# RACE AGAINST THE CLOCK—ALTERNATIVE DISPUTE RESOLUTION AND LIMITATION PERIODS IN CONSTRUCTION DISPUTES

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## IN BRIEF

What happens if the limitation period expires while parties engage in alternative dispute resolution (ADR)?

Whether a contract allows for an appeal by the unsuccessful party outside underlying time limits following an ADR process is a difficult question.

## PARTIES NEED TO COMPLY WITH ADR CLAUSE EVEN IF LIMITATION PERIOD IS EXPIRING

It is often the case that limitation periods are looming by the time:

- damage on a project has manifested;
- the principal has formulated its demands;
- the head contractor (and its insurer) have settled with the principal; and
- the head contractor's insurer is considering subrogation and recovery from contractors and third parties.

Commencing proceedings in court is costly, cumbersome and time-consuming.

In addition, parties are likely to have entered into a written agreement, which may contain an alternative dispute resolution clause. The contract may require the parties to have complied with the ADR clause before they are permitted to go to court.

Courts will generally seek to enforce ADR clauses and stay proceedings while the ADR clause is engaged, even if a party might suffer some real detriment in terms of expiring limitation periods. (See recently, for example, *John Holland Pty Limited v Kellogg Brown & Root Pty Ltd* [2015] NSWSC 451.)

The potential prejudice caused by a limitation period expiring may mean that a head contractor and its insurer are faced with an invidious choice: engage in ADR and the limitation period expires, or go straight to court (and potentially suffer a stay or worse).

## STATUTORY EXTENSION OF LIMITATION PERIOD APPLIES ONLY TO ARBITRATION

The limitations legislation deals with extensions for arbitrations in such circumstances (see section 70 of the *Limitation Act 1969* (NSW)). Other contractually mandated ADR mechanisms do not have the benefit of statutory extensions of the limitation period.

Courts in England have resolved this problem via the use of implied terms and restitution.

## COURT HOLDS IMPLIED TERM ALLOWS 'APPEAL' FROM ADJUDICATION OUTSIDE UNDERLYING TIME LIMITS

Jim Ennis subcontracted with Premier Asphalt to build a road. The head contractor asserted the work was faulty. Premier Asphalt referred its claim for unpaid sums to adjudication.

By that time, Jim Ennis's claim against Premier Asphalt for breach of contract for defective work was statute barred, but Premier Asphalt's claim for non-payment was not. The adjudicator found that Jim Ennis should pay £53,500. Jim Ennis commenced proceedings against Premier Asphalt seeking damages for the defective work.

The question for the court was whether Jim Ennis's claim against Premier Asphalt was time barred for being brought more than six years after the underlying cause of action accrued: *Jim Ennis Construction Ltd v Premier Asphalt Ltd* [2009] EWHC 1906 (TCC).

... best practice may dictate that parties to agreements with ADR clauses agree on an additional term protecting their rights pending final determination. The precise wording and operation of such an additional term must be carefully considered.

The court decided it was not because:

- The obligation to comply with the adjudicator's decision gave rise to a new cause of action in favour of the successful party to compel the losing party to comply with that decision.
- There was an implied term in the contract that where one party (the loser) has paid monies to the other party in compliance with the decision of an adjudicator, then the loser is entitled to have that dispute finally determined by legal proceedings and, if determined in its favour, to have those monies repaid.
- There is also a cause of action to recover the monies paid over in restitution in addition to the cause of action founded on the implied term.
- The losing party has six years from the date of (wrongful) payment in which to bring legal proceedings to recover that payment.

## SECOND COURT DISAGREES

Higgins Construction contracted with Aspect Contracts to provide an asbestos survey report. Higgins Construction subsequently discovered additional asbestos-containing material and incurred additional expense to arrange its removal, causing delay to construction works.

Higgins Construction served a notice on Aspect Contracts referring the dispute for adjudication. The adjudicator found that Aspect Contracts was liable to Higgins Construction and ordered it to pay £650,000.

