

ALL CHANGE! PAYMENT OF ADJUDICATION DECISION DOES RE-START THE CLOCK FOR LOSING PARTY

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The Court of Appeal has now reversed the decision in *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc*, concluding that payment of the adjudication decision constitutes a new cause of action and re-starts the limitation clock for the paying party.

Aspect was the losing responding party in an adjudication in 2009 under the Scheme for Construction Contracts (the Scheme). The adjudicator found that Aspect was in breach of contract (back in 2004/5) for failing to conduct a proper and appropriate survey and failing to identify the presence of asbestos containing material. A decision was issued in favour of Higgins, resulting in Aspect paying Higgins £658,017 (about £200,000 less than was being claimed) in August 2009.

Aspect then commenced legal proceedings in 2012 in the Technology and Construction Court for a negative declaration that it was not liable to Higgins for breach of contract. In doing so, it relied on an implied term that an unsuccessful party was entitled to have an adjudication dispute finally determined in court proceedings and was entitled to repayment of monies it had paid, if successful in those proceedings.

Higgins argued a limitation defence on the basis that the Housing Grants, Construction and Regeneration Act (Construction Act) and the Scheme did not alter or extend limitation periods for bringing a dispute before the court. In its counterclaim, Higgins also argued that it was entitled to the full amount of its claim and it sought the balance of £150,776.98, exclusive of interest. Aspect's reply was that the counterclaim was statute barred.

Jim Ennis

Aspect argued that payment of the adjudication award created a new cause of action in favour of the losing party. It relied on the only relevant decision, *Jim Ennis Construction Ltd v Premier Asphalt (Ltd)* (2009) which held that there was an implied term of the

construction contract that an unsuccessful party to an adjudication was entitled to be repaid all sums if they were subsequently found not to be due, and that the cause of action for those sums accrued at the date of the original payment.

Aspect's claim failed because Akenhead J declined to follow the decision in Jim Ennis. He decided that neither the Construction Act nor the Scheme extended the original underlying limitation period (six years for contracts under hand - or simple contracts - and 12 years for contracts executed as a deed) which continued to apply.

Implied term was unnecessary

Akenhead J decided there was no need for the implication of such a term - Aspect could have:

- sought a negative declaration from the court at any stage after the contract was last performed (2004); or
- commenced legal proceedings to have the dispute finally determined; within the original limitation period (six years).

In the circumstances, Aspect's claim for a declaration was time-barred, as was Higgins' counterclaim.

Aspect appealed to the Court of Appeal.

The appeal

The issue for the Court of Appeal was whether the court of first instance was right not to follow the decision in Jim Ennis. The question to be answered was: "whether a claim by the losing party to the adjudication for repayment of sums paid over to the successful party is subject to a time bar accruing at the time of the (supposed) original breach or duty or only from the date of the (supposedly) unnecessary payment made as a result of the adjudication."

The submissions

Aspect argued that:

- On its true construction the contract provided for the parties' contractual rights to be revisited after the adjudication had been completed and any over-payment returned;

- Such a term was to be implied because that was how the statutory scheme worked and the term satisfied all the necessary tests;
- Aspect's claim for repayment accrued on payment of the sum and was well within time;
- If Aspect could not in fact make such a claim and therefore its only claim was for a negative declaration, there was no time-bar because the Limitation Act 1980 did not apply to negative declarations;
- The judge had rightly held Higgins' claim was time-barred since Higgins had always had a claim for negligent work done by Aspect.

In reply, Higgins submitted that:

- None of the tests for implied terms could be satisfied on the facts of the case - in particular, the implied term was unnecessary because Aspect could always have sought a negative declaration;
- The court could order money to be repaid "as part and parcel of its jurisdiction to grant a declaration of non-liability" but this had to be done within the original limitation period (and was, therefore, now time-barred);
- However, if the implication worked for Aspect, it had to work in favour of both parties - therefore, Higgins' counterclaim for sums additional to those awarded by the adjudicator was not time-barred and should be allowed to proceed.

The decision

The court allowed Aspect's appeal. Longmore LJ, who gave the leading judgment (and with whom Rimer LJ and Tomlinson LJ agreed), referred to paragraph 23(2) of the Scheme and said that although it "does not say, in actual words, that any overpayment is recoverable, that seems to me to be the true intent of the provision and is inherent in the words used."

According to the judge, the Scheme expressly provides that adjudication is only temporarily binding until the dispute is finally determined. If on final determination one party had paid too much, repayment had to be made. The judge said that "[T]o the extent that there is no reference to such repayment in paragraph 23(2) of the Scheme it is implicit. But it is as close to being explicit as it is possible to be."

What about the negative declaratory relief option?

The judge referred to it as being "at best, an ungainly remedy", with various disadvantages:

1. It is "counter-intuitive" to expect a person who maintains he is not liable to take the initiative and start proceedings;
2. It was not clear on what juridical basis a declaration of non-liability would automatically carry with it a right to claim repayment;
3. Whether or not a declaration of non-liability was time-barred was a difficult question since a "cause of action" is usually an assertion of entitlement.

A level playing field?

The situation was indeed different for an unsuccessful party (who has six years from overpayment) and the successful party (who must sue within six years of the original breach of contract or duty). The judge said that it was a "difficulty more apparent than real because the successful party always knows he has a claim and can easily issue proceedings any time he chooses. There is thus no real unevenness in the playing field.."

The court also stressed that it had received no argument to the effect that Aspect could recover its overpayment by relying on the law of unjust enrichment.

Commentary

The appeal decision gives the unsuccessful party further time to seek repayment of the adjudication sum regardless of whether or not the original limitation period has expired. This is therefore good news for paying parties. Conversely, referring parties who are successful will have to keep an eye on the limitation clock as they do not have two bites of the cherry and, if appropriate, will have to seek final determination of the dispute within the original limitation period. It is of course open to the parties to agree a shorter limitation period expressly in the contract so as to displace the usual statutory six or 12-year period.

The difference in approach to declarations of non-liability between Akenhead J and the Court of Appeal is interesting. Such declarations are not an attractive option in these circumstances and would appear in light of the appeal decision, to be less important or appropriate.

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Ashley Pigott

Partner - Birmingham

 Email

ashley.pigott@gowlingwlg.com

 Phone

+44 (0)121 393 0543

 vCard

Ashley Pigott