Time Waits For No Man – So you think the Adjudicator got it wrong? How long do you have to challenge the decision?

Written by Dominic Helps

How long have you got to challenge the adjudicator's decision? The English Court of Appeal has decided:

- **the claimant who considers the adjudicator awarded too little must challenge before the original limitation period for his claim expired.**
- **the defendant who considers he paid too much has a new limitation period starting on the day he paid the adjudicator's decision.**

Is it unfair that the loser may have years longer than the winner? That question will soon be answered by the Supreme Court of the United Kingdom. Their decision will be of interest to anyone involved with FIDIC DABs anywhere in the world.

In a couple of months the highest court in the land, the Supreme Court, will for the first time be wrestling with the complexities of adjudication law. The case in question is *Aspect Contracts (Asbestos) Ltd v Higgins Construction Ltd*[1] (the Aspect Case). The Supreme Court's judgment will hopefully dispel much of the confusion surrounding the Court of Appeal's controversial decision on the application of limitation rules to matters decided by an adjudicator.

The concept of "temporary finality", as it has become known, is a central feature of UK statutory adjudication. Although an adjudication decision is binding, either party can later seek a final determination of the matters to which it relates. This will be done either through the courts or arbitration, depending upon the parties' agreement.

In cases involving the payment of money, for instance an award of damages for breach of contract, either party might invoke the final determination option. The party receiving payment might consider that the amount awarded by the adjudicator was inadequate. Conversely, for the paying party, the issue might well be that the sum awarded by the adjudicator was excessive in which case the claim would involve recovery of the amount of the perceived over-payment.

The Aspect Case concerned a claim for recovery of a perceived overpayment. It arose out a dispute between a contractor, Higgins, and its specialist consultant, Aspect, which it engaged to carry out an asbestos survey to determine the amount of asbestos on a site that was to be redeveloped.

The Facts

First it should be mentioned that the limitation period for claims in this case was six years running from the date of the relevant breach of contract. Otherwise the facts of the Aspect Case are refreshingly straightforward:

- In April 2004 Aspect carried out its survey and reported to Higgins.
- Higgins then entered into the development contract with the housing authority and engaged a subcontractor, Falcon, for asbestos removal and demolition.
- Falcon encountered a much higher volume of contaminated material than was identified in Aspect's report and Higgins maintained that it therefore had to pay much more than anticipated to Falcon and there were 17 weeks of critical delay to the project.
- It was not until June 2009 that Higgins commenced adjudication proceedings against Aspect claiming damages representing the losses which it suffered as a result of Aspect's failure to provide an accurate survey.

Tel: + 44 (0)20 8614 6200
Fax: + 44 (0)20 8614 6222
Email: info@corbett.co.uk
www.corbett.co.uk

- In July 2009 the Adjudicator awarded Higgins over £650,000 as damages which was duly paid by Aspect in the following month.
- Getting on for three years later, in February 2012, Aspect commenced court proceedings in the Technology and Construction Court in England (TCC) for the final determination of its liability to Higgins.
- In May 2012 Higgins served its defence and counterclaim in the court proceedings in which it sought to offset against Aspect's claim further losses which it now said it had suffered as a result of Aspect's breaches. However, its right to do so was challenged by Aspect who contended that Higgins' counterclaim was time-barred.

One of the puzzling features of this case is the remarkably slow speed at which the dispute unfolded. Indeed, it is an object lesson in the perils of leaving disputes to fester. For instance, why did it take Higgins approximately four years to start an adjudication to recover the substantial losses it had suffered? Even more oddly, having had to pay such a substantial sum to Higgins, why did Aspect then leave it almost another three years to take the necessary steps to recover what it claimed was a substantial over-payment?

How the limitation issue arose

Perhaps unwittingly and somewhat ironically, it was Aspect's challenge to Higgins' defence and counterclaim on limitation grounds that precipitated an application by Higgins for permission to amend its case by introducing a limitation argument regarding Aspect's own claim for recovery of the alleged over-payment.

If the date when time began to run for Aspect's claim was the date when it advised Higgins about asbestos on the site - and it was that advice that had led to Higgins' claim and the resulting award against Aspect - then Aspect's court proceedings would be time-barred. Conversely, if, as Aspect alleged, time ran from when it had complied with the adjudicator's decision, by making the alleged over-payment, then the court proceedings would have been commenced well within the six-year limitation period.

It was those matters relating to limitation on which Higgins asked the court to issue a binding declaration. At first instance in the TCC, Akenhead J decided the matter in Higgins' favour, declaring that Aspect's claim was indeed time-barred and that both Aspect's claim and Higgins' counterclaim should be dismissed. Aspect took the case to the Court of Appeal and Longmore LJ delivered a unanimous judgment overturning Akenhead J's decision.

The contract issue

As one might expect, the contract contained no express obligation upon a successful party in adjudication proceedings to repay monies awarded where it is later shown in final determination proceedings that it was not entitled to those monies. Therefore, the central issue, both at first instance and in the Court of Appeal, revolved around defining that obligation.

Central to Aspect's position was the argument that, because of the absence of any such duty in either the primary or secondary legislation which imposed adjudication in construction contracts[2], or in contracts such as the one in this case, it was clearly appropriate for the court to *imply* a term to that effect. If such a term were to be implied, it would appear to follow that the relevant duty to repay would arise when the losing party pays the monies pursuant to the adjudication decision. Crucially, for Aspect's purposes, it would then follow that the relevant breach would in this case have occurred well within the six-year limitation period.

