

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

1. Introduction

- 1.1** I am pleased to have been appointed as the Chairperson of the Construction Contracts Adjudication Panel by Mr Damien English T.D., Minister of State for Business, Employment and Retail, succeeding Dr Nael G. Bunni.
- 1.2** 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 is responsible for the Construction Contracts Act, 2013.
- 1.3** The following is the Fifth Annual Report since the commencement of the Construction Contracts Act, 2013, which covers the period from the 26th of July 2020 to the 25th of July 2021. During this period Dr Nael Bunni was the Chairperson until the 30th of June 2021. I would like to record my appreciation for his work as the first Chairperson of the Construction Contracts Adjudication Panel.
- 1.4** The Construction Sector of the economy was, like many other sectors, significantly disrupted by the COVID-19 pandemic in the past year. Thankfully, the Sector has resumed activity on construction sites across the country.

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

- 2.1** The Construction Contracts Bill was signed into law by the President, Michael D. Higgins, on the 29th of July 2013. Following a national information campaign, undertaken by the Department of Enterprise, Trade and Employment, the Construction Contracts Act, 2013 came into force for certain construction contracts 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 are a contract of less than €10,000 in value; a Public Private Partnership contract; and a contract for a dwelling of less than 200 square metres, where one of the parties occupies or intends to occupy it.
- 3.2** The Act provides new legal rights and obligations on the parties to a relevant construction contract. The Act 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 its provisions. The Act also prohibits the practice of 'pay-when-paid', with the exception of a third party to a contract becoming insolvent.

3.3 A construction contract covered by the Act shall include:

- (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 above information, 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 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 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 (Main Contractor or Subcontractor) 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 payment claim date. If that Other Party contests that the amount claimed by the Executing Party is due and payable, the Other Party (or person acting for 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.

3.7 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 notice. This payment shall be made by the payment due date in accordance with Section 4(3)(b) of the Act.

- 3.8** 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.
- 3.9** The Act introduced, for the first time in Ireland, a new 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. If the parties to the construction contract cannot agree as to whom to appoint as Adjudicator, one or other may apply to me, in my capacity as the Chairperson of the Ministerial appointed Panel of Adjudicators seeking the appointment of an Adjudicator.
- 3.10** Further detailed information on the Construction Contracts Act, 2013 Act is available on the website of the Department of Enterprise, Trade and Employment, www.enterprise.gov.ie.

4. Applications to the Chairperson of the Construction Contracts Adjudication Panel for the appointment of an Adjudicator under section 6(4) of the Construction Contracts Act, 2013

- 4.1** I am, as the Chairperson of the Construction Contracts Adjudication Panel, 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 and which complies with paragraph 15 of the ‘Code of Practice Governing the Conduct of Adjudications’. The appointment of an Adjudicator by me usually takes place within 7 days of the receipt of a written application, unless the application fails to comply with paragraph 15 of the Code of Practice or if further information is required from the applicant relevant to the nature of the dispute, in accordance with paragraph 16 of the Code of Practice.
- 4.2** During the period covered by this Annual Report, there were 51 applications seeking the appointment of an Adjudicator received by the Construction Contracts Adjudication Service of the Department of Enterprise, Trade and Employment. The Construction Contracts Adjudication Service provides the Chairperson of the Construction Contracts Adjudication Panel with the necessary administrative support in processing such applications.
- 4.3** There were 37 Adjudicator appointments made under section 6(4) of the Construction Contracts Act, 2013. Dr Nael Bunni made most of these appointments, as he was the Chairperson of the Construction Contracts Adjudication Panel until the 30th of June 2021.
- 4.4** One application was deemed incomplete, which was re-entered a second time and that application resulted in the appointment of an Adjudicator. Three applications were withdrawn prior to the appointment of an Adjudicator. One withdrawn case was re-entered

a second time and that application resulted in the appointment of an Adjudicator. These appointments are included in the number of appointments referred to in the preceding paragraph.

- 4.5 There were ten applications which were deemed to be non-compliant with the legislation or the application requirements set out in the 'Code of Practice Governing the Conduct of Adjudications'. One of these cases was re-entered a second time and that application resulted in the appointment of an Adjudicator. This appointment is included in the number of appointments referred to in paragraph 4.3.
- 4.6 A jurisdictional issue arose in two cases after the appointment of the Adjudicator. The Adjudicator in one case resigned because of the jurisdictional issue. Both cases were re-entered a second time and these applications resulted in the appointment of an Adjudicator. These appointments are included in the number of appointments referred to in paragraph 4.3.
- 4.7 Section 5 of this report provides detailed information on adjudication cases that were completed and on which information was provided by the Adjudicators in those cases.

