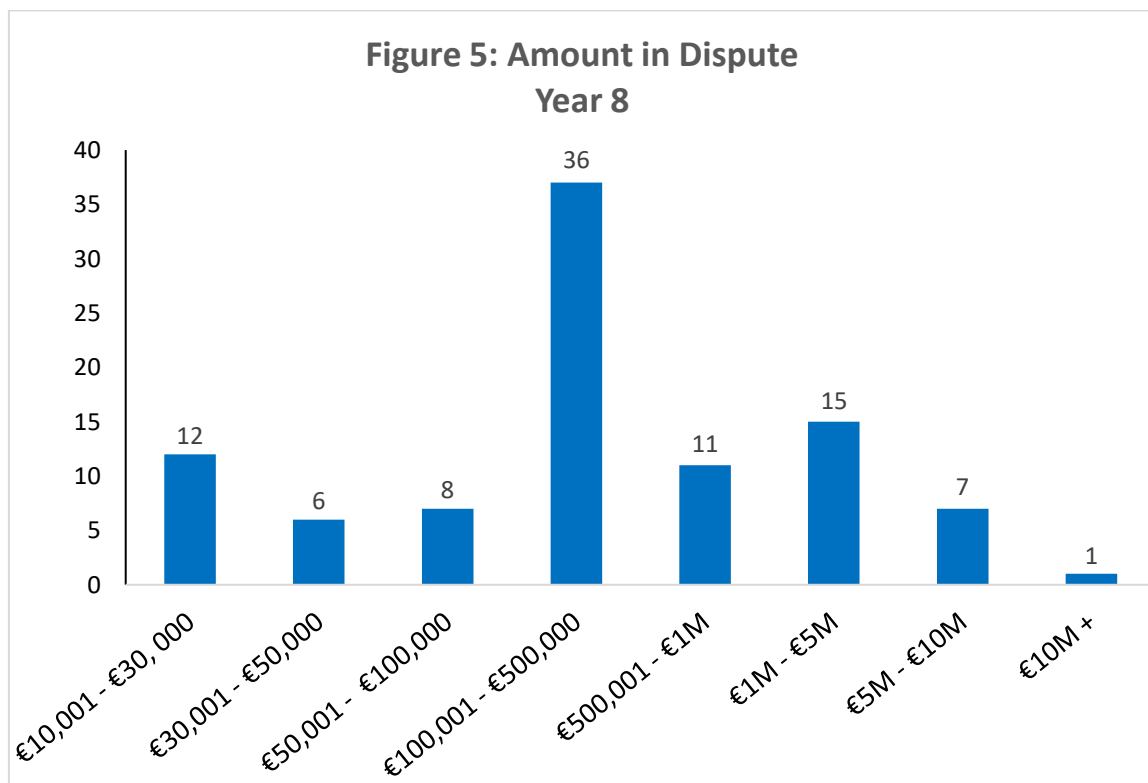
5.4 Figure 3 below sets out the categories of the parties in dispute in the 96 cases reported. The most common category of parties in dispute involved a Subcontractor in dispute with a Main Contractor (43 cases), with the referral being made by the Subcontractor. The second highest category (34 cases) involved a Main Contractor and an Employer (Other). The category ‘Employer (Other)’ means that that contracting party is in the private sector.