Aspect Contracts commenced proceedings against Higgins Construction, alleging an implied term that it was entitled to have the dispute determined by litigation and (if its 'appeal' succeeded) to recover the £650,000 it paid to Higgins Construction. Once again, the court had to consider whether the claim was time barred: *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2013] EWHC 1322 (TCC).

In contrast to *Jim Ennis*, the court held that there was no implied term and that the claim and counterclaim were time barred, because:

- Either party could have gone to the court at any time for a positive or negative declaration i.e. a finding that the relevant party was or was not in breach of contract—it did not have to wait until the adjudicator issued his decision.
- The limitation period for a cause of action for a declaration was six years from the latest date when the contract was performed because there could be no breach after performance.
- While an implied term for a right to 'appeal' was capable of clear expression and did not contradict any express term, it was not reasonable, equitable or necessary to make the contract work and there was no overriding policy reason why such a term should be implied.
- There was no separate cause of action in restitution because the payment following the adjudicator's decision was not paid under any mistake or under duress.

## APPEAL COURT HOLDS THERE CAN BE AN IMPLIED TERM PERMITTING 'APPEAL' (WITH ANOTHER SIX YEAR LIMITATION PERIOD)

Aspect Constructions appealed and asked the court to decide between *Jim Ennis* and *Aspect: Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2013] EWCA Civ 1541.

Q: Was there an implied term that an unsuccessful party to adjudication would be entitled to seek a final determination by litigation and, if successful, recover payment made?

A: The contract expressly provided that the adjudication was only to be binding until the dispute was finally determined, so there was an implied term that an unsuccessful party to adjudication would be entitled to seek a final determination by litigation and, if successful, recover the payment made.

Q: If there was such an implied term, what was the applicable limitation period for a claim seeking to enforce it?

A: The cause of action accrued on the date of overpayment and the applicable limitation period for a claim seeking to enforce it was six years from payment.

Q: Was there a claim in restitution?

A: Did not arise in argument.

## WOULD AN AUSTRALIAN COURT APPLY *ASPECT*?

The general rule in Australia in the case of implied terms is well known: *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337.

The court needs to be satisfied that the term:

- is reasonable and equitable;
- is necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
- is so obvious that 'it goes without saying';
- is capable of clear expression; and
- does not contradict any express term of the contract.

In *Commonwealth Bank of Australia v Barker* [2014] HCA 32, the High Court expressed a general unwillingness to imply terms into a contract.

The interplay between ADR clauses and limitation periods involves a difficult balancing act for a court:

- Parties should honour their agreements, including ADR obligations.
- ADR processes can take longer than anticipated (even without, for example, a recalcitrant defendant dragging its feet to run out the clock).
- There is a real unfairness in preventing parties from suing to remedy deficiencies in ADR processes on the basis of expiry of limitation periods.

While there are mechanisms for an Australian court to review the ADR process (depending on the contract), the real difficulty arises if money is paid pursuant to the ADR process.

## ADDITIONAL CONTRACT TERM PROTECTING PARTIES' RIGHTS PENDING FINAL DETERMINATION

It may 'go without saying' that the parties, had they turned their mind to it pre-contract, would have agreed that either party be permitted to recover money paid pursuant to an ADR process that was subsequently overturned. This might permit a court to imply such a term, without venturing into the intellectual exotica of unjust enrichment and restitution law.

In order to avoid this uncertainty, best practice may dictate that parties to agreements with ADR clauses agree on an additional term protecting their rights pending final determination. The precise wording and operation of such an additional term must be carefully considered.

However, a party's desire to protect its right to advance its own claims must be balanced with its desire to be protected from another party's claim being commenced possibly years later.

## TACTICAL STEPS TO COMPLY WITH ADR CLAUSE BUT AVOID LIMITATION PERIOD EXPIRING

If a party is in the situation where this hasn't happened, then one way to approach this could be to:

- engage the ADR process;
- commence court proceedings within the normal limitation period; and
- seek an immediate stay of the proceedings to allow the parties to complete the ADR process.

While not free of risk, or expense, this tactical manoeuvring is likely to be better than completing the ADR process, only to find a claim 'appeal' is time barred.

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