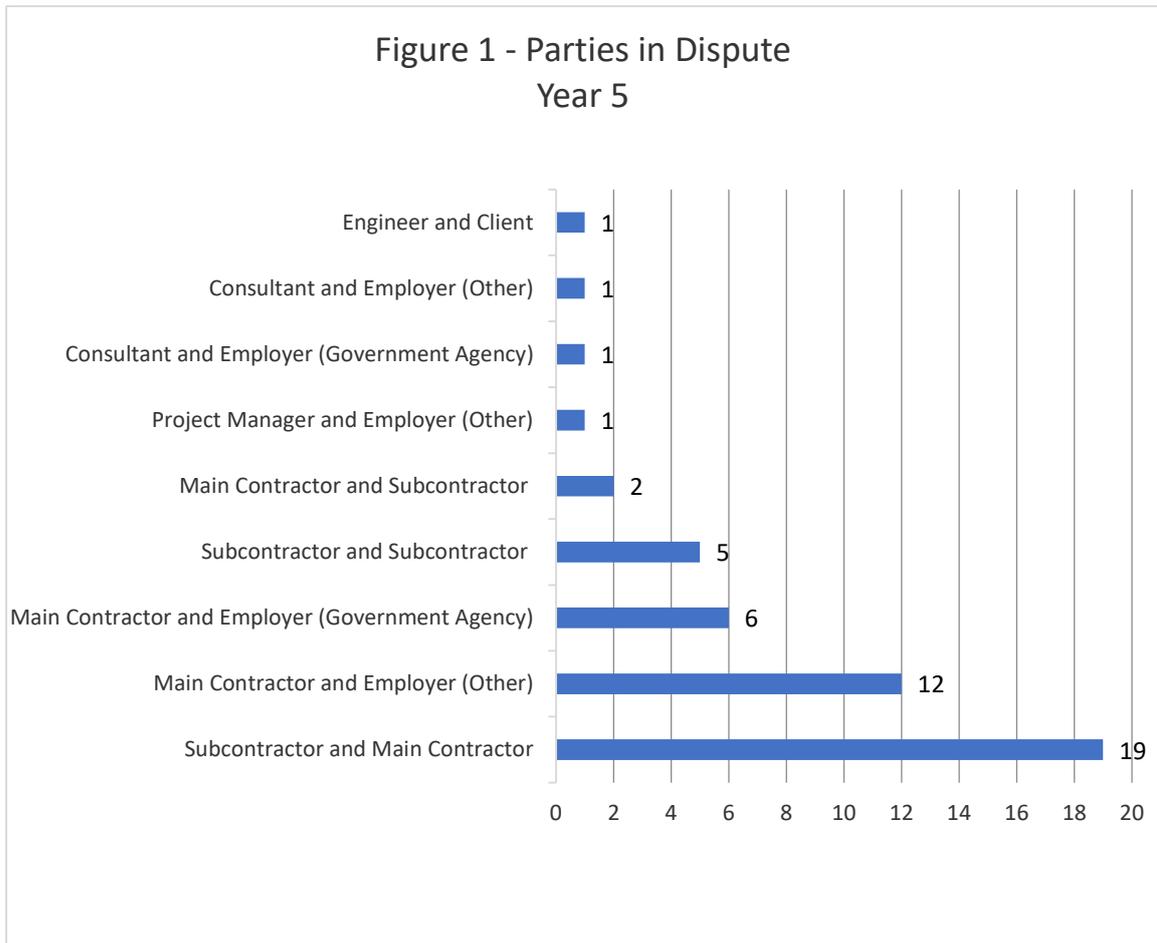
5. Statistical data returns from Adjudicators

- 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 the 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 48 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 qualifications of the Adjudicators in these 48 cases are set out in Table 1 and the principal site locations of the payment disputes concerned are listed in Table 2 below.