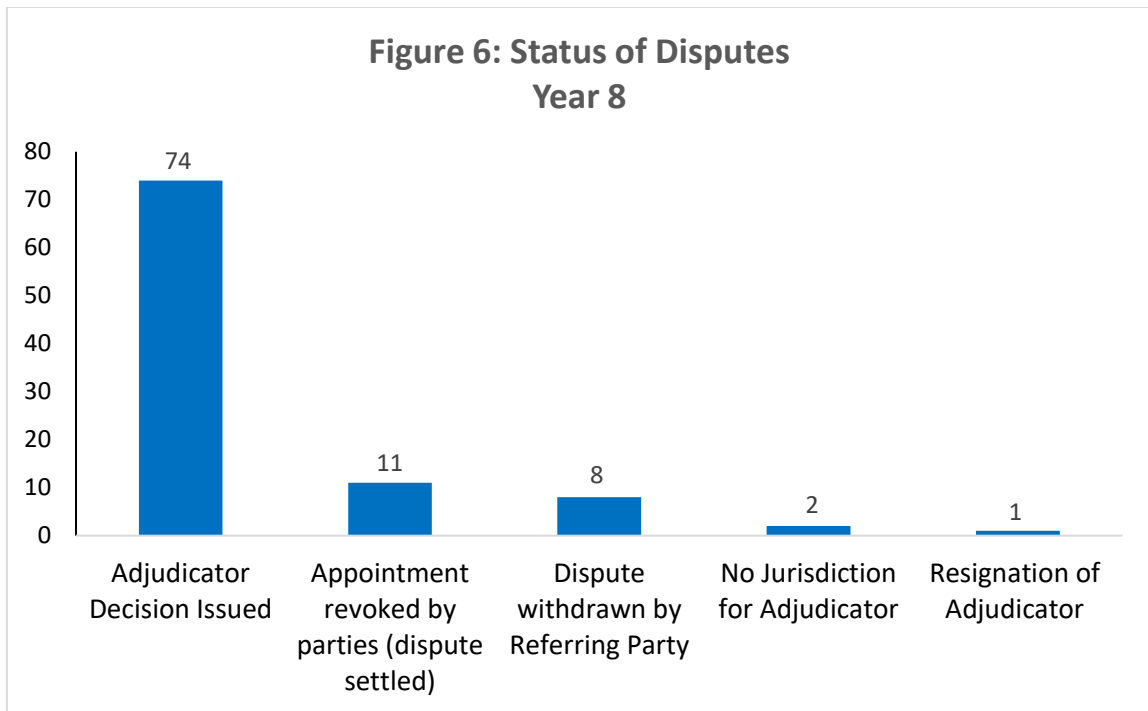
5.5 Figure 4 provides information on the nature of the disputes in the 96 cases. The highest number of disputes related to final payment disputes (45 cases). There were ten cases described as ‘Other Payment’ disputes. Some of those disputes were described as follows: COVID-19 claim; loss and damage claim for wrongful termination; claim for payment of retention; claim for defects; and claim for return of deposit paid in advance.



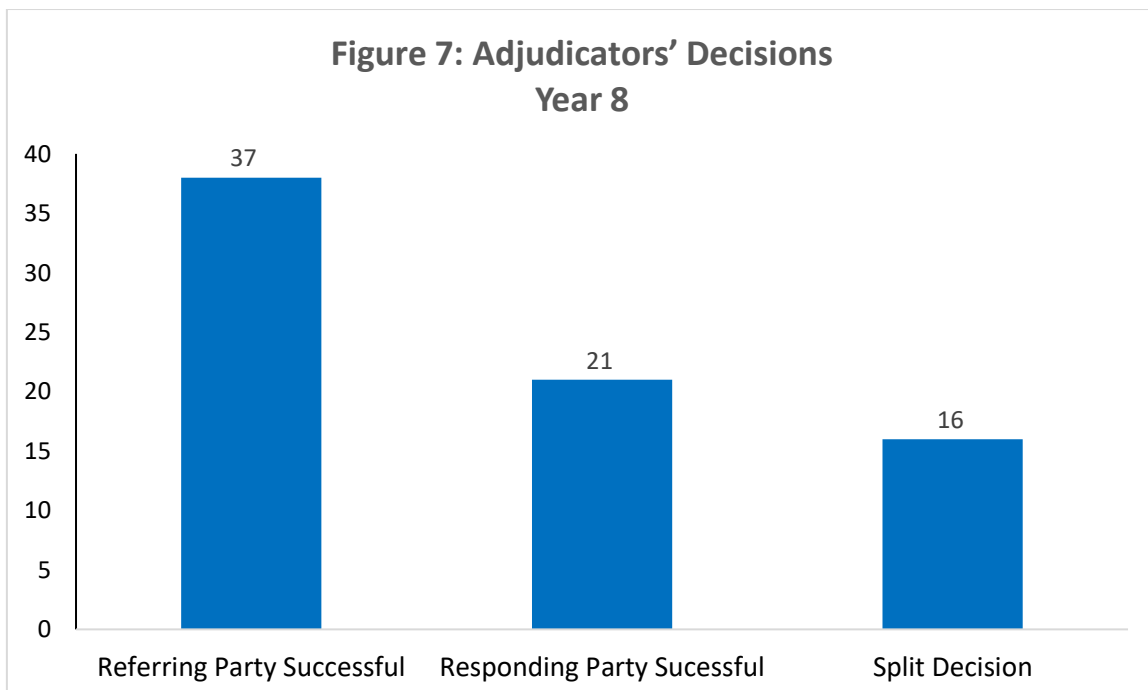
5.6 Figure 5 provides information on the amount in dispute in the 96 cases. The most common amount in dispute involved amounts in the range of €100,001 to €500,000 (36 cases).



