Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc
[2015] UKSC 38; SC; Lord Mance

In 2004 Higgins Construction Plc (Higgins) entered into a contract with Aspect Contracts (Asbestos) Ltd (Aspect) for Aspect to carry out an asbestos survey and report on the Ivybridge Estate, Hounslow (the Contract).

Provisions were implied into the Contract under the Housing Grants, Construction and Regeneration Act 1996 (the HGCRA 1996) and the Scheme for Construction Contracts (England and Wales) Regulations 1998 (the Scheme) stating that disputes would be referred to adjudication and that the adjudicator's decision was not binding ‘until the dispute is finally determined by legal proceedings, by arbitration … or by agreement’.

A dispute arose when Higgins discovered asbestos which had not been identified by Aspect in 2004. Higgins referred the dispute to adjudication in 2009.

Higgins alleged that Aspect was in breach of contract and/or negligent for failing to identify the additional asbestos. Higgins claimed damages of £822,482.00 plus interest. In July 2009, the adjudicator held that Aspect was in breach of contract and negligent and ordered Aspect to pay £490,627.00 plus interest and costs (totalling £658,017.00), which Aspect paid in August 2009. The parties did not agree to treat the adjudicator’s award as final.

Higgins made no attempt to recover the £331,855.00 balance not awarded in adjudication. The limitation period for Higgins' claim in contract and tort expired in 2010 and 2011 respectively. In 2012 Aspect commenced proceedings seeking a declaration of non-liability and repayment of the £658,017.00, alleging that no sum was due to Higgins on an examination of the merits of the original dispute.

Aspect claimed that the Contract contained an implied term giving a paying party the right to have the adjudicator’s decision finally determined and to, if successful, recover any overpayment. Aspect argued that this cause of action arose from the date of payment of the award (ie 2009) and therefore it had six years from this date to enforce its right. Aspect further argued that it had a restitutionary claim arising on payment.

Higgins counterclaimed for the balance of its original claim of £331,855.00. Aspect argued that Higgins’ claim was time barred as the limitation period expired in 2010–2011.

The High Court rejected Aspect’s claim. On appeal the Court of Appeal overturned the first instance judgment and held that the Scheme implied the term relied upon by Aspect. Both courts held that Higgins’ counterclaim for £331,855.00 was time barred. Higgins appealed to the Supreme Court.

Decision
The Supreme Court dismissed Higgins’ appeal. The court held that as adjudication was a ‘speedy provisional measure’ pending final determination, the Scheme would make ‘no sense’ if there was no ability to seek repayment. Aspect had a right to have the dispute finally determined and to recover any overpayment. This arose from an implied contractual or restitutionary basis once Aspect made the payment to Higgins. The Scheme implied:

‘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’.

Aspect was not time-barred from bringing its claims in contract and restitution as the limitation period was six years from the date of payment of the adjudicator’s award to Higgins. However, as a consequence of Higgins
‘own decision’ not to commence proceedings within the limitation period applicable to its claim, the limitation period for Higgins’ counterclaim had expired.

Significance
This is the first Supreme Court decision concerning adjudication. For successful parties in adjudication it highlights the risk that a cause of action for repayment or restitution can be created following the date of payment if, on a final determination, it can be shown that the sums paid by the paying party were not due. Following this case, parties may consider stating in their contracts that an adjudicator’s decision is finally binding after a certain date. Parties who are unsuccessful in adjudication should note the adjudicator’s decision may not be final. It could be possible to challenge the award for a six year period from the date of payment.

Martifer UK Ltd v Lend Lease Construction (EMEA) Ltd
[2015] Scot CS CSOH 81; CSOH; Lord Tyre

Martifer UK Ltd (Martifer) engaged Lend Lease Construction (EMEA) Ltd (LL) for the construction of the structural and roof steelwork and cladding of the SSE Hydro, Glasgow (the Works) under a sub-contract (the Sub-Contract).

Article 1.5 of the Sub-Contract provided that the Works:

‘shall be completed in accordance with the rights and duties of [Martifier] and [LL] shall be regulated by … the Sub-Contract Documents…which are held to be incorporated in and form part of the Sub-Contract’.

The list of ‘Sub-Contract Documents’ included an outline programme numbered 4170 (4170) showing the key sequencing of Works and an information release schedule (IRS) setting out the dates by which certain design information would be released to LL.

The Sub-Contract was signed by Martifer on or around March 2011. The IRS was subsequently included in the Sub-Contract Documents and each page initialled by Martifer, before the Sub-Contract was executed by LL in June 2011. The Sub-Contract included an abstract of particulars which stated different commencement and completion dates from the start and finish dates contained in IRS and 4170. Martifer claimed that the Works were to be completed in accordance with IRS and 4170. Martifer alleged IRS and 4170 were contractually binding as the Works were to be carried out in accordance with a ‘level by level and sector by sector sequence’ and IRS was the only document which conveyed this.

LL argued that the IRS and 4170 were only included among the Sub-Contract Documents to affirm the programme to be adopted and that they were not contractually binding as they were only mentioned by their inclusion in the Sub-Contract documents.

Decision
The Outer House, Court of Session held that the IRS and 4170 formed part of the Sub-Contract but did not have the effect claimed by Martifer.

The court had no difficulty deciding that the IRS was a Sub-Contract document; the IRS pages had been initialled by Martifer and included within the Sub-Contract when it was executed. However, the court noted:

‘upon a true construction of the contract as a whole, certain documents may be intended not to bind the parties to their literal terms, but to have a more limited effect’.

The IRS was drawn up to advise LL of the earliest date it might expect to receive design information; not as a programme for the Sub-Contract. The court held that it would have undesirable and uncommercial consequences if every detail of the programme was a contractual requirement. Accordingly, the court held that the inclusion of IRS and 4170 did not have the effect of ‘imposing’ an obligation on the parties to complete the Works in accordance with them. A reasonable person with the background knowledge would not conclude these documents to be contractually binding.

Significance
This judgment provides some useful guidance on the incorporation of documents into a construction contract and reiterates the need to consider the contract as a whole, including all documents incorporated into the contract. If possible the intended effect of all contractual documents should be specified. Whilst this is a decision of the Scottish courts, it may be persuasive to the courts of England and Wales, if not binding upon them, and so will be of interest, in particular regarding the status of an information release schedule and any contractual programme.

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