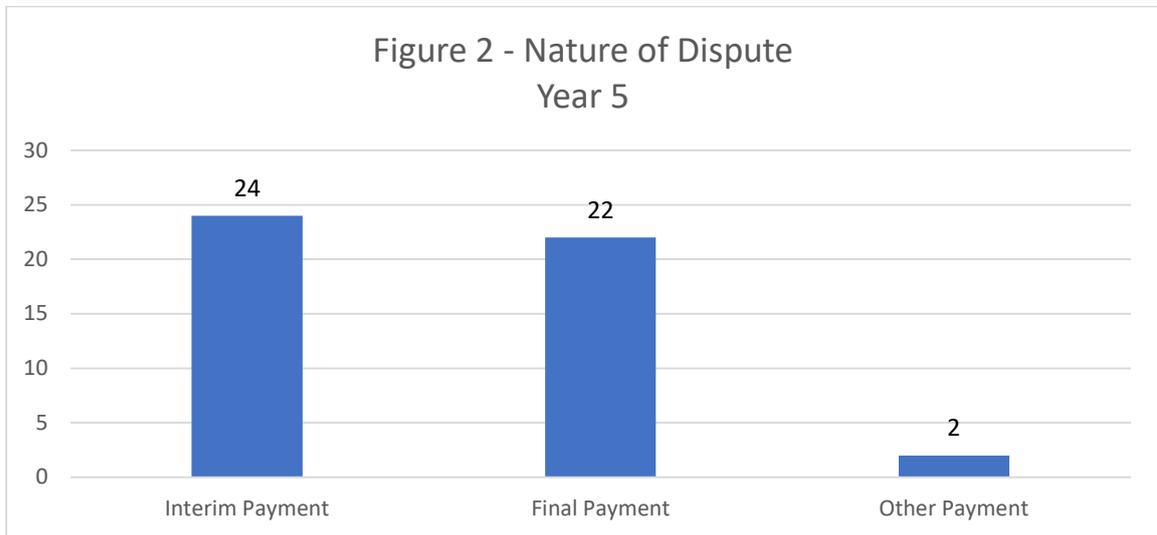
Table 1 – Primary Professional Qualification of Adjudicator	
Architect	16
Quantity Surveyor	15
Barrister	9
Engineer	5
Fellow of the Chartered Institute of Arbitrators	3
Total	48

Dublin	28
Cork	4
Tipperary	3
Kildare	2
Laois	2
Carlow	1
Cavan	1
Clare	1
Galway	1
Kilkenny	1
Longford	1
Louth	1
Meath	1
Mayo	1
Total	48

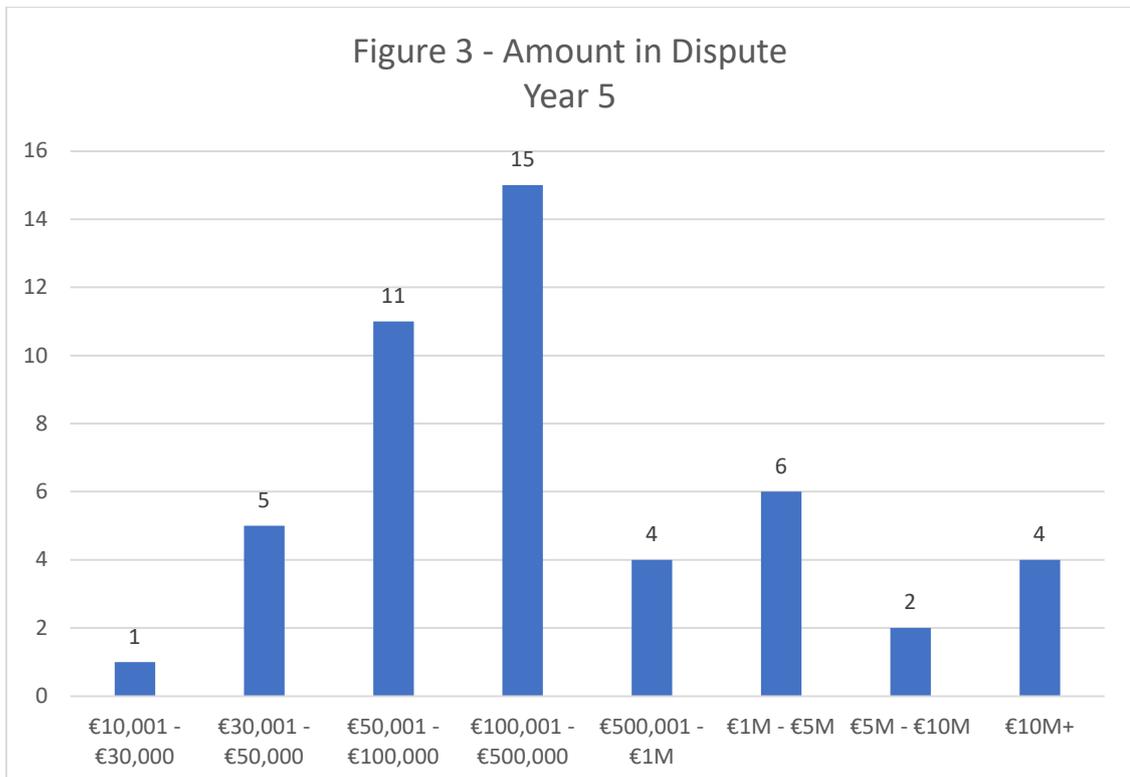
5.4 Figure 1 below sets out the categories of the parties in dispute. The most common dispute referred for adjudication involved a Subcontractor in dispute with a Main Contractor, with the referral being made by the Subcontractor.



