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ADJUDICATION AND LIMITATION: IMPLIED TERM AND RESTITUTION

By Peter Sheridan

Introduction

Limitation is not an issue that arises frequently in relation to adjudication. Adjudication is thought to have been intended primarily as a means of obtaining a swift interim decision in respect of disputes as they arise while projects are in the process of construction; limitation does not normally arise at that stage.

A limitation issue may, however, 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,[1] or 12 years where the contract is by deed.[2] The limitation position is the same in principle where the claim is for a contractual entitlement but breach is not alleged. If, for example, the dispute concerns contractual entitlement to an interim payment, the cause of action will have accrued on the date of entitlement to the interim payment.

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 of merely temporarily binding effect pending final determination by the court or arbitral tribunal. These types of provision are of questionable value as they run the risk of forcing parties quickly into formal dispute processes that might otherwise be avoided.

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.[3]

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

[1] S.5 of the Limitation Act 1980.
[2] S.8 of the Limitation Act 1980.
[3] For a full analysis of this principle, see P. Sheridan "The Juridical Basis for Enforcement of Adjudicators' Decisions" (2003) 19 Const. L.J. No 3.

case its claim is statute barred? Or does the adjudicator's decision itself provide a new cause of action in some way?

An issue that therefore arises is what the cause of action is in the court or arbitral proceedings. In one case, the *Jim Ennis* case,[4] it was held that there is an implied term whereby the adjudicator's decision does give rise to a new cause of action; and also that there is a remedy in restitution. A different view was taken at first instance on both of these issues in the more recent *Aspect Contracts* case.[5] The uncertainty that arose for a brief time from these first instance cases has now been settled by the decision of the Court of Appeal in the *Aspect Contracts* case,[6] in favour of the *Jim Ennis* implied term approach. Although the position is settled, the analysis in respect of the implied term is unsatisfactory both in the *Jim Ennis* case and the *Aspect Contracts* case in the Court of Appeal, for the reasons considered below.

Relevant statutory provisions

The relevant provision of the Housing Grants, Construction and Regeneration Act 1996 ("the HGCR Act") (as amended by the Local Democracy, Economic Development and Construction Act 2009) as to final determination of a dispute is s.108(3) as follows:

> "The contract shall provide in writing that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement."

The relevant provision of the statutory Scheme for Construction Contracts ("the Scheme") (applicable in the event of a construction contract failing to provide as required by s.108(3))[7] is sub-paragraph 23(2) as follows:

> "The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties."

Implied term

The first consideration of limitation where an adjudicator's decision is taken on to the court for a final determination came in the *Jim Ennis* case, which is also an example of long delay by the claiming party before referring the dispute to adjudication.

The relevant facts are as follows. Jim Ennis Construction Ltd ("Jim Ennis") was a sub-contractor to Taylor Woodrow, to construct some road works. Jim Ennis sub-sub-contracted the tarmac surfacing work to Premier Asphalt in April 2002; the sub-sub-contract was one to

[4] *Jim Ennis Construction Ltd v Premier Asphalt Ltd* [2009] EWHC 1906 (TCC); 125 Con. L.R. 141.
[5] *Aspect Contracts (Asbestos) Ltd v Higgins Construction PLC* [2013] EWHC 1322 (TCC); [2013] All E.R. (D) 339.
[6] *Aspect Contracts (Asbestos) Ltd v Higgins Construction PLC* [2013] EWCA Civ 1541.
[7] S.108(5) of the HGCR Act.

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which the statutory Scheme for Construction Contracts ("the Scheme") applied. There was complaint about this work; Jim Ennis removed the tarmac surface and Premier Asphalt replaced it in June 2002.

In December 2002, Premier Asphalt made final application for payment, which included a claim for the cost of the replacement works. Jim Ennis refused to pay this and also asserted cross-claims for losses caused by the laying of the original base course. The total deduction from the account was £38,647.22.

Premier Asphalt did not challenge that deduction by way of adjudication or litigation at the time, but almost six years later, in September 2008, it referred the dispute about the deduction to adjudication. This was within the applicable six-year limitation period for a claim in contract founded on the non-payment of the final application, but it was outside the six-year period for Jim Ennis to advance a claim for damages for breach of contract in relation to the alleged defects in Premier Asphalt's original work. The adjudicator upheld Premier Asphalt's claim for the £38,647.22, plus interest, totalling £53,476.32. Jim Ennis recognised it was bound by the adjudicator's decision and paid this amount, but issued proceedings in the Technology and Construction Court in April 2009 for a final determination.

