



Welcome to June's 2015 edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

This issue examines the Supreme Court's decision, and considers the effect on adjudication practice for winning and losing parties to adjudication under the Scheme going forward.

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Landmark Supreme Court decision on adjudication: *Aspect Contracts v Higgins Construction*

On 17 June 2015, the Supreme Court handed down judgment in *Aspect Contracts (Asbestos) Limited v Higgins Construction Plc* [2015] UKSC 38, and in doing so, it considered for the first time the interaction between the statutory adjudication provisions contained in the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme") and the statutory law of limitation, and laid down an important new law.

The facts

Aspect Contracts (Asbestos) Limited ("Aspect") contracted with Higgins Construction PLC ("Higgins") to carry out an asbestos survey and report on blocks of maisonettes in Hounslow which Higgins was considering redeveloping. The contract contained implied terms under the Scheme which enabled disputes under it to be referred to adjudication, and required the parties to comply with the decision of any adjudicator until the dispute was finally determined by legal proceedings, arbitration or agreement.

A dispute subsequently arose when Higgins discovered asbestos containing materials which had not been identified in Aspect's original report of 27 April 2004 and the dispute was referred to adjudication. The adjudicator's decision went in Higgins' favour and Higgins was awarded the sum of £490,627 plus interest and the adjudicator's costs in respect of Aspect's breach of contractual and / or tortious duty to exercise reasonable care and skill. On 6 August 2009, Aspect made a part payment of the adjudicator's award, leaving an unpaid balance of £331,855 plus interest which Higgins made no attempt to recover, whether by proceedings or otherwise.

The limitation periods for any claim in contract and tort by Higgins expired on 28 April 2010 and in early 2011 respectively. In an unusual move, Aspect issued proceedings seeking to recover the part payment it made on 8 August 2009 after the expiry of both limitation periods as it wished to revisit Higgins' original claim in contract and / or tort which it alleged was without merit. Aspect contended that it had a cause of action against Higgins (in addition to its causes of action in the underlying dispute) which was based on an implied term in the Scheme and / or restitution¹. The alleged implied term provided that, in the event that a dispute between the parties was referred to adjudication pursuant to the Scheme, parties remained entitled to

have the decision finally determined by legal proceedings and, to the extent that the dispute was finally determined in one party's favour, to have that money repaid to it.

Higgins defended Aspect's claim on the basis that it was time barred and sought to counterclaim for the £331,855 balance of its claim that Aspect had never paid.

Decision at first instance²

Akenhead J rejected Aspect's claim that there was no implied term for repayment as it was open to Aspect to have claimed a declaration of non-liability at any time within six years after performance of the contract, but that such a claim was now time barred. Aspect's claim in restitution also failed on the basis that a right to repayment was secondary, and could only arise if and when the court had determined the dispute in Aspect's favour. Since the court found there was no implied term, no repayment was due and the restitutionary claim fell away.

Court of Appeal decision³

The Court of Appeal reached an opposite conclusion to the court at first instance and found that the Scheme did imply that any overpayment could be recovered.

Lord Justice Longmore noted that the contract incorporated the Scheme and therefore expressly provided that the adjudicator's decision would only be binding until such time as the dispute was finally determined. He emphasised that the final determination may be different from the decision reached by the adjudicator but that it was the final determination that is determinative of the rights of the parties: if the final determination concludes that a party has paid too much in the course of adjudication proceedings, then that overpayment should be returned. The Court of Appeal concluded in terms of timing that the cause of action accrues on the date of the overpayment



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which was the date on which the losing party was entitled to have the overpayment returned to him.

Aspect did not pursue its claim in restitution before the Court of Appeal but the Supreme Court subsequently granted Aspect permission to rely upon restitution as an alternative to its primary case, on the basis that the question was one of pure law.

The Supreme Court agreed with the Court of Appeal in holding that, just as Higgins had the right to enforce payment pursuant to an adjudicator's decision, Aspect should also be able to recover any overpayment made pursuant to an adjudicator's decision. The Supreme Court did not, however, endorse the implied term that was pleaded by Aspect at first instance; instead it held that there was a different implied term which enabled the paying party to obtain a final determination of the dispute. The implied term provided that:

"A paying party has a directly enforceable 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"

Lord Mance emphasised that, without the ability to recover such an overpayment, the Scheme makes no sense, and that the implied term was a necessary legal consequence of the Scheme as adjudication was always conceived as being a provisional mechanism pending final determination of the dispute. If, and to the extent that the basis on which the payment had been made fell away as a result of the court's determination, and an overpayment was retrospectively established either by contractual implication, or through

an independent restitutionary obligation, then repayment should be required.

