



17 June 2015

PRESS SUMMARY

Aspect Contracts (Asbestos) Limited (Respondent) v Higgins Construction Plc (Appellant)
[2015] UKSC 38
On appeal from [2013] EWCA Civ 1541

JUSTICES: Lord Mance, Lord Wilson, Lord Sumption, Lord Reed, Lord Toulson

BACKGROUND TO THE APPEAL

Aspect Contracts (Asbestos) Limited (“Aspect”) contracted with Higgins Construction Plc (“Higgins”) to survey and report on a block of maisonettes which Higgins was considering redeveloping. Aspect’s report was dated 27 April 2004. During the redevelopment in 2005, Higgins discovered asbestos not identified in Aspect’s report and a dispute arose between the parties [1-2].

The contract contained an implied term (under sections 108 and 114 of the Housing Grants, Construction and Regeneration Act 1996, read with The Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998 No 649)) enabling disputes to be referred to adjudication [1]. Higgins referred the dispute to adjudication and claimed £822,482 plus interest for breach of Aspect’s contractual and/or tortious duties to exercise reasonable skill and care in carrying out the survey. On 20 July 2009, the adjudicator found that Aspect had been in breach of such duties and awarded Higgins £490,627 plus interest. Aspect duly paid Higgins £658,017 on 6 August 2009 [3].

It was also an implied term of the contract, under sections 108(3) of the 1996 Act and paragraph 23(2) of the 1998 Regulations, that “*the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration ... or by agreement.*” The parties did not agree to treat the adjudicator’s decision as final. Higgins did not commence any proceedings to recover the £331,855 balance of its claims. The limitation period for any such claim by Higgins expired in contract on or about 27 April 2010, and in tort by early 2011 [4]. On 3 April 2012 Aspect issued proceedings to recover the sum it had paid to Higgins, claiming that no payment had been due to Higgins on the merits of the original dispute. Higgins then sought to counterclaim the £331,855 balance of its original claims. Aspect responded that any such counterclaim became time-barred after six years in 2010 or latest 2011.

The High Court (Akenhead J) rejected Aspect’s claim on the basis that there was no implied term for repayment and no entitlement to restitution after the expiry in 2010 or 2011 of a six-year limitation period during which Aspect could have claimed a declaration of non-liability with consequential relief. The Court of Appeal allowed Aspect’s appeal on the basis that the contract contained an implied term for repayment by Higgins of any sum paid by Aspect which Aspect could show had not been due on the merits, and that this attracted a six-year limitation period running from the date of Aspect’s payment. The alternative restitutionary basis was not pursued by Aspect in the Court of Appeal. Both courts held Higgins’ counterclaim for £331,855 to be time-barred. Permission having been granted to Higgins to appeal to the Supreme Court, the Supreme Court invited submissions on restitution as well as on the implied term.

JUDGMENT

The Supreme Court unanimously dismisses Higgins' appeal in a judgment given by Lord Mance.

REASONS FOR THE JUDGMENT

The Court concludes that:

- (1) Adjudication is intended to be a speedy provisional measure, pending final determination. The decision of an adjudicator is binding from the time it is given, but lasts only “*until the dispute is finally determined*” by one of the ways identified in paragraph 23(2) of 1998 the Regulations or section 108 of the 1996 Act [14-15].
- (2) Higgins' argument that Aspect's only claim was for declaratory relief and consequential orders and that such relief is time-barred in the same way as Higgins' own counterclaim is misconceived. Consequential orders cannot be made for the repayment of money to which there is no independent basis for claiming [19-20].
- (3) Aspect has an independent basis for having the original dispute finally determined, and for repayment, arising on an implied contractual or restitutionary basis. That right arises upon and from Aspect's payment [16-17]. It was an implied contractual term that Aspect, having made payment as ordered by the adjudicator, would have a directly enforceable right to recover such payment if, on a final determination on the merits of the original dispute, those sums were shown not to have been due to Higgins [23]. Repayment can also be claimed by way of restitution, it being retrospectively established by final determination that the sums paid pursuant to the adjudication amounted to an overpayment [24].
- (4) The limitation periods for Aspect's claims in contract and restitution are six years from the date of payment [21-22] and [25]. Aspect can require repayment by reference to a determination of the parties' original rights and liabilities as they stood when they were adjudicated upon.
- (5) Higgins on the other hand is time-barred from pursuing its counterclaim for the balance of its original claim. This is the consequence of Higgins' own decision not to commence legal proceedings to have the dispute finally determined within the limitation periods applicable to its claims [26-29 and 33].
- (6) The Court of Appeal's obiter observations in *Walker Construction Ltd v Quayside Homes Ltd* [2014] EWCA Civ 93, approving Akenhead J's decision in the present case, were wrong [34].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.uk/decided-cases/index.html