CONSTRUCTION : BULLETIN

Adjudication, Litigation and the Limitation Period:
When does the limitation clock start ticking?

In this bulletin we discuss the recent Court of Appeal decision in *Aspect Contracts (Asbestos) Limited v Higgins Construction Plc*.

Ultimately the question before the Court was: how long do you have to commence legal proceedings to finally determine a dispute that was the subject of adjudication? Section 5 of the Limitation Act 1980 provides that a party to a simple contract has 6 years to pursue a cause of action starting from the date the cause of action arose (the period is 12 years for contracts executed as a deed). Simply, if you fail to bring a claim within this 6 (or 12) year period, your claim will be time-barred. However, it seems that when adjudication is involved, determining the relevant cause of action is not always clear-cut.

In the *Aspect v Higgins* case, a dispute between the parties was referred to adjudication. The adjudicator decided that just under £650,000 was due to Higgins and Aspect duly paid this sum. Aspect then commenced legal proceedings to seek a final determination of the dispute and to recover the money it had paid out in compliance with the adjudicator's decision. But how long does Aspect have to start those proceedings? When did the cause of action arise - does the limitation period run from the original breach or does the limitation period start afresh when Aspect paid the £650,000 to Higgins?

Background

Higgins, a main contractor undertaking the demolition and redevelopment of a housing estate in Hounslow, London, appointed Aspect to carry out an asbestos survey in March 2004. Aspect carried out the survey and sent the final report to Higgins in April 2004. Higgins began work on the site and engaged Falcon Refurbishment and Demolitions ("Falcon") for asbestos removal.

In February 2005, when carrying out the work, Falcon discovered more materials containing asbestos than were identified in Aspect's survey. This, Higgins claimed, resulted in Falcon having to be paid more than originally agreed to remove the additional materials and caused roughly 17 weeks of delay to the development.

In June 2009, some 4 years later, Higgins referred this dispute to adjudication, under the adjudication provisions of the Scheme for Construction Contracts (England and Wales) Regulation 1998 (the "Scheme"). Higgins claimed roughly £825,000 as damages for Aspect's breach of contract for failing to conduct a proper and appropriate survey and failing to identify the presence of the additional materials containing asbestos. The adjudicator decided in favour of Higgins. She found that Aspect was in breach of contract and that approximately £650,000 was due to Higgins. Aspect paid this sum in August 2009.

Technology and Construction Court

Following the adjudication Aspect referred the matter to the Technology and Construction Court, seeking a final and binding resolution of the dispute and to recover the money it had paid to Higgins in compliance with the adjudicator's decision.

However, Aspect only began proceedings in February 2012 - 2½ years after the adjudicator issued her decision.

Commencing proceedings in February 2012 was clearly outside the 6 year limitation period from the date of the original cause of action - whether it is

Hawkswell Kilvington

Solicitors to the Construction and Engineering Industries

Hawkswell Kilvington

17 Navigation Court
Calder Park
Wakefield
WF2 7BJ

90 Long Acre
Covent Garden
London
WC2E 9RZ

T: 0844 809 9566
E: enquiries@hklegal.co.uk
W: www.hklegal.co.uk

construed as April 2004 (when Aspect submitted the report to Higgins) or as February 2005 (when the additional asbestos was discovered). Aspect argued that the payment it made to Higgins in August 2009 created a new cause of action, with the limitation clock starting to tick from the date of payment; Aspect was therefore within the 6 year limitation period and its claim was not time-barred.

Aspect claimed that it was an implied term of the Scheme that *"in the event that any dispute between the parties was referred to adjudication… and one party paid money to the other in compliance with the adjudicator's decision… that party remained entitled to have the dispute 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."*

Higgins argued that there is no necessity or room for the implication of the above term and, put simply, Aspect's cause of action arose in either 2004 or 2005 and therefore the claim is barred by limitation.

The Judge, Mr Justice Akenhead, considered that, in essence, Aspect's fundamental claim was for a declaration that it was not in breach of contract. Aspect had a cause of action for this declaration from the date that it provided its report to Higgins in 2004; Aspect did not have to wait until the adjudicator issued her decision to pursue it. The dispute was therefore no different now from what it was in 2005 or at the time of the adjudication – no new cause of action has been created.

The Judge held that there was no implied term that gave a party a new right to sue as from the date of payment in compliance with an adjudicator's decision for the recovery of sums paid. He considered the circumstances in which a term is capable of being implied into a contract and found that it was not possible to say that the term Aspect was seeking to imply into the Scheme was reasonable, equitable, or necessary to make the contract work and it was not so obvious that it "goes without saying". Therefore, the Judge held, Aspect's claim for a declaration that it was not liable to pay damages to Higgins, and for the repayment of sums paid in accordance with the adjudicator's decision, was indeed barred by limitation.

Court of Appeal

Aspect referred the case to the Court of Appeal and argued that the various tests for implication of terms were all satisfied and on the true construction of the Scheme, a party was entitled to the repayment of money if, when a dispute has been referred to the court for final determination, it transpires that the party has made an overpayment.

The Court of Appeal overturned the Judge's decision. It held that if a payment is made in compliance with an adjudicator's decision but subsequent proceedings decide that it should not have been paid, there must be some mechanism whereby it can be recovered. Lord Justice Longmore stated that, whilst the Scheme does not say in actual words that any overpayment is recoverable, it is the "*true intention of the provision*" and is "*inherent in the words used*" that if the final determination decides a particular party has paid too much, repayment must be made. The Court confirmed that the date of the cause of action is the date of the overpayment since this is the date the losing party becomes entitled to have the overpayment returned to him.

Accordingly, the limitation clock started afresh from the date Aspect paid £650,000 to Higgins in accordance with the adjudicator's decision. Aspect's claim was not time-barred and it had 6 years from August 2009 to commence proceedings against Higgins to seek the repayment of £650,000 and a declaration that it was not in breach of contract.

Along with the defence that Aspect's claim was barred by limitation, Higgins made a counterclaim for damages in the sum of roughly £200,000 (the difference between its original claim and the value the adjudicator found was due). The Court considered Higgins's counterclaim and held that as the counterclaim was a consequence of the original breach, and not the repayment claim, the applicable limitation period was 6 years from the alleged breach in either 2004 or 2005. More than 6 years had passed since the breach Higgins relied on, so the Court held that the counterclaim was barred by the expiry of the limitation period.

The consequence of the Court's decision means that Higgins is time-barred from raising any claim for the additional sums it always alleged was due whilst Aspect is now allowed to bring a repayment claim. Some may question the fairness of this ruling.

Practical Implications

Referring a dispute which has been the subject of adjudication to the court for final determination after the expiry of the limitation period for the original cause of action, but within the limitation period from the date of payment made to the successful party, effectively gives the unsuccessful party "another bite of the cherry", with the added comfort that the successful party is barred by limitation from bring a counterclaim. Has this decision opened the floodgates for unsuccessful parties to reopen "cold cases" – cases which were previously considered barred by limitation – and refer them to court for final determination?

Want to know more?

As specialist, award winning construction lawyers, Hawkswell Kilvington has a wealth of experience in dispute resolution within the construction industry; successfully representing parties in adjudication, mediation, arbitration and litigation proceedings.

If you would like to discuss any of the above, please contact Jonathan Hawkswell (jhawkswell@hklegal.co.uk).

CONTACT DETAILS
Hawkswell Kilvington Limited
17 Navigation Court
Calder Park
Wakefield
WF2 7BJ

90 Long Acre
Covent Garden
London
WC2E 9RZ

T: 0844 809 9566
W: www.hklegal.co.uk
E: enquiries@hklegal.co.uk