Given that Aspect's cause of action arose from payment of the award, the Supreme Court found Aspect's claim could be brought at any time within six years after the date of payment to Higgins. Higgins' counterclaim for the £331,855 balance of its original claim on the other hand was, however, time barred. This was because Higgins had failed to issue legal proceedings for a final determination within the limitation periods applying to its underlying claim (i.e. six years from April 2004 or early 2005) and it had taken the risk of not confirming the adjudication award it had received.

The Supreme Court also recognised that repayment can be claimed by way of restitution if it is retrospectively established that the sums paid pursuant to the adjudication decision amounted to an overpayment, and Aspect's alternative claim in restitution was therefore also accepted.

The Supreme Court explained its decision in terms that, at a cash flow level, Higgins remained entitled to the payment unless and until the outcome of legal proceedings, arbitration or negotiations. But at the deeper level of the substantive dispute between the parties, the parties have rights and liabilities which may differ from those identified by the adjudication decision, and on which the party making a payment under an adjudication decision must be entitled to rely in any later legal proceedings, arbitration or negotiations.

Practice points

Generally

- If you can, enter into your construction contract under seal as this will extend the limitation period for the underlying dispute to 12 years which may avoid the

issue in *Aspect Contracts v Higgins Construction* completely.

- Alternatively, you could try and agree that the adjudicator's decision is conclusive unless it is challenged in litigation or arbitral proceedings within a specific timeframe (for example, within 28 days)⁴.
- Failing either of the above, then the following practice points will apply:

Losing parties

- If you made payment pursuant to an adjudicator's decision, it will be open to you to issue court proceedings to seek a final determination of the adjudicator's decision and repayment within six years from the date on which you made payment.
- If your claim was rejected outright by the adjudicator, it will be open to you to pursue your claim before the court within the limitation periods relating to the causes of action in your underlying claim. NB: these will generally be much earlier dates than the date of the adjudicator's decision so it is very important you act quickly as your claim could be time barred.
- For tactical reasons, you should consider holding off on your claim for a repayment until after the underlying limitation period for the dispute has expired to ensure that any counterclaim that might otherwise be brought against you will be time barred.
- Any further proceedings relating to your claim for repayment will not be limited to the adjudicator's decision: the court will revisit the whole dispute and the adjudicator's reasoning will have no legal or evidential weight.



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Winning parties

- The adjudicator's decision is not final in the sense that it will be open to challenge by the losing party for six years after the date on which it settled the adjudicator's award.
- The only way you can ensure you are not on the receiving end of a claim for repayment is by bringing legal proceedings to confirm the adjudicator's award within the limitation periods relating to your underlying claim.
- If you find yourself on the receiving end of a claim for repayment and you have a counterclaim in answer to the claim for repayment, it may be time barred if your cause of action in the underlying claim expired six years ago or more.
- Even if your underlying causes of action are time barred, if you have a valid defence to any claim for a repayment (such as a defence of set-off) which was rejected by the adjudicator, then you are entitled to ask the court to consider that defence in answer to the claim for a repayment.

Conclusion

This is the first time that the Supreme Court has considered adjudication and the outcome is a brand new entitlement for the losing party to challenge an adjudicator's decision within six years of making payment. The decision will come as a surprise to many, but it is firmly rooted in the fact that adjudication under the Scheme was conceived as being a speedy provisional measure until such time as the dispute is finally determined by court, arbitral proceedings, or agreement.

The Supreme Court's decision is only days old and only time can tell how it will affect adjudication practice in England and Wales going forward. In practice, the majority of parties treat adjudicator's decisions as being 'final': it is relatively unusual for parties to attempt a second bite of the cherry and have the claim litigated before a court or tribunal so it may be that there will be very little if any change seen.

Once this is certain, however, winning parties that are caught by the decision in *Aspect Contracts v Higgins Construction* will need to be aware of when the limitation period for their underlying claim expires and take a commercial view as to whether it is worth pursuing it to a final resolution within the limitation period, or risk losing their entitlement in the underlying dispute for ever.

Footnotes

1. Claims in restitution are based on the unjust enrichment of one party at the expense of another.
2. See also http://www.fenwickelliott.com/files/insight_issue_26.pdf
3. See also http://www.fenwickelliott.com/files/insight_issue_38.pdf.
4. Coulson J indicated that such a contractual term would be effective in his judgment in *Jerram Falkus Construction Ltd v Fenice Investments Inc* [2011] EWHC 1935 (TCC).

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston. lkingston@fenwickelliott.com. Tel +44 (0) 207 421 1986

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