Aspect Contracts (Asbestos) Limited v Higgins Construction Plc

In the Supreme Court’s first ruling concerning construction adjudication the court considers challenging adjudicators’ decisions and limitation periods.

Background


Whilst carrying out the subsequent redevelopment, Higgins discovered asbestos that had not been identified in the report. This caused delay to the project and caused Higgins to incur further costs. Higgins alleged that Aspect’s negligence in failing to identify the amount of asbestos to be removed had caused the delay and costs incurred as Higgins had to spend more time than estimated to fully remove the asbestos. Higgins claimed £822,482 in damages plus interest from Aspect. After failed negotiations and mediation, Higgins referred the matter to adjudication in June 2009.

The adjudicator concluded that Aspect had been in breach of their duty in various, though not all respects, alleged by Higgins. Higgins was awarded £490,627 plus interest and costs, a total sum of £658,017.

Aspect paid the sum ordered by the adjudicator to Higgins on 6 August 2009. Higgins did not further pursue Aspect for the balance of its claim of £331,855.

Key Facts

+ An adjudicator’s award is binding but not final until determined by legal proceedings, arbitration or agreement between the disputing parties.

+ A party who has paid an award will have six years from payment to challenge the award.

+ The right of recovery for overpayment is separate to the original dispute and will exist even if a claim under the original dispute is time barred.
On 3 February 2012 Aspect began proceedings to recover the sum of £658,017 arguing that on the merits of the original dispute no sum was due. In response Higgins counterclaimed for the balance of its original claim of £331,855.

Under sections 2 and 5 of the Limitation Act 1980 a claim for breach of contract or for tort cannot be brought after six years from the date when the cause of action accrued. The main point in dispute in this case was the relevant cause of action which started the clock on the limitation period for Aspect’s claim for recovery of the alleged overpayment and for Higgins’ counterclaim for the balance of their original claim.

The court was required to consider if the start of the limitation period was:

+ the survey by Aspect carried out in 2004;
+ when Higgins discovered the asbestos during the redevelopment works in 2005; or
+ the date that Aspect paid the sum of £658,017 as awarded by the adjudicator in 2009.

If the limitation period began to run in 2004 or 2005 then Aspect’s claim was time barred and should be struck out. If it ran from the date of payment of the award in 2009 then Aspect could bring the claim.

Similarly, the court needed to consider if Higgins’ counterclaim was time barred.

Adjudication provisions implied by the Scheme for Construction Contracts (England and Wales) Regulations 1998 (“the Scheme”)

The key issue in determining the cause of action was the interpretation of the adjudication provisions in the contract between the parties. Under section 108(5) of the Housing Grants Construction and Regeneration Act 1996 (“the Act”) certain provisions governing
adjudication as described in the Act must be included in every construction contract.

In the absence of such provisions, the Scheme’s provisions are implied in the contract (section 114 (4) of the Act). In this case, Aspect’s contract did not contain the provisions required by the Act and therefore the contract was governed by the terms implied by the Scheme.

In relation to the binding nature of the adjudicator’s decision the Scheme (paragraph 23(2)) and the Act (section 108(3)) state that “the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration...or by agreement”.

Aspect claimed that this paragraph of the Scheme (and the Act) implied a term which meant that in the event that one party paid money to the other in compliance with an adjudicator's decision under the Scheme, the party remained entitled to have the decision finally determined by legal proceedings and if found in their favour, recover the money paid under the adjudicator's decision.

Aspect claimed that the right to have the adjudicator’s decision reviewed is independent of the original dispute and time for limitation purposes ran from when they paid Higgins in 2009. Aspect contended that their claim to recover the sum paid was not time barred. According to Aspect, Higgins did not have this right and their counterclaim was time barred.

Higgins argued that Aspect's interpretation was unfair as it gave Aspect a “one-way throw” as it allowed them to dispute the adjudicator’s decision on the basis of the merits of the case but did not allow Higgins to counterclaim.

The High Court ruled that there was no such implied term and that Aspect was time barred from making a claim. The Court of Appeal reached the opposite conclusion and held that the Aspect's interpretation of the legislation was correct and the Scheme implied...
that any overpayment could be recovered.

**Supreme Court Ruling**

This was the first Supreme Court ruling concerning adjudication under the Act and the implied terms of the Scheme. The Supreme Court interpreted the wording of the Act and the Scheme to mean that the adjudicator’s decision is enforceable for the “time being”.

According to the court, adjudication was envisaged as a speedy provisional measure pending final determination by legal proceedings, arbitration or agreement between the parties. Given that adjudication is a provisional measure, a party required to pay an award must have some ability to recover the sum paid if found to be made incorrectly.

On this basis the Supreme Court found that Aspect has a directly enforceable right under the Act and the Scheme to recover any overpayment arising from an adjudicator’s decision. The court understood this either as a contractual right or an independent restitutionary right (as a separate simple contract) to recover an overpayment. This right was triggered when Aspect paid Higgins under the adjudicator’s award. As a contractual right there is a six year limitation period from the date of payment. Aspect was therefore allowed to pursue its recovery as the claim was commenced within six years of the date of payment to Higgins. If Aspect were to succeed in their claim they would be entitled to interest on the overpayment.

This contractual right under the Scheme only exists in respect to recovering overpayment caused by an adjudicator’s decision. The right is separate to the original dispute the parties were involved in even though the merits of the original case will be considered.

Consequently, this does not allow for other matters in dispute to be raised by the other party and reconsidered by the court. The implied
contractual term only allows for the party who has paid out to make a claim. Therefore, in this case only Aspect could make a claim. Any sum pursued by Higgins would be under the original cause of action i.e. the negligence or breach of contract by Aspect in 2004. This was time barred as six years had passed since the original cause of action accrued.

In response to Higgins’ objection that this is unfair, the court responded that it was Higgins’ own fault for taking the risk of not confirming (and possibly improving) the adjudication award it received. The Act sets out that the adjudicator’s decision can be made final by the court, through arbitration or by agreement between the parties. Higgins pursued none of these avenues and was content with the adjudicator’s decision and the sum awarded. The court said that Higgins could have pursued the further £331,855 in court or at the very least obtained a final agreement between the parties.

Implications

Parties who are successful in an adjudication should be aware that the adjudicator’s award is not final and that the award can be challenged for a six year period from the date of payment. If appropriate a successful party should endeavour to obtain an agreement with the paying party that the adjudicator’s decision and award is final. If the paying party does not consent and a challenge is likely at some point within the six year period, consideration should be given to starting court or arbitration proceedings in order to finalise the adjudicator’s decision. This will however result in additional costs and also carries the risk of the judge or arbitrator finding against the successful party and reversing the adjudicator’s award.

Conversely, parties who are unsuccessful at adjudication should note that they have six years from when they pay the sum awarded by the adjudicator to start legal proceedings for a claim for overpayment.