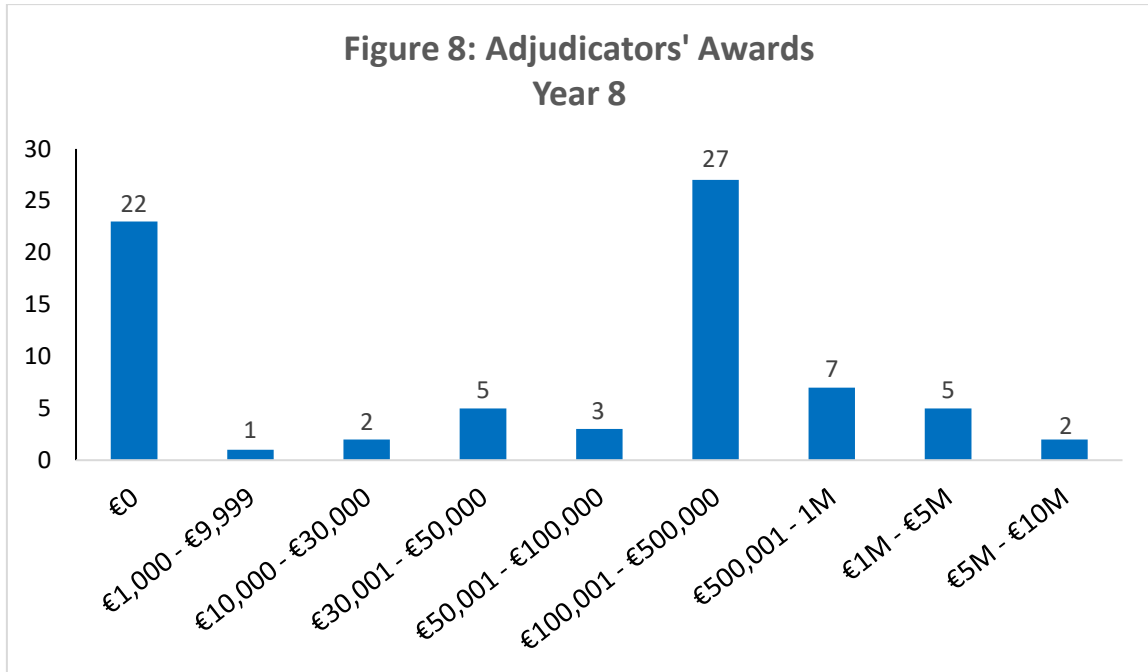
5.7 Figure 6 provides information on the status of the 96 cases after an Adjudicator was appointed. In total, there were 74 Adjudicator decisions issued.



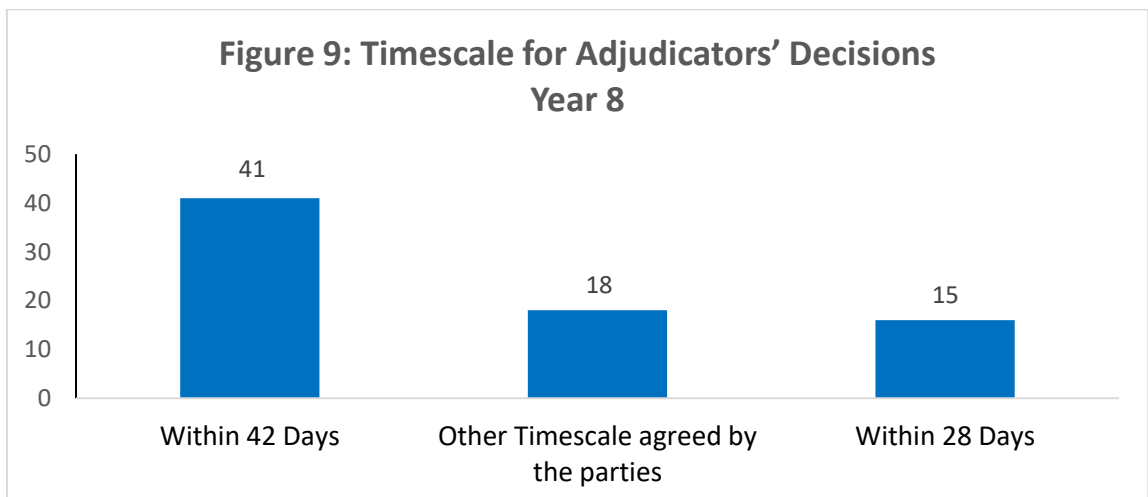
5.8 Figure 7 provides information on the outcome of the 74 Adjudicator decisions. The Referring party was successful in 37 cases, the Respondent party was successful in 21 cases and there was a split decision between the parties in 16 cases.



