

ADJUDICATION AND LIMITATION: RECENT COURT OF APPEAL DECISIONS

By Peter Sheridan

Introduction

A limitation issue may arise where parties treat adjudication as a means of resolving a dispute long after the construction work is completed, as they are entitled to do.

The position of a claimant in adjudication is straightforward. If the claim is for breach of contract, the limitation period is six years from the date of accrual of the cause of action, *i.e.* from the date of breach, or 12 years where the contract is by deed. The limitation position is the same in principle where the claim is for a contractual entitlement but breach is not alleged.

If the claimant refers a dispute to adjudication, there will be no limitation defence if the claimant refers within the six- or 12-year limit. If the claimant loses or is otherwise not satisfied with the decision of the adjudicator, it may bring proceedings in court or start arbitration for a final determination. The limitation period normally remains six or 12 years from the accrual of the original cause of action. It should be noted, however, that it is also quite usual for there to be a stricter contractual time limit. For example, the NEC 3 contracts contain a short time limit (of four weeks) for notifying dissatisfaction with an adjudicator's decision, in the absence of which the adjudicator's decision becomes final instead of being merely temporarily binding, pending final determination by the court or arbitral tribunal.

A claimant who has won an adjudication may (subject to any contractual provision to the contrary) bring enforcement proceedings in court at any time within six or 12 years of the decision of the adjudicator (12 years if the parties' contract is by deed). The cause of action in the enforcement proceedings is the express or implied contractual obligation to comply with the adjudicator's decision.

The position of a responding party is potentially less straightforward. Suppose that a claimant refers a dispute to adjudication before the expiry of the limitation period, but only just, claiming that the responding party is in breach of contract and that the claimant succeeds. By the time the adjudicator makes his decision, the limitation period has expired. The responding party wishes to take the matter to court or arbitration for a final determination. Does the responding party's time run from the date of the breach, in which case its claim is statute barred? Or does the adjudicator's decision itself provide a new cause of action in some way?

Michael Draper's recent article considered the two recent cases on this issue, *Jim Ennis* and *Aspect Contracts*. Since that article, the *Aspect Contracts* decision has been reversed in the Court of Appeal (late in 2013) and so the position has changed and has been settled for the time being by the Court of Appeal. The position as it currently stands is that there is an implied term whereby the adjudicator's decision does give rise to a new cause of action, so the responding party in the situation described above is unlikely to have any limitation problems. There is an implied term that the unsuccessful party in the adjudication is entitled to seek a final determination by litigation (or arbitration, if applicable) and, if successful, recover payment made. The limitation period runs from payment.

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The implied term analysis is incorrect in the writer's view for a number of reasons, of which the primary one is that entitlement to seek a final determination is not bestowed as a contractual term by the Construction Act, but is a right that always existed prior to the Construction Act and is unaffected by it.

Shortly after the *Aspect Contracts* case in the Court of Appeal, a differently constituted Court of Appeal reached a different conclusion in the *Walker Construction* case (2014), which was that the first instance judge, Akenhead J had been right in *Aspect Contracts* in saying that there was no implied term! The Court of Appeal in *Walker Construction* was seemingly unaware of its own earlier decision. As the Court of Appeal is bound by its own decisions, the *Aspects Contracts* case stands and the comments in *Walker Construction* (which were probably also *obiter*, *i.e.* not part of the court's essential reasoning) are not to be followed in other cases, albeit that in the writer's view the Court of Appeal in *Walker Construction* was correct on this point.

The different views expressed by three first instance judges and by the Court of Appeal on two recent occasions indicate that the issue is a difficult one, which would benefit from a decision by the Supreme Court. This is particularly so as in the writer's view none of the courts has as yet arrived at the correct analysis, which is that there is no implied term, but that the responding party in the situation described has or should have a remedy in the law of restitution, thereby avoiding the limitation problem described.

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