

Aspect v Higgins: The Final Reckoning

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How long do you have to challenge an adjudicator's decision?

Controversially, the English Supreme Court has now ruled as follows:

- If you were the loser and required to pay monies, you will have the full limitation period, typically six years, to bring your claim to recover those monies starting from when you were required to make payment to the winner; whereas
- If you were the winner, your right to seek an improvement of the result will come to an end at the same time as the limitation period for the original claim.

In our last issue we discussed the background to the then forthcoming Supreme Court's decision in the *Aspect v Higgins* case ("the Decision").

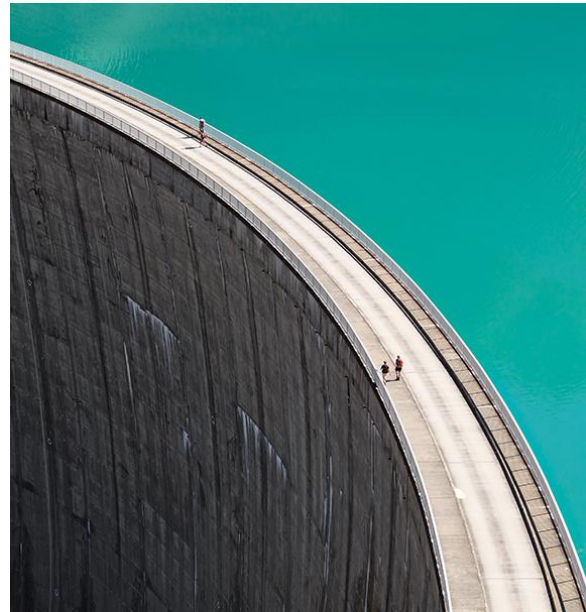
If I had been forced to lay my cards on the table then about which way the Decision might go, I would have predicted that Aspect would succeed and the Court of Appeal's decision would be upheld. That would have been a fairly unpopular opinion since many considered this would be not just an unfair result but one that would seriously undermine the adjudication process.

We are now going to see how prophetic those views turn out to be because the five members of the Supreme Court, with Lord Mance delivering the single judgment, have unanimously found in favour of Aspect.¹

The key facts

The rather complicated factual background of this case can be summarised as follows:

- In April 2004 Higgins engaged Aspect to provide asbestos advice on a project;



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- In July 2009 Higgins obtained an adjudicator's decision condemning Aspect's advice and awarding damages of approximately £658,000 which Aspect duly paid in August 2009;
- By August 2010 the six-year limitation period had expired for any claim that Higgins might have brought against Aspect;
- Subsequently, Aspect issued proceedings at first instance in the Technology and Construction Court to recover the full £658,000 which it had paid to Higgins in complying with the adjudicator's decision, claiming it had been an over-payment;
- Higgins defended the proceedings by arguing that Aspect's claim was time-barred;
- At first instance, before Akenhead J, Aspect's claim was indeed held to be time-barred²;
- That decision was overturned by the Court of Appeal.³

¹ *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38 (17 June 2015)

² *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2013] EWHC 1322 (TCC) (27 May 2013)

³ *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2013] EWHC Civ 1541 (29 November 2013)



The nature of Aspect's Case for Recovery of the Monies

Readers will recall that, both at first instance and in the Court of Appeal, Aspect had pursued a two-pronged case against Higgins.

Firstly, Aspect had based its claim upon a term which should be implied into the Scheme for Construction Contracts (which itself takes effect as a series of implied terms), giving a party who is required to pay monies under an adjudication decision the right to recover any over-payment ("the Contract Argument").

Secondly, Aspect pursued an alternative claim based upon restitutionary principles and more specifically unjust enrichment ("the Restitution Argument").

The nature of Higgin's Case against Aspect

Before examining how the Supreme Court approached these two arguments, it is worth reminding ourselves of the thrust of Higgins' case against Aspect at first instance and before the Court of Appeal because it was here that the battle-lines for the Supreme Court were really drawn.

It was central to Higgins' case that Aspect's position was inherently unfair and, if supported by the courts, would seriously undermine adjudication as we have come to know it. Higgins contended that the facts of this case showed precisely why that was so.

Instead of seeking a final determination of the underlying dispute, as it had been entitled to, Aspect had just sat back and done nothing until the limitation period had expired for any claim that Higgins might have wished to advance. This meant that, in any subsequent action for recovery of monies which Aspect might pursue, Higgins would be unable to pursue any set-offs or counterclaims in relation to these matters.

Such a result, Higgins contended, was clearly unfair and, by potentially doubling the limitation period for such claims, would undermine the intended finality and therefore the efficacy of the adjudication process itself. Those propositions have received much support from commentators ahead of the Supreme Court's judgment in this matter.

In the Decision, Lord Mance described Higgins' complaint about the Court of Appeal's approach to limitation as being that it "gives Aspect a one-way throw and undermines finality". However, he had a simple but, in his view, complete answer to that complaint:

"That consequence follows, however, from Higgins's own decision not to commence legal proceedings within six years from April 2004 or early 2005 and so itself to take the risk of not confirming (and to forego the possibility of improving upon) the adjudication award it had received. Adjudication was conceived, as I have stated, as a provisional mechanism, pending a final determination of the dispute. Understandable though it is that Higgins should wish matters to lie as they are following the adjudication decision, Higgins could not ensure that matters would so lie, or therefore that there would be finality, without either pursuing legal or arbitral proceedings to a conclusion or obtaining Aspect's agreement."