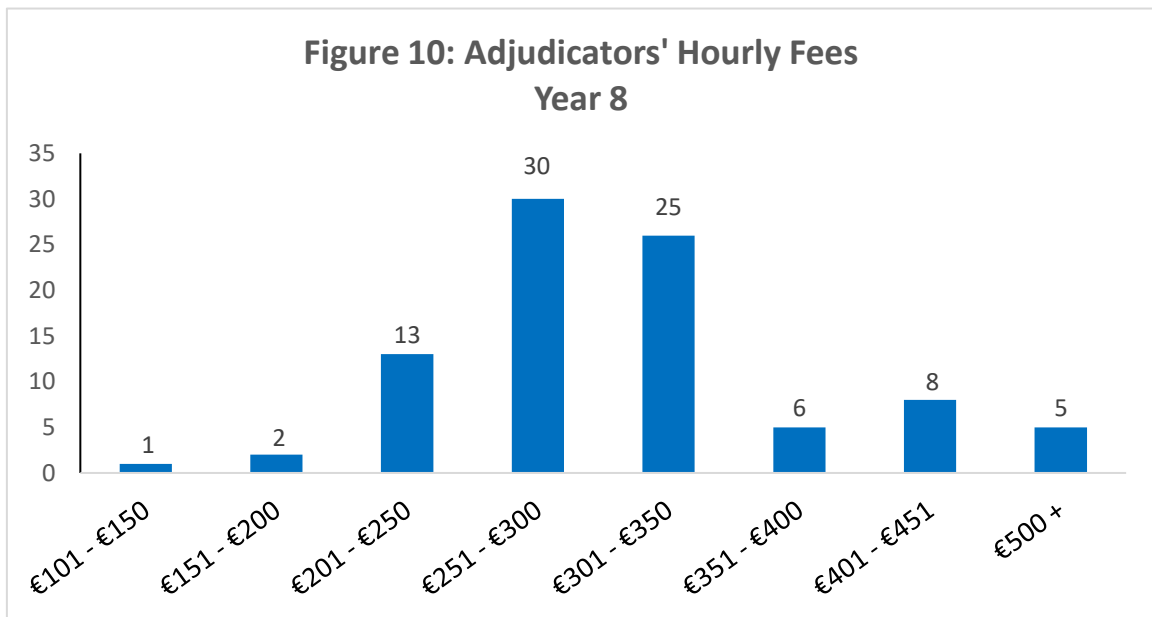
5.9 Figure 8 provides information on the amounts that were awarded in the Adjudicators' decisions. A total of 52 cases resulted in monetary awards made by the Adjudicator to the Referring party. There were no monetary awards in the other 22 cases, mainly because the Respondent party was successful in 21 of those cases. The highest number of awards was in the range of €100,001 to €500,000 (27 cases).



