

LIMITATION IN ADJUDICATION – DOES ADJUDICATION AMOUNT TO AN ACTION?



ALEX EDWARDS

SENIOR CONSULTANT, DGA UK

The Judge in *LJR Interiors Ltd v Cooper Construction Ltd [2023] EWHC 3339 (TCC)* explored the issue of the limitation defence in adjudication. Although the judgement was given with a word of caution from the Judge, HHJ Russen KC grappled with the application of s5 of the Limitation Act 1980, and how the Adjudicator approached the limitation defence in the preceding Adjudication.

THE FACTS

The Parties entered into a (simple) construction contract on 26 August 2014 whereby LJR were to carry out and complete dry lining, plastering and screed works for Cooper. The contract sum was £18,675 with monthly invoices for work undertaken to be paid within 28 days.

The works completed on 19 October 2014, which was shortly followed by LJR's Application for Payment ("AFP") No.3 on 31 October 2014. Cooper dealt with AFP No.3 in the normal fashion and notified the sum it considered due in its Payment Notice.

Almost 8 years later LJR submitted its AFP No.4 on 31 July 2022 which was largely based on its AFP No.3.



Cooper did not respond with a payment and/or pay less notice against AFP No.4, nor did it pay the sum claimed. LJR subsequently served its Notice of Adjudication on 9 September 2022.

THE ADJUDICATION

LJR stated in its Notice that the dispute arose around 22 August 2022 when Cooper failed

to pay the sums claimed in LJR's AFP No.4 by the final date for payment. The Referral was a simple payment dispute claiming the sum



LJR considered was due to it.

Cooper's response was that, pursuant to s5 of the Limitation Act, LJR's claim was outside of the limitation period of six years for a simple contract.

The Adjudicator dealt with the issue of limitation stating that the cause of action accrued when the breach took place. That being when the sum claimed in AFP No.4 was

not paid by the final date for payment.

The Adjudicator went on to state that the Limitation Act seeks to bar a remedy, not a right, and that the Scheme does not impose a limit as to when a claim for payment can be made. Therefore, the Adjudicator decided that LJR's AFP No.4 was a valid application from which the payment obligations flow.

Accordingly, the Adjudicator found that the limitation period had not expired because the cause of action did not occur until the final date for payment when the breach occurred.

LJR were successful in the Adjudication, to which Cooper continued to resist. LJR sought to enforce the Adjudicator's decision in the Court and Cooper sought a Part 8 declaration regarding the enforceability of the Decision in consideration of the claim being barred by limitation.

THE JUDGEMENT

It is well settled that adjudicator's decisions will often be enforced despite that the decision may be considered as wrong. However, aggrieved parties often seek a Part 8 declaration from the Court on specific points that may overturn an adjudicator's decision.

The Judge in this case recognised that the limitation issue needed to be considered because this claim was not a typical payment dispute that is often before the Court. The Judge stated that LJR's claim was:

“perhaps better viewed as a return to

an otherwise cold contractual scene long after the time when any appropriate investigations into it might be expected the have concluded.”

With that in mind, the Judge was faced with determining whether LJR’s claim was statute barred, or whether the decision should be enforced, with the primary issue being, *is adjudication captured by the Limitation Act?*

THE LIMITATION ACT

S.5 of the Limitation Act requires an ‘action’ to be brought prior to the expiry of the limitation period; in this case, for a simple contract that was 6 years from performance. S.5 provides as follows:

‘an action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued’.

S.38 defines an ‘action’ as follows:

“action” includes any proceeding in a court of law, including an ecclesiastical court.”

The term ‘action’ is further extended to include arbitral proceedings. However, there is no mention of adjudication and whether adjudication constitutes an ‘action’ for the purposes of the Limitation Act.

The terminology of the Construction Act has been the subject of much judicial focus, one part of which is that a dispute can be referred to adjudication ‘at any time’. This complicates

matters when seeking to apply the Limitation Act as a defence.

THE AUTHORITIES

To address this issue the Judge first turned to the authorities. In *Connex South Eastern Limited v M J Building Services Group PLC [2005] EWCA Civ 193*, Lord Dyson stated:

“There is, therefore, no time limit. There may be circumstances as a result of which a party loses the right to refer a dispute to adjudication: the right may have been waived or the subject of an estoppel. But subject to considerations of this kind, there is nothing to prevent a party from referring a dispute to adjudication at any time, even after the expiry of the relevant limitation period. Similarly, there is nothing to stop a party from issuing court proceedings after the expiry of the relevant limitation period. Just as a party who takes that course in court proceedings runs the risk that, if the limitation defence is pleaded, the claim will fail (and indeed may be struck out), so a party who takes that course in an adjudication runs the risk that, if the limitation defence is taken, the adjudicator will make an award in favour of the respondent.”