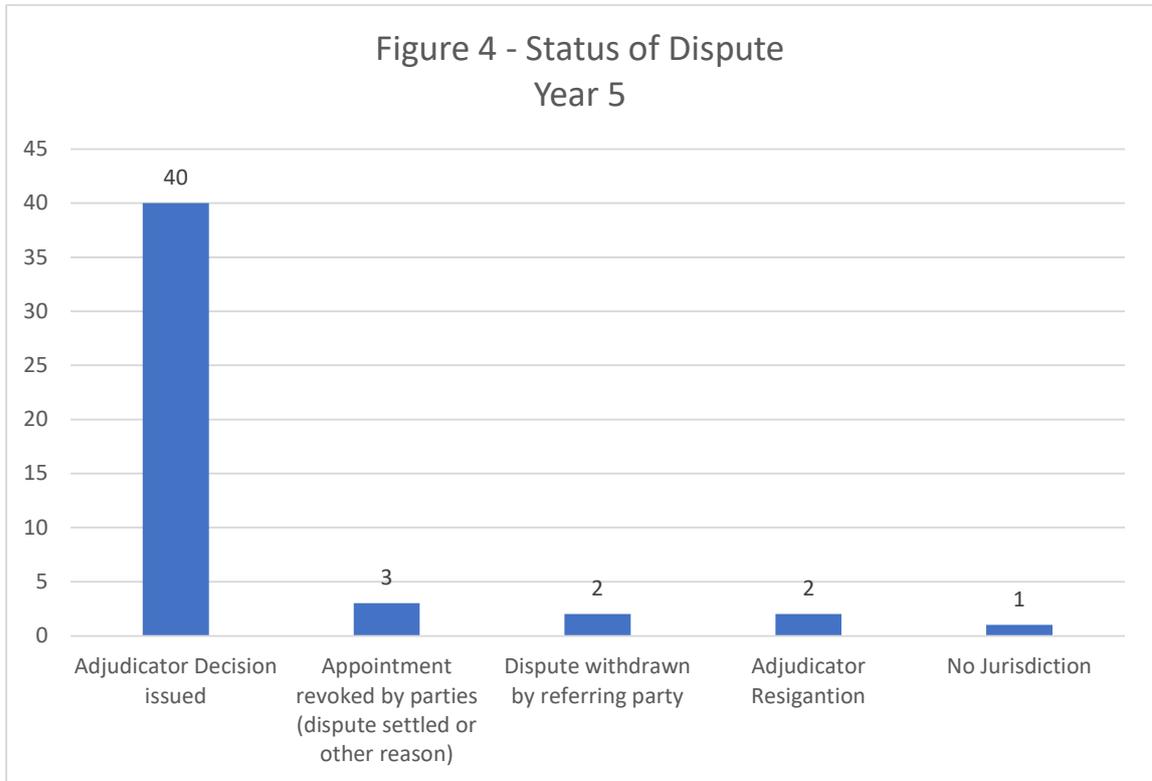
5.5 Figure 2 provides information on the nature of the disputes in these cases. Most disputes were categorised as interim or final payment disputes. The category ‘Other Payment’ involved disputes related to, inter alia, fees for professional services and extension of time claims.



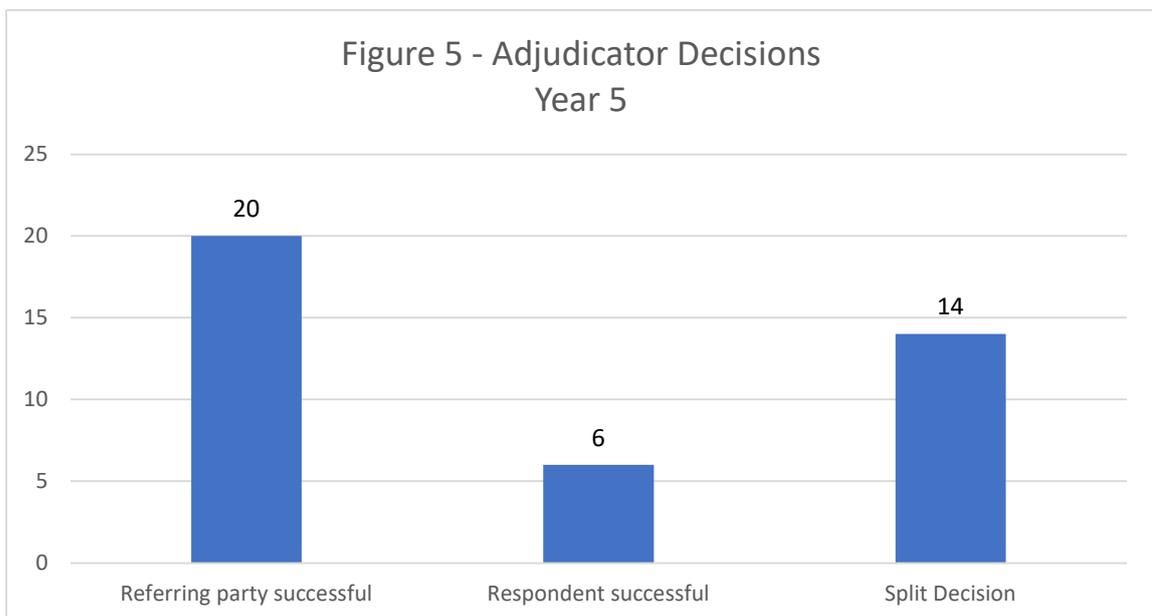
5.6 Figure 3 provides information on the amount in dispute between the parties. The highest number of cases involved amounts in the ranges of over €100,000 to €500,000 and over €50,000 to €100,000.