The question then arose whether Jim Ennis' claim in the court proceedings was statute-barred. The sub-sub-contract was a simple contract, so the statutory limitation period was six years from the date of accrual of the cause of action, *i.e.* the date of breach. So the real issue was what Jim Ennis's cause of action in the court proceedings was. If it was the original breach of contract, Jim Ennis's clam was statute-barred. But if the adjudicator's decision gave rise to a new cause of action, Jim Ennis's claim would be good; this is what Judge Stephen Davies found to be the position.

The starting point of Judge Stephen Davies's analysis is the notion that the contractual obligation to comply with the adjudicator's decision gives rise to a new cause of action in favour of the successful party to compel the losing party to comply with that decision. This point is correct, it is submitted: there is always either an express or implied obligation to comply with the decision. This provides the cause of action in court proceedings to enforce an adjudicator's decision. This point and the authority for it have been considered in detail in the writer's articles on the juridical basis for enforcement.[8]

Judge Stephen Davies rightly accepted that this enforcement principle alone did not support his conclusion but stated:

> "It does however provide the platform for the Claimant's [Jim Ennis's] second submission that there is additionally an implied term that an unsuccessful party is entitled to bring court proceedings to have the dispute referred to the adjudicator finally determined and, if successful in persuading the court to reach a conclusion

[8] See n. 3 above and also (2004) 20 Const.L.J. No. 1 19 and (2005) 21 Const.L.J. No 16 535 (which include contributions from Robert Fenwick Elliott and Nicholas Gould respectively). The law is now settled in favour of the position set out in the writer's first article (n.3 above).

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> different to that reached by the adjudicator, to be repaid all sums paid by him in compliance with the decision."[9]

It is not stated in the judgment and it is therefore not clear how the express or implied obligation to comply with the decision provides a platform for the implied term said in *Jim Ennis* to be applicable. It is also not clear if this was a significant part of the reasoning, as the judge gave other reasons for the implied term, as set out below.

Judge Stephen Davies formulated the implied term which he concluded to be applicable as follows.

> "I am satisfied therefore that [1] in a contract such as this to which the adjudication provisions of the Scheme apply there is to be implied a term that where one party has paid monies to the other party in compliance with the decision of an adjudicator then that party is entitled to have that dispute finally determined by legal proceedings and [2], if or to the extent that the dispute is finally determined in his favour, to have those monies repaid to him."[10] (Numbers added by the writer.)

Judge Stephen Davies had three further reasons for concluding the implied term was applicable.

The first was that the right to bring legal proceedings for a final determination and, if successful, to recover sums paid pursuant to an incorrect adjudicator's decision, is not conferred by either s.108(3) nor the Scheme paragraph 23(2).

The counter-argument, which was put to the judge, is that the right to bring legal proceedings for a final determination already exists in the form of the underlying cause of action. This counter-argument is to be preferred, it is submitted, for the following reasons. There is no need for s.108(3) or paragraph 23(2) of the Scheme to confer the right to bring legal proceedings for a final determination; both provisions recognise that this right already exists. It always existed, independently of the new law, relating to the temporarily binding effect of adjudicators' decisions. So there is no need for limb [1] of the judge's implied term. Once the right to bring legal proceedings for a final determination is recognised to exist already, there is also no need to imply a term for recovery of the sums paid pursuant to an incorrect adjudicator's decision (limb [2] of the judge's implied term). The recovery will follow from the court (or the arbitral tribunal's) decision in the proceedings brought on the basis of the underlying cause of action.

Judge Stephen Davies's second reason was that usually an adjudication is concerned with the payment of money. Until there is an adjudication, the responding party in that adjudication does not have a cause of action other than for nominal damages or for a "negative declaration", *i.e.* a declaration that it is not in breach. This is because in the usual case the responding party is, until it loses the adjudication, the party holding the money and is not out of pocket. The judge considered there is a significant difference between this type of action and legal proceedings for the return of sums paid; and that the implied term provides the cause of action for the repayment of money.

[9] *Jim Ennis*, above, at [17].
[10] *Jim Ennis*, above, at [24].