The point made by Lord Dyson being that, although there appears to be no express limitation on a dispute being referred to adjudication with regard to the Limitation Act, the referring party runs the risk of the limitation defence being pleaded by the respondent.

The Judge at this point recognised that that in consideration of *Connex*, it is difficult to identify good reason why the limitation defence should not form part of a dispute referred to adjudication. Particularly so because, despite adjudication not expressly amounting to an action for the purposes of the Limitation Act, the decision which comes out of an adjudication may lead to court proceedings which plainly do.

The Judge went on to consider *Aspect Contracts (Asbestos) Limited v Higgins Construction Plc [2015] UKSC 38*, where Lord Mance observed that:

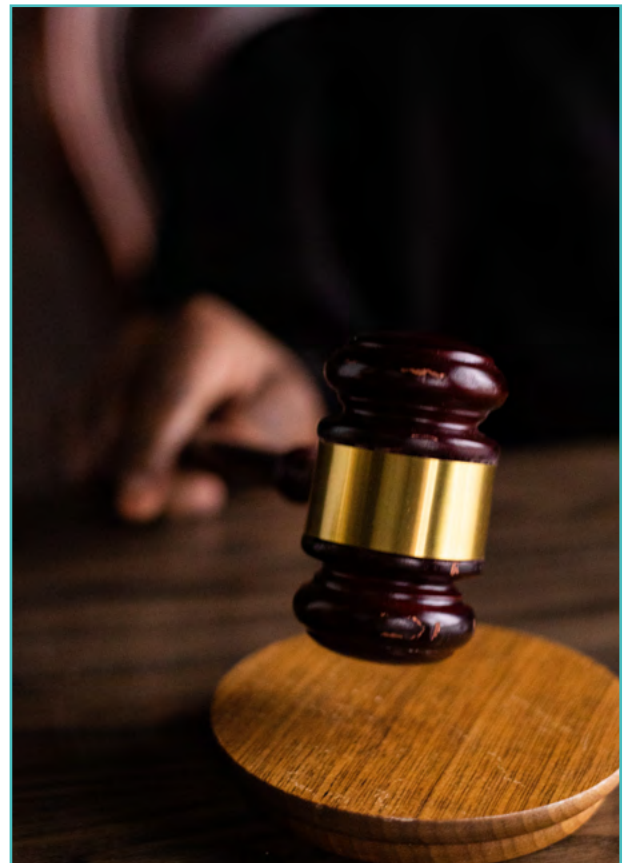
“... If there is an adjudication award within 6 years of performance, without any further proceedings being commenced, both sides are after the six-year period time-barred in respect of any claim to any balance which they originally contended to be due to them. Any further proceedings would be limited to a claim for repayment by the party required to pay a net balance to the other. “

Lord Mance made it clear that only court proceedings that relate to the enforcement of the adjudicator’s decision (as in the obligation to comply with the decision rather than the substantive issue) may be brought after the limitation period and to which attract their own limitation period in line with the contract.

The authorities therefore do not help to answer the question of whether adjudication amounts to an ‘action’ under the Limitation Act, only that the succeeding court proceedings, by way of a Part 8 claim that may follow the

adjudicator’s decision, are caught by the Limitation Act.

However, the Judge noted that since there is a contractual and statutory backed obligation to comply with an adjudicator’s decision, which for the purposes of the Limitation



Act is distinguished from court and arbitral proceedings, yet is enforceable by the court or arbitration, leads to the conclusion that the limitation period should be applicable to contract claims at both levels of the dispute resolution process.

The Judge further considered Keating on Construction Contracts, which at para 16-047 states that:

The Limitation Act 1980 and other enactments apply equally to adjudication in the sense that an adjudicator must treat the law of limitation as a substantive defence just as any other defence.

The Judge stated that the statement in Keating appears to be a statement of the obvious, in that the true nature of the limitation defence does not extinguish the right but in certain types of legal proceedings operates to bar the remedy. Further, the fact that an adjudicator is required to reach his decision in accordance with the applicable law in relation to the contract, the adjudicator as the decision maker himself would recognise that the decision is effective subject to final determination before a tribunal where there is no question as to the limitation defence being effective in the same dispute.

THE JUDGE'S CONCLUSIONS

The conclusion that HHJ Russen KC reached was that:

'... in my judgement, the context does require the term 'action' in the non-exhaustive definition provided by s38 of the [Limitation Act] to be read as including adjudication proceedings. On that basis, such proceedings are not expressly excluded [...] from the meaning of 'action' by s38 of the [Limitation Act]. Further adopting what Dyson LJ said in Connex, s108(2) of the [Construction Act] cannot be read as prescribing any limitation period, so neither can it be suggested that s39 of the [Limitation Act] operates to disapply its s5.

