

CONSTRUCTION : BULLETIN

Adjudication and Limitation Periods – You May Have Won The Battle, But Have You Won The War?

The Supreme Court recently made its first decision on adjudication in the case of *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc*. The Court considered what entitlement a party who has been ordered to pay money in an adjudication has to recover that payment and what time limit applies to such a claim.

Background

Higgins Construction Plc (“Higgins”), a building contractor, engaged Aspect Contracts (Asbestos) Ltd (“Aspect”), an asbestos specialist, to survey and report on a block of maisonettes which Higgins was considering redeveloping.

Aspect conducted the survey in March 2004 and issued its report on 27 April 2004. However, in early 2005 Higgins discovered asbestos not identified in Aspect’s report and a dispute arose.

Higgins referred the dispute to adjudication pursuant to the Scheme for Construction Contracts (England and Wales) Regulations 1998 (the “Scheme”) seeking payment of £822,482 in damages plus interest.

On 28 July 2009, the adjudicator found that Aspect had been in breach of contract and/or negligent for failing to exercise reasonable skill and care in carrying out the survey. Higgins was awarded £490,627 plus interest. Aspect paid this sum to Higgins on 6 August 2009.

The limitation period for bringing claims under the contract between Higgins and Aspect was six years. At the time of Aspect’s payment to Higgins, almost nine months remained of the limitation period applicable to

Higgins’ claim for breach of contract, and around 18 months remained in respect of Higgins’ claim in tort. However, neither party sought a final determination of the dispute within those periods.

On 3 February 2012, after both limitation periods applicable to Higgins’ claim had expired, Aspect commenced legal proceedings to recover the sum it had paid to Higgins on 6 August 2009. Aspect alleged that no payment should have been due to Higgins on the merits of the original dispute.

Aspect’s claim was based on an alleged implied term that a paying party “remained entitled to have the [adjudicator’s] decision finally determined by legal proceedings and, if or to the extent that the dispute was finally determined in its favour, to have that money repaid to it.” Aspect argued that it had six years from the date of payment to enforce this contractual right.

Higgins sought to counterclaim for the £331,855 balance of its original claim not awarded by the adjudicator.

High Court

The claim was first of all heard by the High Court, which rejected Aspect’s claim on the basis that there was no implied term for repayment and found that Aspect should have sought a declaration that it was not liable to Higgins within the original limitation period (i.e. within six years after performance of the survey and provision of the report).

The High Court held Higgins’ counterclaim for £331,855 was also



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time-barred as the limitation period applying to Higgins' claim had expired.

Court of Appeal

The case went to the Court of Appeal, which reversed the High Court's judgment on the basis that the Scheme did imply a term into all construction contracts for repayment of any sum paid in connection with an adjudication which could be shown not to have been due. This right to recover wrongly made payments was subject to a six year limitation period running from the date of Aspect's payment.

The Court of Appeal also confirmed Higgins' counterclaim for £331,855 was time-barred.

Supreme Court

The case finally came to be heard by the Supreme Court, which came to the same decision as the Court of Appeal.

Since Higgins (the winning party in the adjudication) had a right to enforce payment pursuant to the adjudicator's decision within a limitation period of six years from the date of the decision, the Court considered that Aspect (the losing party in the adjudication) must also have a right to recover the payment made within the same six year period *if* Aspect could establish that the sum ordered to be paid by the adjudicator was not due. The Court stated that the "Scheme makes no sense" without a right to recover the payment made.

The Court therefore found that the Scheme contains an implied term that the paying party in an adjudication has a right to "recover any overpayment to which the adjudicator's decision can be shown to have led, once there has been a final determination of the dispute". To bring a successful claim for recovery of a payment, it would be necessary to ask the Court to finally determine the dispute by reconsidering the evidence and the parties' respective arguments in the adjudication. If the adjudicator's decision was found to be wrong, the payment ordered by the adjudicator could be repaid.

However, although the Court could reconsider the dispute which was the subject of the adjudication, it would

not be possible for the Court to decide to award Higgins more money representing the balance of their original damages claim which they had failed to recover in the adjudication because the limitation period for that claim had expired. Accordingly, even if the Court decided that the adjudicator's decision had been correct, Aspect would be no worse off (apart from having incurred legal costs) because the Court could not have ordered Aspect to pay any more than the sum the adjudicator had already ordered them to pay to Higgins.

Higgins argued that it was unfair for Aspect to have a fresh period of six years in which to challenge the adjudicator's decision when Higgins did not have an equivalent period to make a claim for payment of the balance of damages not awarded by the adjudicator. However, the Court did not have any sympathy for this argument. Higgins could have prevented Aspect from ever bringing this claim by pursuing legal proceedings for final determination of the dispute (together with a claim for payment of the balance not awarded by the adjudicator) within the original six year limitation period. Higgins did not do so and instead chose to let matters rest on the basis of the adjudicator's decision.

In conclusion, Aspect was entitled to pursue a claim for final determination of the dispute within six years from the date of the adjudicator's decision with a view to trying to recover the monies paid to Higgins.

Analysis

As the Supreme Court has implied a term into the Scheme, this decision is relevant to all construction contracts which incorporate the adjudication provisions of the Scheme. Whilst the facts of this case are unusual, it raises the possibility that a party may commence legal proceedings relating to an adjudicator's decision after the limitation period for the original claim has expired, thereby extending the life of the dispute.

To protect against the risk of finding themselves in a similar position to Higgins, successful parties have the

option of seeking the losing party's agreement that the adjudicator's decision is binding, or commencing proceedings to have the dispute finally determined. However, the losing party is unlikely to agree that the adjudicator's decision is binding and it may be risky to incur costs having the dispute finally determined in case the adjudicator's decision is overturned.

An easier and lower risk option would be to consider including wording in the contract at the outset which spells out when an adjudicator's decision becomes binding on the parties. This could be at the end of the original limitation period or within a shorter period of time. The NEC3 Engineering and Construction Contract caters for this by giving the parties a four week period to refer an adjudicator's decision for final determination, after which it becomes binding.

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