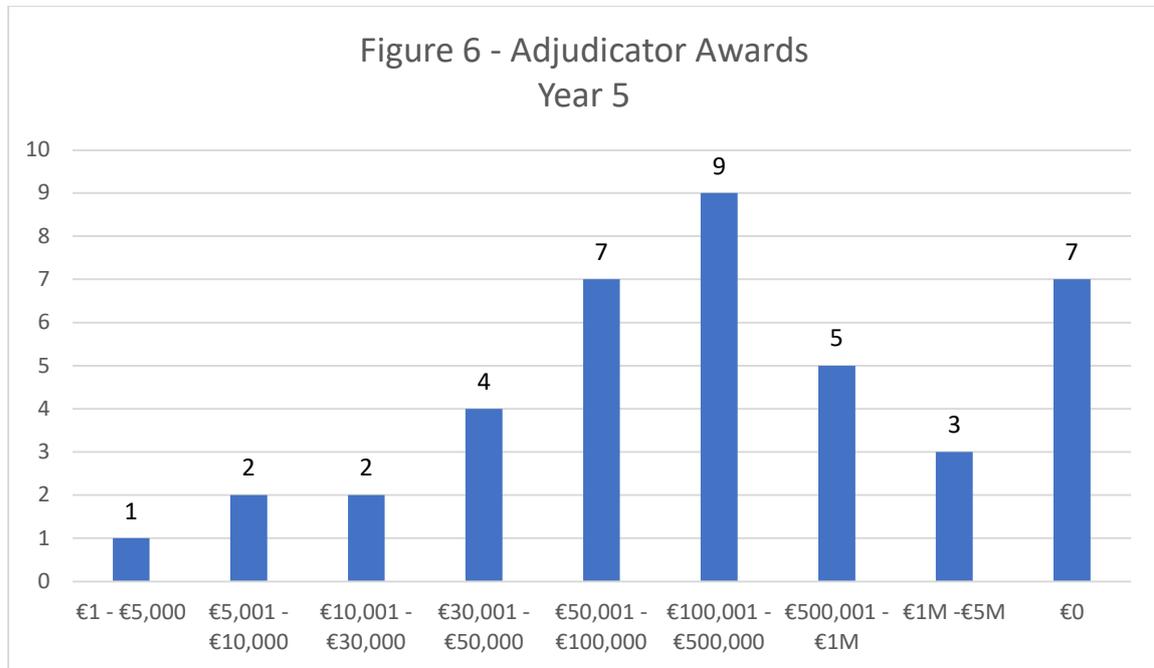
5.7 Figure 4 provides information on the status of the 48 disputes following the referral of these disputes to an Adjudicator. In total there were 40 Adjudicator decisions issued.



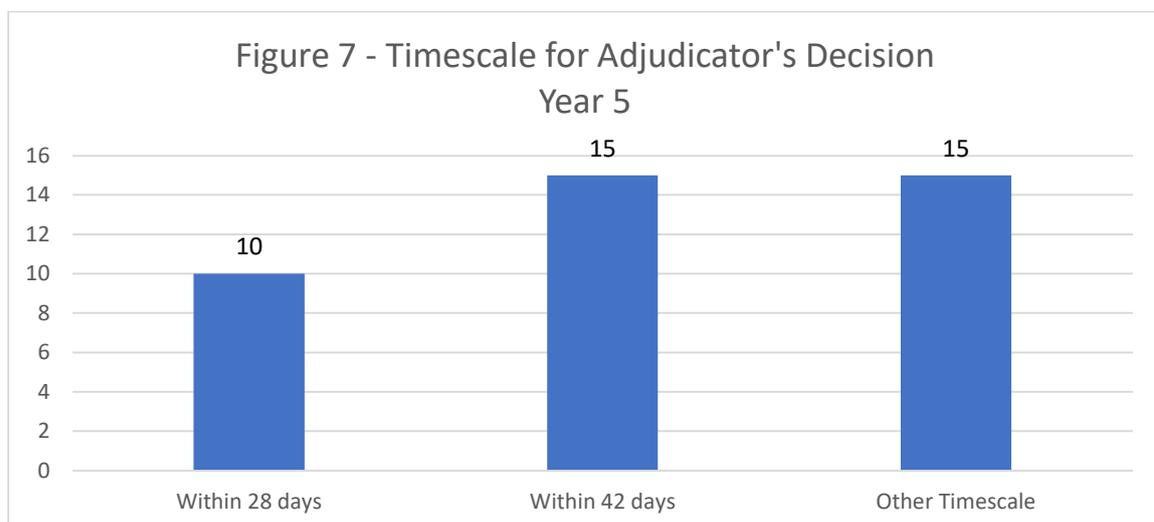
5.8 Figure 5 provides information on the outcome of the 40 Adjudicator decisions. The Referring Party was successful in 20 cases, the Responding Party was successful in 6 cases and there was a split decision between the parties in 14 cases.