However, should the point still be regarded as uncertain, because the Contract might be embraced by the language of section 5 [of the Limitation Act] but not the dispute resolution process of adjudication (the "non-action") implied into it, then I would nevertheless come to the alternative conclusion that it is enough that the court is required to consider it in the "action" which is plainly before it on the Part 8 Claim.'

The Judge concluded that, in context, the term 'action' was not exhaustive and should include adjudication proceedings on the basis that they are not expressly excluded, as are some other 'non-court' methods of payment recovery.

Alternatively, the Judge concluded that it is enough that because the contract is embraced by the Limitation Act but not the dispute resolution process, that the court is required to consider the limitation defence in the action before it.

COMMENTARY

Although the outcome in this judgement is generally supported because adjudication should not be able to circumvent the concept of limitation, it has been the subject of some discussion.

One point of discussion is that the Court's objective in cases where the answer is not expressly identified in statute, is to interpret the Parliament's intentions from the language used. In this case, the statute appears clear in its intentions, in that the Limitation Act is

clear what was intended to constitute as an 'action'. Further, the Limitation Act predates the Construction Act, therefore, the issue here is that the argument is circular. If the Limitation Act is 'applicable law' of which an adjudicator must consider in the making of his decision, then when faced with the question of whether adjudication is considered an 'action', the answer is that it is not by definition of s38 of the Limitation Act, which is what the respondent will be relying upon in the adjudication.

It follows that when the Court is seeking to interpret the intentions of Parliament with regard to adjudication amounting to an 'action' within the definition of s38 of the Limitation Act, one must ask how that interpretation can include adjudication, which is a product of statute that postdates the very definition being interpreted.

In contrast, HHJ Russen KC's judgement does prevent an adjudicator ruling on his own jurisdiction to decide the substantive dispute if adjudication is considered as an 'action' and the limitation defence is raised. It is commonly understood that an adjudicator is prohibited from ruling on his own jurisdiction, and prior to this case, an adjudicator could in effect rule on his jurisdiction to decide the substantive dispute if adjudication was not considered an 'action' under the Limitation Act. However, following this judgement, an adjudicator must bring an end to the substantive dispute should the limitation defence be raised and succeed, and the parties will not be subjected to unnecessary expense.

Key points of consideration following the ruling in *LJR v Cooper* include:

1. If you are considering referring a dispute to adjudication:

- a) Are you vulnerable to the limitation defence?
- b) Check the contract, is it a simple contract or signed as a Deed?

2. If you are the responding party in a dispute:

- a) Are you able to raise the limitation defence to dismiss the claim entirely?
- b) Evaluate when the cause of action began to accrue and consider limitation under both a simple contract and a contract signed as a Deed.
- c) If you are pleading the limitation defence, be sure to reserve your position should the adjudicator consider it does not apply in the circumstances.

This case demonstrates that if a contractor's application for payment is met with a payment notice containing an amount lower than applied for, the contractors should not leave it too late to refer the dispute concerning the value to the works, other amounts, and the notified sum. This principle could equally apply to any submitted claims which are then reduced or rejected outright by the other party. Resurrecting and pursuing the same disputed claim after the limitation period has expired is likely to be fertile ground to have the resurrected disputed claim struck out and jurisdictional challenge.

DGA can provide you with advice regarding your position under the contract and represent you in adjudication proceedings accordingly.

DGA UK IN-HOUSE TRAINING & BREAKFAST SEMINARS



Due to DGA's expertise in the provision of contractual advice, commercial and programming services, and dispute resolution across all construction industry sectors, we have created educational training seminars on the understanding and administration of the various forms of construction contracts.

Our highly experienced course presenters are able to apply the contract to the day to day tasks and problems encountered by the delegates.

Our in-house training seminars are provided for a fixed fee at your chosen venue. The benefit of this is the ability to choose the number, position type, and experience of delegates who attend without a price increase. We appreciate that workload and training is a fine balance and, therefore, our in-house seminars minimise disruption to the delegates duties that can occur with public seminars.

NEC3 & NEC4

UNDERSTANDING AND USING THE NEC3 ENGINEERING AND CONSTRUCTION CONTRACT

FULL DAY SEMINAR

This training seminar is aimed at novice through to professionals with experience of the NEC3 ECC:

- **Introduction - The agreement**
Contract Data 1 and 2, Risk Register, Site Information, Works Information, Activity Schedule, Main Options, Secondary Options, Z Clauses, precedence of documents.
- **Providing the Works**
Mutual trust & co-operation, Communication, Early Warning notifications, Works Information, Design, Instructions.

