Adjudication Update – the loser wins, in time

In the recent case of Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc [2013], the Court of Appeal has looked at the effect of an adjudicator’s decision on the limitation period within which a claim for breach of contract must be brought. The Court confirmed HHJ Stephen Davies QC’s decision in Jim Ennis Construction Ltd v Premier Asphalt Ltd [2009], finding that the unsuccessful party to an adjudication has six years (or 12 years if the contract was signed as a deed) from the date of payment of the adjudicator’s award (rather than from the date of breach of contract) in order to commence legal proceedings for repayment of the adjudicator’s award.

Facts

Higgins was the main contractor for a project in London involving the demolition and redevelopment of property. In 2004, Higgins instructed Aspect, a consultant, to carry out an asbestos survey for the site and this was carried out later that year. In 2005, an asbestos removal sub-contractor identified asbestos which had not been picked up in Aspect’s survey.

Higgins made a claim alleging that Aspect had failed to conduct the survey properly and failed to identify all the asbestos on the site. In 2009, Higgins referred their dispute with Aspect to adjudication. The Scheme for Construction Contracts 1998 applied as there was no express adjudication clause in the contract. The adjudicator found Aspect liable for breach of contract and, later that year, Aspect paid the adjudicator’s award.

In 2012, Aspect commenced legal proceedings. They argued that there was an implied term entitling the unsuccessful party in adjudication to have the dispute determined by litigation and, if those proceedings were successful, to a repayment of monies paid. They relied on the case of Jim Ennis v Premier where such a term was held to have been implied into a contract incorporating the 1998 Scheme on the basis that para. 23(2) of the 1998 Scheme was a ‘platform’ for such a term to be implied.

Higgins denied that there was such an implied term and argued that the 1998 Scheme did not alter the length of limitation periods. Higgins also counterclaimed for the balance of the monies it had claimed at the adjudication.

At first instance, Akenhead J found that there was no implied term. The usual limitation period of 6 years from the breach of contract applied and therefore Aspect’s claim was out of time.
Appeal

Aspect appealed Akenhead J’s decision on the point of the existence of the implied term.

The Court of Appeal allowed the appeal. The Court found that, where the 1998 Scheme applies, there is an implied term that the unsuccessful party in an adjudication is entitled to have the dispute determined by litigation and then, if those proceedings are successful, to a repayment of monies paid. The limitation period for that claim was held to be six years from payment of the adjudicator’s award (where as the limitation period for the respondent’s counterclaim remained as six years from the breach of contract).

Longmore LJ applied the case of Attorney General of Belize v Belize Telecom Ltd [2009] in reaching his decision. The term could be implied because its purpose was not to improve upon the instrument, but to give effect to ‘the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed’.

Comment

This decision has been criticised for giving the unsuccessful party to adjudication an unfair advantage over the successful one. The unsuccessful party, who has had to pay the adjudicator’s award, will have six years (or twelve years if the contract was signed as a deed) from the date of payment of the award to commence legal proceedings for the purpose of trying to recover some or all of the money paid. By contrast, the usual limitation period of six (or twelve) years from the breach of contract would still apply to the party who was successful at the adjudication should they wish to commence legal proceedings in order to increase their recovery.

The potential effect of this difference in approach to limitation between the successful and unsuccessful parties to adjudication can be seen on the facts of this decision. Aspect were able to bring their claim for repayment as they had commenced proceedings within six years from the date they paid the adjudicator’s award. However, Higgins’s counterclaim for the balance of the sum they had claimed at the adjudication was out of time as more than six years had passed since Aspect’s breach of contract.

December 2013

In the present case the contract incorporating the Scheme expressly provides that the adjudication is only to be binding until the dispute is finally determined. That of itself contemplates that the final determination may be different from the adjudication and that it is the final determination which is to be determinative of the rights of the parties. If the final determination decides that a particular party has paid too much, repayment must be made. To 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.

Longmore LJ

For further information please contact:

Stephen Milne
Associate
T: +44 (0) 20 7469 0414
E: s.milne@beale-law.com