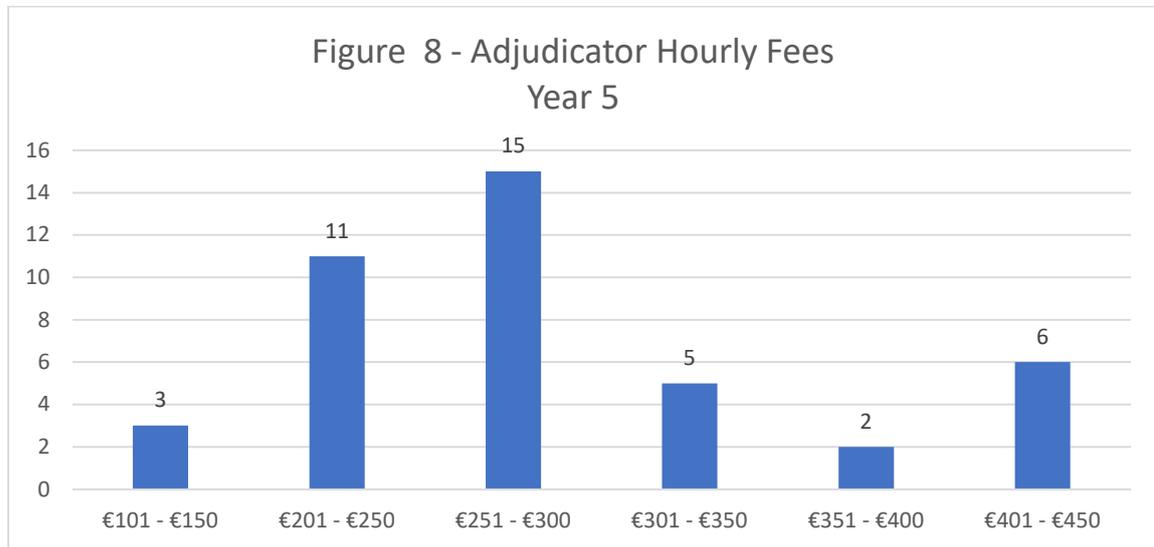
5.9 Figure 6 provides information on the amounts that were awarded in Adjudicator decisions. A total of 33 cases resulted in monetary awards made by the Adjudicator. In the other seven cases, no monetary awards were reported as the Respondent Party was successful in six cases and the other case was a decision concerning liability for the payment of the Adjudicator’s fees.



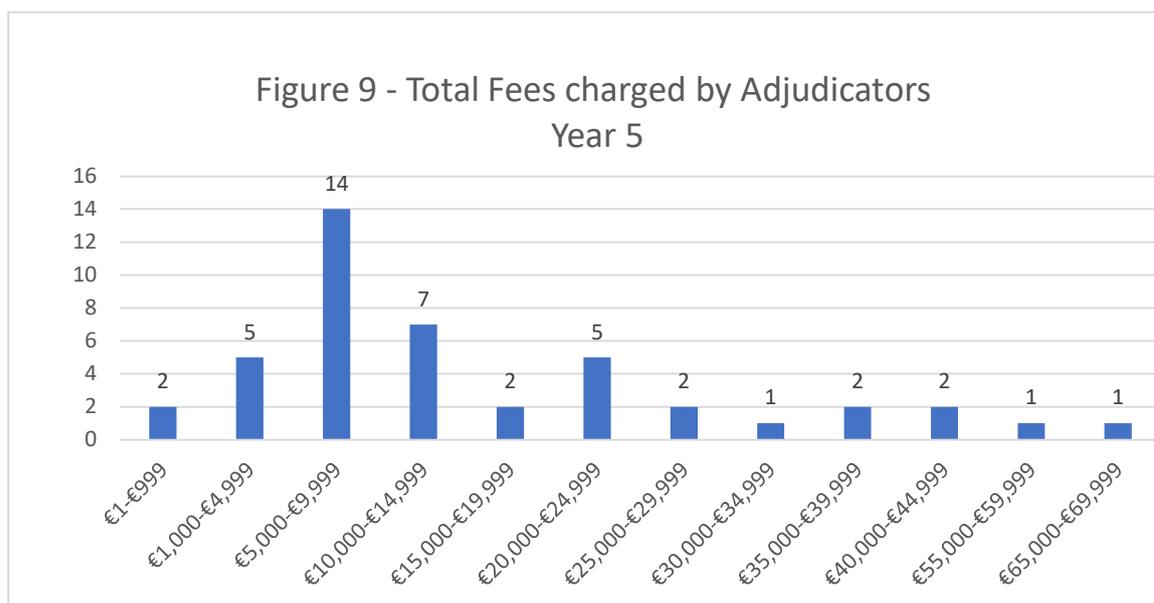
5.10 Figure 7 provides information on the timescale for the issue of the Adjudicator’s decision to the parties in the above mentioned 40 cases. A decision was issued in 25 cases within either 28 or 42 days from the date of the referral of the payment dispute to the Adjudicator. There were 15 cases in which the decision was issued after 42 days from the date of the referral of the payment dispute to the Adjudicator.