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This is the attraction of the *Jim Ennis* approach; it solves the difficulty of a losing respondent in adjudication who otherwise would face a limitation defence; and for whom there is no commercial attraction in taking legal action prior to the adjudication which is brought against it belatedly (but within the limitation period).

The counter-argument here is that the cause of action does not alter according to who is holding the money; the cause of action for nominal damages or for a negative declaration is the same cause of action as that applicable after an adjudication which reverses who is holding the money; it is the same breach of contract by the other party.

Judge Stephen Davies's third reason was that the implied term satisfied the five requirements set out by the Privy Council in the *BP Refinery* case[11] for the implication of a term, namely that:

(1) it must be reasonable and equitable;
(2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
(3) it must be so obvious that it goes without saying;
(4) it must be capable of clear expression; and
(5) it must not contradict any express term of the contract.

The counter-arguments were considered in the *Aspect Contracts* case. Higgins, a contractor, engaged Aspect in March 2004 to carry out an asbestos survey; Aspect undertook the survey in March 2004 and provided its report in April 2004. In early 2005, additional asbestos not identified in the survey was allegedly found. Four and a half years later in June 2009, Higgins referred a dispute relating to these matters to adjudication and obtained a decision in its favour, pursuant to which Aspect paid Higgins £658,017. After another two and a half years, in February 2012, Aspect started proceedings to seek a final determination in court. It was common ground that the Scheme applied to the parties' contract.

Aspect, no doubt in reliance on the *Jim Ennis* case, pleaded the following implied term:

> "...that in the event that any dispute between the parties was referred to adjudication pursuant to the Scheme and one party paid money to the other in compliance with the adjudicator's decision made pursuant to the Scheme, 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 the money repaid to it."

If the *Jim Ennis* case were correct, Aspect would be able to pursue its claim. But if Aspect had to rely on the underlying cause of action, it would be out of time as the parties' contract was a simple contract and the breach must have occurred more than six years before February 2012.

Whether there was such an implied term was in issue and it was necessary for the judge at first instance, Akenhead J, to review the earlier decision in the *Jim Ennis* case. Akenhead J

[11] *BP Refinery v Shire of Hastings* (1978) ALJR 20.

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took the law relating to the implication of terms now to be as stated by Lord Hoffmann in the *Attorney General of Belize* case,[12] rightly, it is respectfully submitted; he also, however, considered the *BP Refinery* requirements.

Akenhead J's view in that regard is that it is not possible to say that the implication of the pleaded term is reasonable, equitable or necessary to make the contract work (business efficacy) and it does not go without saying. It is "just about"[13] capable of clear expression and does not contradict any express term. Akenhead J accordingly found against the alleged implied term. The writer agrees with Akenhead J's conclusion on this issue, primarily for the writer's own reasons given above in relation to the *Jim Ennis* case, rather than the reasons given by Akenhead J.

Akenhead J reasoned that a party may seek a negative declaration that it is not in breach of contract; the court of course has a discretion whether to grant the declaration or not. Aspect had that option from 2004 and did not have to wait for the adjudicator's decision. A negative declaration was what Aspect ultimately did seek, albeit after the adjudicator's decision. In connection with his argument in this regard against the existence of the implied term, Akenhead J stated:

> "The only risk on analysis which theoretically exists is that, if a party like Aspect waits to see what the result of an adjudication started against it just before the expiry of the limitation period will be (which is not this case), its later claim for a negative declaration may well fail if the limitation defence is run against it. Of course, in the commercial world and in real life, as here, adjudications are started usually well within the limitation period and often close to the beginning of it so that the losing party will, almost invariably, be able well within the limitation period to initiate its own proceedings to put right any factual or legal error made by the adjudicator. The risk therefore is not only very small but is one for which each party to a contract does have a remedy, which is to commence its proceedings (with six or 12 years after performance) and even for a negative declaration within the limitation period."[14]

Longmore LJ, delivering the judgment of the Court of Appeal, identified, rightly, it is respectfully submitted, the following difficulties with the negative declaration solution:

> "But negative declaratory relief is, at best, an ungainly remedy. It has a number of potential disadvantages. First, it is counter-intuitive to expect a person who says he is not liable to have to take the initiative and himself start legal proceedings. If a wily claimant begins an adjudication (as he is apparently entitled to do) shortly before any relevant six-year period of limitation expires and himself issues (but does not serve) precautionary proceedings for the full amount of his claim in case he does not get all he wants from the adjudicator, it is asking a lot to expect a perhaps less wily defendant to appreciate that he must immediately himself issue proceedings claiming he is not liable to the claimant, if he wishes to preserve his own position.

