Time limit for challenges to adjudication decisions clarified

July 2015

Adjudication is intended to be a quick and cost-effective means of resolving a dispute. However, in its first decision concerning adjudication, handed down on 17 June 2015, the Supreme Court has reached a finding that means parties to adjudication may face a very long delay to reach a final determination of the dispute between them. The decision, in the case of *Aspect Contracts (Asbestos) Limited v Higgins Construction plc*, allows a respondent to adjudication to challenge the outcome any time up to six years after it makes payment to the successful referring party, thereby potentially rendering historic adjudication decisions vulnerable to further litigation.

The adjudication and decision at first instance

In 2004, Higgins instructed Aspect to conduct an asbestos survey. The survey, completed in April 2004, failed to identify all of the asbestos on site. When Higgins discovered the further asbestos, it had to take steps to remove it, which resulted in delays to the project and further costs. Higgins claimed damages from Aspect under the contract. Aspect disputed Higgins' entitlement to the claimed damages.

In 2009, Higgins referred the dispute to adjudication under the Construction Contracts (England and Wales) Regulations 1998. The adjudicator found in Higgins' favour, awarding 75% of the sum claimed, which Aspect promptly paid.

In 2012, Aspect issued proceedings to overturn the adjudicator's decision. Higgins defended the action and counterclaimed for the difference between the sum it had claimed in the adjudication and the sum awarded. At first instance, the Court found against Aspect, concluding that: (a) there was no implied term in Aspect's contract with Higgins, entitling it to challenge the adjudication decision; and (b) Aspect was not entitled to sue for a declaration of non-liability, as over six years had elapsed from the alleged breach and therefore both its claim and Higgins' counterclaim were time-barred.

Appeal

Aspect appealed the first-instance decision and, in 2013, the Court of Appeal allowed Aspect to pursue its claim. The court confirmed that an adjudicator's decision is binding until the dispute is finally determined. In the court's view, the time for challenging the adjudicator's decision started to run from the date of payment by the responding party. Aspect had therefore brought its claim in time. As to Higgins' counterclaim, the court concluded that the time for bringing a claim for a further amount of damages began to run from the date of the original breach, so that Higgins was no longer entitled to recover a greater sum than had been awarded by the adjudicator.

Any comments or queries?

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Supreme Court

On 17 June 2015, the Supreme Court confirmed the Court of Appeal's findings on all issues, holding that it is an implied term of the statutory adjudication scheme that, once an award has been made, the paying party has the right to recover any overpayment (plus interest) resulting from an adjudicator's decision, by challenging the award through the courts. Accordingly, a partially successful referring party must now bring proceedings within six years of the date of the breach if it wishes to seek a greater recovery than that awarded in the adjudication. By contrast, a responding party who has been ordered to make payment has six years from the date of payment to challenge the award made against it.

Implications

This decision should sound a warning to successful claimants in adjudication, who must carefully weigh up the risk of seeking final determination of an adjudication, and having the adjudicator's favourable finding overturned, against the risk of not confirming the adjudication award, and foregoing the opportunity to bring a claim for the balance of the sum it originally sought, because limitation has expired.

Whilst a standstill agreement may be a means around a successful adjudication claimant's quandary, it seems unlikely that the unsuccessful party would agree to this measure. A potential reform to the Housing Grants, Construction and Regeneration Act 1996 may, therefore, result. Until such reforms are enacted, historic adjudications remain vulnerable to further litigation.

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