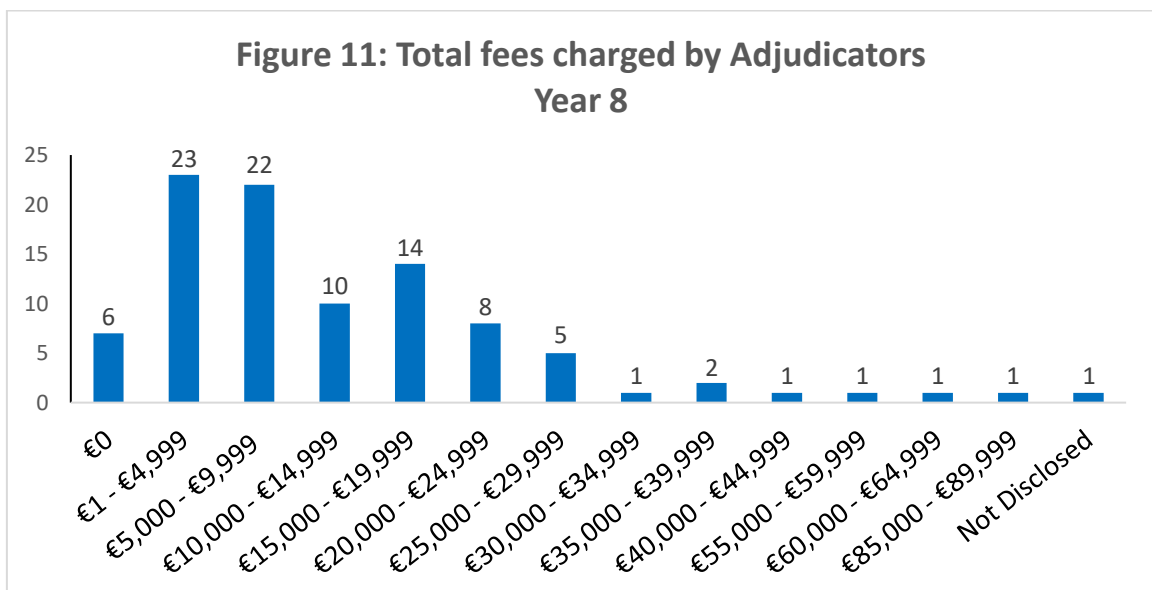
5.10 Figure 9 provides information on the timescale taken by the Adjudicators to issue their decisions to the parties in the above mentioned 74 cases. Most decisions were issued within 42 days from the date of the referral of the payment dispute to an Adjudicator (41 cases). There were 18 decisions which issued after a longer period than the 42 days, following the agreement of the parties involved in those cases, which is provided for in section 6 of the Construction Contracts Act, 2013 ('Other timescale').



5.11 The ‘Code of Practice Governing in Conduct of Adjudications’ requires that the fees charged by an Adjudicator should be “reasonable in the amount having regard to the amount in dispute, the complexity of the dispute, the time spent by the Adjudicator” on the dispute and other relevant circumstances. Figure 10 provides information on the hourly fees charged by the Adjudicators in 90 of the 96 cases reported. There were 6 cases in which no hourly fees were charged, as either the cases settled or did not proceed for some other reason. The most common hourly fees charged were in the range €251 to €300 (30 cases) and €301 to €350 (25 cases).



5.12 Figure 11 details the total fees charged by the Adjudicators in the 96 cases reported. The most common Adjudicator fees charged were in the ranges of €1,000 to €4,999 (23 cases) and €5,000 to €9,999 (22 cases). As referred to paragraph 5.11, there were 6 cases in which no fees were charged.



6. High Court Judgments

- 6.1** The Rules of the Superior Courts were broadened to incorporate a provision for the enforcement by the High Court of Adjudicators' decisions under the Construction Contracts Act, 2013 – 'Rules of the Superior Courts (Construction Contracts Act, 2013) 2016' (Statutory Instrument No. 450 of 2016)
- 6.2** There have been a number of Judgments issued by the High Court to enforce the decisions made by Adjudicators under the Construction Contracts Act, 2013.
- 6.3** A further High Court Judgment of Mr. Justice Garrett Simons was issued earlier this year in the case of McGill Construction Ltd and Blue Whisp Ltd [2024] IEHC 205. This case concerned an application for leave to enforce a decision made by an Adjudicator under the Construction Contracts Act, 2013. Blue Whisp Ltd did not establish any grounds for refusing the application to enforce the Adjudicator's award.
- 6.4** Appendix 2 provides a list of High Court Judgments in relation to the Construction Contracts Act, 2013.