- **Quality**
Defects, Defect correction, access given/ not given, assessment of cost of correction.
- **Time obligations & Programming**
Start Date, Access Date, Key Dates, planned Completion, Completion Date, float, Accepted Programme, Revised programme, Acceleration.
- **Payment**
Activity Schedule, Price for Work Done to Date, Applications for payment, Project Manager's assessment.
- **Compensation events**
Significance of Early Warning notice, notification of compensation events, time barring late notification, an overview of the assessment of the change to the Prices and/or delay (calculation of Defined Cost, Shorter or Full Schedule of Cost Components), dividing date, quotations, rejection of quotations, Project Manager's assessment, implementation.

UNDERSTANDING AND USING THE NEC4 ENGINEERING AND CONSTRUCTION CONTRACT

FULL DAY SEMINAR

The NEC4 seminar will follow the NEC3 training (above) format while incorporating the changes in the new NEC4 edition.

NEC3 TO NEC4 ENGINEERING AND CONSTRUCTION CONTRACT – THE CHANGES AND IMPLICATIONS

HALF DAY SEMINAR

This training is an ideal follow on from the Understanding & Using the NEC3 Engineering and Construction Contract. Best suited to professionals with experience of the NEC3 ECC as it solely considers the changes and the impacts from the NEC3 ECC to the NEC4 ECC:

- **Why a new edition?**
- **New terminology**
- **New clauses**
- **Amendments to clauses of the NEC3 ECC**
- **Amendments to Schedules of Cost Components**
- **Questions**

NEC3/ 4 ECC COMPENSATION EVENTS: THE EVENTS, NOTIFICATION & ASSESSMENT

HALF DAY

This seminar considers all of the events that are compensation events, which party is liable to notify the event, the mechanism for notification and assessment in more detail. The delegates will receive training in correctly assessing and submitting quotations for compensation events.

FULL DAY SEMINAR

As above plus workshop

TERM SERVICE CONTRACTS

FULL DAY SEMINAR

Much like the Understanding and Using seminars (above), this considers the Term Service Contract, looking at Contract Data, works information and providing the service itself.

JCT FORM OF CONTRACT

JCT MINOR WORKS AND INTERMEDIATE BUILDING CONTRACTS 2016

JCT INTERMEDIATE AND STANDARD FORM BUILDING CONTRACTS 2016

JCT DESIGN AND BUILD CONTRACT 2016

JCT 2024: COMING SOON

FULL DAY SEMINARS

Each of our JCT contract seminars are full day and consider the Contract Particulars, Execution of the documents, Carrying out the Works, Sub-Contracting, time for completion, delays, valuation, payment; and design (where applicable).

CONTRACTUAL & COMMERCIAL AWARENESS

FULL DAY SEMINAR

In this seminar, we consider issues commonly encountered during the course of a contract, including but not limited to, formation of contract, deeds, letters of intent, changes to the terms and the scope of works, authority, design liability, records and notification of events, claims for delay, loss and/or expense or damages, payment, liquidated damages, time bar clauses, exclusive remedy provisions, termination and repudiation.

BREAKFAST SEMINARS

DGA's next breakfast seminar hosted by Scott Milner is coming soon. Further details to be issued in the New Year.

WHAT TO DO NEXT?

For more information about our training seminars, please email scott.milner@dga-group.com; or telephone 0113 337 2174.

DGA CONTACT INFORMATION

If you would like to find out more details about any of the subjects covered in this Ebriefing please contact DGA Group through the contact details below or at DGAGroup@dga-group.com

DGA HEADQUARTERS

25 Eastcheap
London
EC3M 1DE

Tel: +44 (0)203 961 5340

SINGAPORE

#11-09,
Eon Shenton
70 Shenton Way
Singapore
079118

Tel: +65 62916208

AUSTRALIA

Level 8
One Melbourne Quarter
699 Collins Street
Melbourne
Vic 3000

Tel: +61 (0)3 8375 7620

AUSTRALIA

Level 15
207 Kent Street
Sydney
NSW 2000
Australia

Tel: +61 (0)2 7202 3494

AUSTRALIA

Level 17
215 Adelaide Street
Brisbane
QLD 4000
Australia

Tel: +61 (0)7 3811 1499

AFRICA

Building 2
Country Club Estate
21 Woodmead
Sandton
South Africa
2054

Tel: +27 (0)11 258 8703

HONG KONG

6/F Luk Kwok Centre
72 Gloucester Road
Wan Chai
Hong Kong

Tel: +852 3127 5580

UNITED ARAB EMIRATES

Associated Office
PO Box 6384
Dubai
United Arab Emirates

Tel: +971 4 437 2470

CANADA

Associated Office
61 Legacy Landing SE
Calgary
Alberta
Canada
T2X 2EH

Tel: +1(587) 586 5502

UNITED KINGDOM