[12] *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10. A full analysis of this case and its new approach to the implication of terms is set out in the writer's article "Construction Act Review: Slip Rule Update" (2010) 26 Const.L.J. 278,
[13] *Aspect Contracts*, see n.5 above, at [45].
[14] *Aspect Contracts*, see n.5 above, at [45].

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> Secondly it is not at all clear (at least to me) on what juridical basis it can be said that a declaration of non-liability will automatically carry with it a right (on this view not given by the contract) to claim repayment of what he has overpaid."[15]

The Court of Appeal did accept that there was an implied term as contended for by Aspect. Longmore LJ commented, again rightly, it is respectfully submitted, on the basis of the *Attorney General of Belize* case that "it does not matter much whether one calls this a process of construction or a process of implication because one is trying to decide what the words mean."[16]

Longmore LJ stated that it was instructive to compare the terms of paragraph 23(2) of the Scheme with the implied term contended for by Aspect. After quoting the Scheme provision, he stated:

> "It is thus clear that the binding nature of the adjudication in intended to be temporary and is liable to be displaced by subsequent legal proceedings, arbitration or agreement. It is, however, to be binding and, if money is decided to be payable, it has to be paid. If such payment is made but subsequent proceedings, arbitration or agreement decide that it should not have been paid, there must be some mechanism whereby it can be recovered. Although paragraph 23(2) does not say, in actual words, that any overpayment is recoverable, that seems to me to be the true intent of the provision and is inherent in the words used."[17]

> "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."[18]

Of the implied term contended for by Aspect, Longmore LJ stated:

> "Up to the words 'legal proceedings' the proposed implied term says no more and no less than paragraph 23(2) of the Scheme. The following phrase spells out, in actual words, what I have said is already inherent in the words used and to be the true intent of paragraph 23(2)."[19]

The phrase "inherent in the words used" here means not stated in the words used but to be taken as what was intended as a matter of construction. The writer has some misgivings

[15] *Aspect Contracts*, see n.6 above, at [14-15].
[16] *Aspect Contracts*, see n.6 above, at [11].
[17] *Aspect Contracts*, see n.6 above, at [9].
[18] *Aspect Contracts*, see n.6 above, at [12].
[19] *Aspect Contracts*, see n.6 above, at [10].

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over this analysis, although as will already be clear the writer agrees with the result in the *Jim Ennis* case and the Court of Appeal in *Aspect Contracts*.

The purpose of paragraph 23(2) is clear enough: it is to give temporarily binding effect to adjudicators' decisions. It does that; and it sets out when the temporary period is over: on final determination in court or arbitration, or by agreement. At that point the adjudicator's decision is no longer binding. That, in the writer's view, is all that paragraph 23(2) does or was intended to do. It does not confer permanently binding effect on decisions of the courts, arbitral awards or settlements between the parties; all these matters already had permanently binding effect prior to the HGCR Act and the Scheme.

Contrary to Longmore LJ's assertion, the element in the implied term contended for by Aspect "that party remained entitled to have the dispute finally determined by legal proceedings" does not appear in paragraph 23(2). The reason this element is absent from paragraph 23(2) is not, it is submitted, because it is "inherent" in the wording of paragraph 23(2) that such is a contractual entitlement conferred by paragraph 23(2). It is simply because the right pre-existed paragraph 23(2); there was accordingly no need to confer such a right as a matter of contract. It is simply a case of the usual position stated by Lord Hoffmann in the *Attorney General of Belize* case in relation to implied terms, which is that if the parties have not stated what is to happen, usually nothing is to happen.

A further difficulty with the decision of the Court of Appeal on this element of the implied term which it held to apply is that the court has inherent jurisdiction to make a final determination by litigation, so an implied term to that effect is otiose (as would be an express term).

Once the point is reached at which the adjudicator's temporarily binding decision is no longer binding, and the court's final determination is binding, then repayment of an amount wrongly paid to the claimant in the adjudication pursuant to the adjudicator's decision should not present a juridical difficulty. Once the court determines the correct position, the writer doubts if the court's powers are merely declaratory; if repayment is necessary to give effect to the court's judgment, then repayment may be ordered, it is submitted. If a further juridical basis is needed, then it is to be found not in a strained implied term or construction analysis, but in restitution, it is submitted.