7. Comment and Conclusions

- 7.1** I have appointed 93 Adjudicators under section 6(4) of the Construction Contracts Act, 2013 to payment disputes with a combined total value of €42.2 million (excluding the value of any cases re-entered a second time) in the period covered by this Annual Report.
- 7.2** The number of applications and Adjudicator appointments made in the eight years since the Act came into force is the highest to date. This illustrates that statutory adjudication under the Act continues to gain momentum and that parties to construction contracts are pursuing their rights to seek redress for non-payment or underpayment.
- 7.3** In the last five years, Adjudicators have been appointed to payment disputes under section 6(4) of the Construction Contracts Act, 2013 with a combined total value of €227.7 million, which demonstrates the benefit of the legislation to the Construction Sector.
- 7.4** While most payment disputes reported in year 8 involved a Subcontractor/Main Contractor and a Main Contractor/Employer, Figure 3 confirms that other parties are also pursuing their rights under the legislation. The Referring party has been successful or partially successful in 53 of the 74 Adjudicator decisions reported in Figure 7.
- 7.5** It is important that Employers, Main Contractors and Subcontractors adhere to their obligations set out in the Construction Contracts Act, 2013. I would also point out that if a party to a construction contract, as defined under the Act, is contemplating referring a payment dispute for adjudication, all appropriate procedures required under the Act and the *'Code of Practice Governing the Conduct of Adjudications'* should be followed.
- 7.6** While I have reported on the data provided in circumstances where Adjudicators have chosen to provide such data, it is not possible to state definitively that this encompasses all adjudication cases concluded under the Act in the past year. Additional adjudications will have taken place pursuant to the Act, where the parties agreed on the appointment of the Adjudicator without recourse to the Construction Contracts Adjudication Service, and in respect of which the Service has not been furnished with statistics.
- 7.7** Finally, I would also like to thank the members of the Panel who have accepted Adjudicator appointments under Section 6(4) of the Act, often at short notice. In addition, I thank the staff of the Construction Contracts Adjudication Service of the Department of Enterprise, Trade and Employment for their administrative support to me in my role as Chairperson of the Panel.

Mr Bernard Gogarty,
Chairperson.
September 2024

Appendix 1

Members of the Construction Contracts Adjudication Panel

Mr. Bernard Gogarty is a member and the Chairperson of the Panel.

Mr Peter Aeberli

Ms Karen Killoran

Mr Joe Behan

Mr Niall Lawless

Mr Kevin Brady

Dr John Derek Layng Ross

Mr James Bridgeman

Mr Niall Meagher

Mr Jonathan Cope

Mr Matthew Molloy

Mr Dermot Durack

Mr Gerard Monaghan

Ms Siobhan Fahey

Mr James O'Donoghue

Mr Ciaran Fahy

Mr Denis O'Driscoll

Ms Orla Fitzgerald

Mr Sean O'Flaherty

Mr John Thomas Gibbons

Ms Niav O'Higgins

Mr James Golden

Mr David O'Leary

Mr Conor Hogan

Mr Peter Eugene O'Malley

Mr John Hughes

Mr Gerard O'Sullivan

Mr Jarlath Kearney

Mr Edward James Quigg

Mr Keith Kelliher

Mr Martin Waldron

Mr Conor Kelly

Mr Peter Walshe

Mr Damien Keogh

Appendix 2

High Court Judgments in relation to the Construction Contracts Act, 2013

2024

- *McGill Construction Limited-v-Blue Whisp Limited* [2024] IEHC 205

2023

- *K&J Townmore Construction Limited-v-Damien Keogh and Deslend (Mechanical) Limited T/A COBEC Engineering Group* [2023] IEHC 509
- *DNCF Limited-v-Genus Homes Limited* [2023] IEHC 490
- *McGurran Civils RoI Limited-v-K&J Townmore Construction Limited* [2023] IEHC 355

2022

- *John Paul Construction Limited-v-Tipperary Co-Operative Creamery Limited* [2022] IEHC 3

2021

- *Aakon Construction Services Limited-v-Pure Fitout Associated Limited* [2021] IEHC 619 (Form of Oder)
- *Principal Construction Limited-v-Beneavin Contractors Limited* [2021] IEHC 578
- *Kevin O'Donovan and the Cork County Committee of the GAA-v-Nael G. Bunni and James Bridgeman and OCS One Complete Solution Limited* [2021] IEHC 575
- *Aakon Construction Services Limited-v-Pure Fitout Associated Limited* [2021] IEHC 562
- *Gravity Construction Limited-v-Total Highway Maintenance Limited* [2021] IEHC 19.

2020

- *Kevin O'Donovan and the Cork County Committee of the GAA-v-Nael G. Bunni and James Bridgeman and OCS One Complete Solution Limited* [2020] IEHC 623