Akenhead J had not been impressed by Aspect's arguments for the implication of this sort of term into the contract. In dismissing those arguments, he applied the long-established rule governing the implication of terms – which is whether it is *necessary* to imply the term relied upon in order to make business sense of the agreement. He decided that the test had in this case not been satisfied.

Tel: + 44 (0)20 8614 6200
Fax: + 44 (0)20 8614 6222
Email: info@corbett.co.uk
www.corbett.co.uk

Akenhead J departed from the earlier TCC decision of HHJ Stephen Davies in *Jim Ennis Construction Ltd v Premier Asphalt Ltd*[3], in which the Judge held that a term should be implied in these circumstances. Akenhead J considered that, not only was it not necessary to imply a right into the contract to recover over-payment resulting from compliance with an adjudicator's decision, but that it would be positively undesirable to do so. This is because the resulting cause of action would in practice extend very considerably the amount of time during which the underlying dispute could be litigated or arbitrated and then only by the party who had made the over-payment.

In rejecting the necessity argument advanced by Aspect, the Judge also relied heavily on the fact that Aspect could, at any time after it had provided its report, have made an application to the court seeking a "negative declaration" of liability to Higgins for the work carried out.

As regards the all-important limitation question, it would follow from Akenhead J's findings on the legal issues that the cause of action available to the paying party (Aspect) arose all the way back when it provided its report in 2004. The limitation period had therefore expired approximately two years before Aspect commenced the court proceedings which were time-barred.

However, the Court of Appeal fundamentally disagreed with both the Judge's approach and his conclusion. Longmore LJ delivered the unanimous judgment of the three-man appellate tribunal. Firstly, and most importantly, Longmore LJ observed that it did not really matter whether one classified the task here as one of implication of terms or construction of the contract. What was crucial was the fact that the contract incorporated the statutory Scheme for Construction Contracts which clearly envisaged the possibility of an over-payment. Although the Scheme does not expressly require the over-payment to be repaid, in Longmore LJ's mind, "it is as close to being explicit as it is possible to be."

Nor was the Court of Appeal persuaded by the argument that, in order to avoid the complications that had arisen in this case, the paying party could at any time have applied to the court for a negative declaration confirming that it was not liable to pay further monies. Longmore LJ considered firstly that the juridical basis of such a step was questionable. Secondly, he thought it was unrealistic and counter-intuitive to expect a party who denies liability to take the initiative and himself start legal proceedings. These departures from Akenhead J's approach to the problem, although not entirely convincing in a number of respects, were fatal to Higgins' case and Aspect's appeal was allowed.

The restitution issue

One of the most tantalising features of the Aspect Case is the treatment by both Courts of the alternative claim advanced by Aspect for repayment of the monies based on the law of restitution and more specifically the principle of unjust enrichment. Aspect argued that the circumstances of this case were comparable to a case where a court judgment requiring the payment of monies is overturned on appeal. In that situation, the law of restitution imposes an equitable duty upon the recipient of those monies to pay them back and which gives rise to an enforceable cause of action against him.

Akenhead J was not impressed by this argument and held that no claim in restitution could lie in these circumstances. He also commented upon the fact that it is unclear how UK legislation on limitation applies to restitution.

It appears from the Court of Appeal's judgment that Aspect's alternative claim in restitution was not argued at that level, possibly due to Aspect's success on its primary claim based upon the law of contract. However, as we understand it, the judges of the Supreme Court have rather surprisingly stipulated that the restitution point should be argued before them when they hear the Aspect Case. It may be dangerous to read anything into this. It may be that the Supreme Court simply wishes its review of the law in this area to be as comprehensive as possible. But it is also possible that the Supreme Court will decide that the answer

Tel: + 44 (0)20 8614 6200
Fax: + 44 (0)20 8614 6222
Email: info@corbett.co.uk
www.corbett.co.uk

lies in the application of restitutionary principles. We shall soon see.

Conclusion

- **Right now, English law says that a claim for a refund arises when the adjudicated amount is paid. A new limitation period starts on the date of payment.**
- **Advantage now lies with the original paying party. He may leave taking steps to recover his alleged over-payment until as late as possible and certainly long after any claim relating to the parties' performance would be time-barred by limitation. All cross-claims may thus be shut out and this opens the door to potential unfairness.**
- **Review by the Supreme Court is however imminent. I predict that if the Supreme Court does reinstate Akenhead J's approach, it will precipitate a number of cases being launched in the courts or arbitration for final determinations to avoid the limitation risk in circumstances similar to the Aspect Case.**

1 At first instance the reference is [2013] EWHC 1322 (TCC). For the Court of appeal the reference is [2013] EWCA Civ 1541.

2 The primary legislation that applied to this case was the Housing Grants, Construction and Regeneration Act 1996 and the secondary legislation was the Scheme for Construction Contracts.

3 3[2009] EWHC 1906 (TCC).

Article Author

Dominic Helps

Email: dominic.helps@corbett.co.uk

Tel: + 44 (0)20 8614 6200
Fax: + 44 (0)20 8614 6222
Email: info@corbett.co.uk
www.corbett.co.uk