One gets the feeling that if ever there was a case where the merits, whichever way they are perceived, seem to be dictating both popular opinion and judicial outcome, then this is surely that case.

In any event, having reached that view on the "merits" of this case, the precise route that the Supreme Court adopted to arrive at the appropriate conclusion almost seems superfluous. Nevertheless, in summary, we explore below how the Supreme Court arrived at its conclusions.

The Contract Argument

Their Lordships had no real hesitation in deciding the following, which was central to Aspect's arguments:

"[I]t is a necessary legal consequence of the Scheme implied by the 1996 Act into the parties' contractual relationship that Aspect must have 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."

In reaching that conclusion, the Supreme Court agreed with the Court of Appeal's analysis that the legal basis for that right is an implied term arising from the Scheme which provided a positive "right to recover an alleged over-payment".

Furthermore, since the right was in essence a right to recover an over-payment that had been made, their Lordships considered that it was obvious that the right would accrue as and when the payment in question had taken place. It followed that, for limitation purposes, a claim based upon that right could be brought at any time within six years from that date.

It also followed from that relatively straightforward analysis of the situation that Aspect had been perfectly within its rights to bring the claim when it had done.

Readers will recall that the contractual analysis advanced by Higgins, with which Akenhead J at first instance had agreed, was very different. There was no room or necessity, Higgins had argued, to imply a term of the sort accepted by the Court of Appeal and now also the Supreme Court.

Instead, Higgins argued, Aspect did have an appropriate right, which it should have exercised within six years from when the contract had been performed, and that was to obtain a negative declaration confirming that it was not liable for the monies which Aspect claimed.

The Supreme Court had little hesitation in rejecting this "negative declaration" approach, Lord Mance commenting:

"It ignores a core ingredient of and the immediate trigger to Aspect's current claim, which is that it has been ordered to make and has made a large payment in 2009. It is artificial to treat a claim to recover that sum as based on an alleged cause of action accruing in 2004 or early 2005. To treat Aspect's remedy as being to seek a declaration, and then to invite the court to use its alleged consequential

powers in order to grant relief, which is the true object of the proceedings, is equally artificial."

Lord Mance helpfully clarified that, in providing for the final determination of matters decided in adjudication, "what the Scheme contemplates is the final determination of the dispute referred to the adjudicator, because it is that which determines whether or not the adjudicator was justified in his or her assessment of what was due under the contract".

This process will involve the court or tribunal in reviewing the "substantive merits of the original dispute", in his Lordship's words, although limitation will be irrelevant. The Decision is not entirely clear regarding the extent to which matters occurring after the adjudicator's decision can be relied upon in the final determination process and this will need clarification in future court decisions.

Lastly, in the context of final determination, Lord Mance confirmed that, in defending its position, Higgins would be entitled to advance all matters upon which it relied in the adjudication, including any set-offs which the adjudicator may have rejected, given that the adjudicator's reasoning would have "no standing" in the process. This softens the blow somewhat for successful parties facing final determination in these circumstances.

The Restitution Argument

The Restitution Argument had been raised, without really going anywhere, at first instance. The Court of Appeal disposed of the appeal from Akenhead J's decision on the basis of the Contract Argument without feeling it necessary to look into restitutionary issues.

However, in giving Higgins permission to appeal, the Supreme Court went to the lengths of stating that it might require the parties to address it on "the legal position regarding restitution".

As it happens, the Supreme Court, like the Court of Appeal before it, felt it unnecessary to look into the Restitution Argument in any great detail in the Decision. What Lord Mance did say, in considering the limitation position, was the following:



"Since Aspect's cause of action arises from payment and is only for repayment, it is, whether analysed in implied contractual or restitutionary terms, a cause of action which could be brought at any time within six years after the date of payment to Higgins, i.e. after 6 August 2009. For this purpose an independent restitutionary claim falls to be regarded as "founded on simple contract" within section 5 of the Limitation Act..."

The fate of the Restitution Argument therefore remains slightly unclear. However, the reality is that it would only really have come into play had Aspect failed on the Contract Argument or if there had been limitation issues about it in circumstances where the position in restitution would have been more favourable for Aspect.

The Consequences of the Decision

Much has already been made about the damaging effect that the Decision will have on the adjudication process. My own view is that these concerns are exaggerated and that the Decision's future impact on a user can be summarised as follows:

- the law is now settled regarding the steps that a party must take if he believes that the adjudicator has required him to make an over-payment; he should commence proceedings to seek final determination of the matters in issue; he will have six years to do so from when the payment was actually made;
- in the final determination proceedings, although the successful party will be able to defend itself by relying on all matters that it raised in the adjudication, what it will not be able to do is to counterclaim in respect of any of its own claims if they have become time-barred on the basis of the application of the normal rules;
- it may be that a losing party in adjudication who has been required to pay out monies to the successful party will seek to "do an Aspect" by deliberately holding off from taking any steps to recover an over-payment; however, this would only make any sense where the successful party

has its own claims which might become time-barred by the time the final determination proceedings have to be commenced; such cases are going to be relatively rare;

- we may well see a number of cases where successful parties in adjudication do take pre-emptive action to prevent themselves from falling into the same position in which Higgins has ultimately found itself but I think those cases are also going to be rare; I suspect it is more likely that in such cases a deal will be done to achieve finality, but successful parties would be well-advised to consider the limitation position in any cases where they have been paid monies on the back of an adjudicator's decision; and
- it would be prudent for professional advisers who have assisted parties in such cases also to address the potential implications of the Decision in the context of the matters with which they were involved.