5.11 Figure 8 provides information on the hourly fees charged by the Adjudicators in 42 cases. This total includes 38 Adjudicator decisions, three appointments that were revoked by the parties and one withdrawn case. The hourly fee charged by Adjudicators was in the range of €251/€300 in 15 cases and €201/€250 per hour in 11 cases.



5.12 Figure 9 details the total amount of fees charged by Adjudicators in 44 cases – this includes two cases where a flat fee was agreed, rather than an hourly rate applied. There were 14 cases where total fees charged were in the range €5,000 to €9,999 and 7 cases where total fees charged were in the range €10,000 to €15,000. The ‘Code of Practice Governing the Conduct of Adjudications’ requires that the fees charged by an Adjudicator should be “reasonable in 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.



6. Legal Cases involving the Chairperson of the Construction Contracts Adjudication Panel

- 6.1** As referred to in last year's Annual Report, there was one Judicial Review ongoing arising from the appointment of an Adjudicator under section 6(4) of the Construction Contracts Act, 2013. These proceedings were struck out with no Order.
- 6.2** A second Judicial Review was commenced in November 2020 arising from the appointment of an Adjudicator under section 6(4) of the Construction Contracts Act, 2013. Mr Justice Brian O'Moore delivered his Decision on the 20th of July 2021 in the case of 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) [2020/872 JR]. Mr. Justice O'Moore decided that the contract governing OCS's entitlement to be paid for the relevant works postdated the commencement of the Construction Contracts Act, 2013 and therefore OCS may seek adjudication under the Act in respect of its claim for payment.

7. Enforcement of Adjudicator Decisions

- 7.1** 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).
- 7.2** A number of applications have now been taken to enforce the decision of an Adjudicator under this Statutory Instrument.

8. Appointment of the new Chairperson of the Construction Contracts Adjudication Panel and members of the Panel

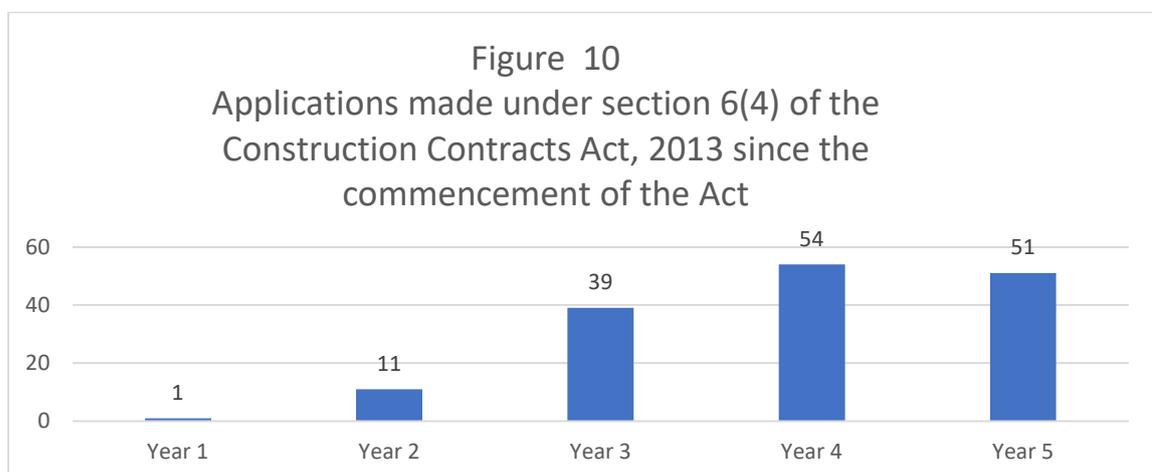
- 8.1** Section 8 of the Construction Contracts Act, 2013 provides that the Minister for Enterprise, Trade and Employment shall appoint members to a Panel of Adjudicators and shall also select a member of the Panel to be its Chairperson. Dr Nael Bunni indicated to the Minister that he would step down from the role of Chairperson once his appointment expired on the 30th of June 2021, having served in the role from the 8th of July 2015.
- 8.2** The Department of Enterprise, Trade and Employment invited 'Expressions of Interest' from eligible candidates for appointment to the Panel of Adjudicators and for appointment to the role of Chairperson. There was a good response by the closing date from candidates seeking an appointment to be a member of the Panel and also there were a number of those who applied for the role of Chairperson.
- 8.3** A selection board was established, which included Dr Nael Bunni, outgoing Chairperson, Mr Michael Farrington, Principal Officer and Head of Procurement Practice and Commercial Skills Academy, Office of Government Procurement, and Ms Tara Coogan, Principal Officer and Head of the Construction Contracts Adjudication Service in the Department of Enterprise, Trade and Employment. The Selection Board decided that 19