Restitution

In the *Jim Ennis* case, as well as accepting the implied term argument, the judge also accepted the argument that there was a cause of action for the repayment of money in restitution. The basis for the application of restitution was the appellate principle. He stated:

> "Ms Sims relied upon the principle, summarised in Goff & Jones' The Law of Restitution (7th edition, 2007) at paragraph 16-001, that where a party to legal proceedings has paid money or transferred property to another party in compliance with a court order, then if that order is subsequently reversed or set aside the paying party is entitled by way of restitution to recover the money or property paid or transferred. The defendant does not challenge that principle, but disputes that it has any application to monies paid in compliance with the decision of an adjudicator. Whilst I can see that there is a difference between adjudication, which is the creature

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> of contract (albeit one which statute requires be written in to the contract whether the parties like it or not), and legal proceedings. It nonetheless seems to me that the end result is the same, namely that the claimant has been required to pay the defendant money under compulsion as a result of the decision of a decision-maker with jurisdiction to rule on the relevant dispute, so that if the decision is subsequently set aside a restitutionary claim ought in both cases to lie to recover the payment."[20]

It was argued that the Limitation Act does not apply to restitutionary claims. The judge did not decide on this point, but stated that even assuming that the usual six-year limitation period applies, it will run from the date of payment, so that the claim in the *Jim Ennis* case was not statute-barred on that basis.

In *Aspect Contracts*, Akenhead J did not agree that the appellate basis was applicable, stating:

> "…it was not argued that, in terms of restitution, there is any…basis for recovery other than the appellate basis where restitution…is treated as arising…as a policy consideration when judgments are successfully appealed or otherwise set aside. This latter analogy does not readily 'work' in the context of adjudication because there is no appeal or judicial setting aside process as such. The underlying dispute is simply referred to the court or to an arbitrator (as the case may be) for final resolution"[21].

Akenhead J concluded that there is no separate cause of action in restitution.

It is of course correct that proceeding to court or an arbitral tribunal for a final determination is not an appeal from the adjudicator's decision. Procedurally, what is done is not to challenge or set aside the adjudicator's decision but to determine the dispute in the same way as would have occurred if there had been no (temporarily binding) adjudication. However, in monetary terms, the position is different if there has been an intervening adjudication, the result of which is in the final determination reversed in favour of the respondent to the adjudication. Where sums have in these circumstances to be repaid to that respondent as a result of the final determination, it does seem reasonably arguable that the basis for the payment may be restitution. Monies have been paid by the respondent which it now transpires were not required by the contract to be paid; in these circumstances the position does seem analogous to the restitutionary appellate principle. The writer accordingly is inclined to agree with Judge Stephen Davies on the issue of restitution.

The writer accordingly considers there is a respectable argument that the principle of restitution applies where monies are repayable to the responding party in adjudication following the final determination. If that is so, then either the Limitation Act does not apply or, more likely, it does apply but the time runs from the date of the adjudicator's decision rather than the date of accrual of the original cause of action.

In *Aspect Contracts* in the Court of Appeal, restitution was not argued or considered. Longmore LJ stated that the "court wishes to make it clear that we received no argument to

[20] *Jim Ennis*, above, at [28].
[21] *Aspect Contracts*, see n.5 above, at [47].

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the effect that Aspect could recover their overpayment by relying on the law of unjust enrichment."[22] It is possible that restitution could have been the basis for the Court of Appeal decision, if argued, either analogously to the restitutionary appellate principle or as a matter of unjust enrichment. If so, the reasoning would, in the writer's view, have been on a sounder footing.

Conclusions

If a claimant refers a dispute to adjudication, there will be no limitation defence if the claimant refers within the usual 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 (and subject to any contractual provision to the contrary) remains six or 12 years from the accrual of the original cause of action.

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.

The position of a responding party who has lost an adjudication and wishes to take the matter to court or arbitration for a final determination is now settled. 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. The analysis of the implied term is somewhat unconvincing; the *Jim Ennis* analysis was not adopted by the Court of Appeal in the *Aspect Contracts* case and the Court of Appeal's own analysis is questionable. Restitution might have provided a better basis for the recovery of the payment.

[22] *Aspect Contracts*, see n.6 above, at [19].

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