members of the previous Panel who had re-applied for appointment should be recommended to the Minister as being suitable for another term of appointment of 5 years. They were appointed by Mr Damien English T.D., Minister of State for Business, Employment and Retail to the new Panel from the 7th of March 2021.

- 8.4** An Interview Board was established which included Mr Hank Fogarty who is a Chartered Engineer with wide experience in conciliation and arbitration of civil engineering construction disputes. The Interview Board determined that an additional 17 persons should be recommended to the Minister as being suitable for appointment to the Panel of Adjudicators based on their professional qualifications and experience. They were appointed by Mr Damien English T.D., Minister of State for Business, Employment and Retail to the new Panel from the 10th of May 2021.
- 8.5** Following an assessment of the applications for the role of the Chairperson, I was recommended to the Minister as the most suitable candidate to succeed Dr Nael Bunni. Mr Damien English T.D., Minister of State for Business, Employment and Retail, confirmed my appointment as Chairperson from the 1st of July 2021.
- 8.6** The full list of the current members of the Construction Contracts Adjudication Panel is at Annex 1.

9. Comment and Conclusions

- 9.1** I am pleased to have been appointed to the important role of the Chairperson of the Construction Contracts Adjudication Panel, succeeding Dr Nael Bunni. The past year has been a challenging one for the Construction Sector, like many sectors of the economy, due to the COVID-19 pandemic. It is indeed good to see that construction sites are open again and work has resumed.
- 9.2** This Annual Report outlines the important statutory protections provided by the Construction Contracts Act, 2013 for an Executing party under a construction contract. This is illustrated in Figure 5 above, where the Referring Party has been successful or partially successful in 34 of the 40 Adjudicator decisions reported. While most payment disputes involved a Subcontractor/Main Contractor and a Main Contractor/Employer, Figure 1 shows that other parties are also pursuing their rights under the legislation.
- 9.3** 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 may also 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.
- 9.4** Both I and Dr Nael Bunni, the former Chairperson, have appointed 37 Adjudicators under section 6(4) of the Construction Contracts Act, 2013 to payment disputes with a combined value of just over €55.5 million in the period covered by this Annual Report. This figure excludes the value of cases which were re-entered a second time.
- 9.5** This Annual Report and the previous Annual Reports highlight that parties to construction contracts are pursuing their rights under the Construction Contracts Act, 2013 and seeking redress for non-payment or under payment.
- 9.6** As Dr Nael Bunni stands down as the first Chairperson of the Construction Contracts Adjudication Panel, it is appropriate to set out the number of applications and appointments made under section 6(4) of the Construction Contracts Act, 2013 since the commencement of the Act in July 2016.



- 9.7** In the past five years there have been 124 Adjudicator appointments made by the Chairperson of the Construction Contracts Adjudication Panel to payment disputes totalling almost €151.5 million.
- 9.8** In order for payment disputes to be avoided in the first instance, 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. An information booklet on the Construction Contracts Act, 2013 is available on the Department’s website at www.enterprise.gov.ie, which includes information on the various stages in the adjudication process.
- 9.9** I welcome the decision of Mr Justice Brian O'Moore in the Judicial Review proceedings taken by Kevin O'Donovan and the Cork County Committee of the Gaelic Athletic Association, as it has clarified an important aspect of the law.
- 9.10** Finally, I would like to welcome the new members of the Construction Contracts Adjudication Panel who were appointed earlier this year following a competition conducted by the Department of Enterprise, Trade and Employment. I would also like to thank those former members whose term of appointment came to an end this year.

Mr Bernard Gogarty,
Chairperson.
August 2021

ANNEX 1

Construction Contracts Act, 2013

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 Gerard	Meehan
Mr John	Costello	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		