Cause célèbre

Ian Pease explores a novel adjudication case concerning whether the adjudicators' decision produced a cause of action in itself

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Adjudication cases often have a ring of déjà vu about them. The same arguments tend to come up time after time. There are the inevitable claims that the process was not fair to one or other of the parties thereby giving rise to a breach of natural justice, or that the adjudicator answered the wrong question, or that one of the parties failed to follow the appropriate procedures and the decision should therefore be set aside or be deemed unenforceable. *Jim Ennis Construction Ltd v Premier Asphalt Ltd* [2009] is different. HHJ Stephen Davies admitted that there was no previous authority on the matter in issue. The point of interest is whether an adjudicator's decision itself produces a distinct cause of action which is different from the contractual cause of action on the dispute submitted. This is of more than academic interest, particularly where questions of limitation of action arise.

Down to the wire

In this case, the contract itself contained no adjudication provision, and hence the default adjudication procedures were to be found under the Scheme for Construction Contracts (the statutory instrument that backs up the Housing Grants, Construction and Regeneration Act (HGCRA) 1996). Back in 2002, issues arose about the road surface laid by Premier Asphalt for Jim Ennis Construction (JEC). Deductions were made from the sub-contractor's account but the dispute did not crystallise into an adjudication until 2008, almost six years later (it was a contract under hand).

Cause and effect

There were two causes of action that arose on these facts. There could have been a claim that the original works were defective and that Premier was therefore in breach of contract. That cause of action would normally have arisen on practical completion of the works. However, by September 2008, when the adjudication commenced, it was apparently statute barred. The second cause (the one that Premier proceeded with in the adjudication) arose when Premier made its final application for payment under the contract provisions. That was within time (just), as it arose in December 2002. The adjudication took place, and in November 2008 the adjudicator gave his decision – basically in Premier's favour – with which JEC complied. Of course, adjudication is only binding until the dispute is finally determined by legal proceedings, arbitration or agreement (s108(3) HGCRA 1996). As a result, JEC could proceed to re-litigate the dispute by issuing proceedings in the High Court, which it did, but only in April 2009, over six years after the final application for payment in December 2002.

As JEC could not rely on the primary contractual rights and obligations for its cause of action it contended that there was a new cause of action that arose on the adjudicator's decision. It claimed this new cause was separate and distinct from that referred to adjudication, and only arose at the date of payment in compliance with that decision.

Novel, yet not so novel

The judge set out JEC's arguments for this cause of action as follows:

(1) The decision of the adjudicator gives rise to an independent cause of

action, separate and distinct from the underlying cause of action in respect of the dispute submitted to adjudication.

(2) The implied term contended for by [JEC] either ousts the provisions of the Limitation Act by agreement or creates a new cause of action at the time of payment in compliance with the adjudicator's decision.

(3) There is a cause of action in restitution, which does not arise until the date of payment in compliance with the adjudicator's decision, or alternatively to which there is no applicable limitation period.

(4) By referring the dispute to adjudication more than six years after the date of the breaches complained of by [JEC] [Premier] is estopped from raising the limitation defence in the subsequent court proceedings.

(5) Unless [JEC] is able to challenge the adjudicator's decision, his rights under Article 6(1) ECHR will have been breached, and the relevant statutory provisions should be construed in such a way as to avoid such a state of affairs from arising.

(6) On the facts of this case, there is nothing that [JEC] could have done to protect itself from the result contended for by [Premier], and to find for [Premier] in this case would throw the construction industry into turmoil by encouraging parties to wait until just before the limitation period before referring disputes to adjudication, the fear of which might itself result in parties in a position similar to [JEC] in this case issuing defensive proceedings for declaratory relief purely to guard against the risk of this happening. It would also be inconsistent with the approach taken by the courts to date in robustly enforcing the decisions of adjudicators on the grounds that however rough and ready the process and however wrong the decision there is no injustice because the losing party can always challenge the decision (and hence recover his money) by subsequent legal proceedings or arbitration.

Remember that a cause of action is the sum total of all those facts and matters that the claimant would have to call evidence on and prove, in order to win its case. Hence, as JEC asserted, a successful party to an adjudication seeking to enforce the decision in court can rely solely on the fact of the decision and has no need to prove the underlying dispute. JEC went on to argue that the decision itself is a separate cause of action. This view accords with that of Alexander Nissen QC in 'The Format for Litigation and Arbitration after Adjudication' (*Construction Law Journal*, Sweet & Maxwell). Mr Nissen bases his view in part on the judgment of Judge John Hicks QC in *VHE Construction plc v RBSTB Trust Co Ltd* [2000], where he says:

> 55. I conclude that enforcement proceedings such as these are proceedings to enforce a contractual obligation, namely the obligation to comply with the decision.

A cause of action is the sum total of all those facts and matters that the claimant would have to call evidence on and prove, in order to win its case.

However, that is not beyond controversy, for Judge Humphrey Lloyd QC declared in *Glencot Development & Design v Ben Barrett & Son Ltd* [2001]:

> ... an adjudicator's decision does not create a cause of action as such... the cause of action remains the original claim and is not the decision of the adjudicator.

Was there a way of reconciling the two views? Judge Thornton QC in *Bovis Lend Lease v Triangle Development* [2002] considered that all Lloyd J was saying was that the underlying cause of action survives and is not superseded by the adjudicator's decision.

So what matters will the claimant have to prove in an enforcement action to win its case and gain enforcement?

Patently it does not have to lead evidence on the facts before the adjudicator, and indeed the court will cut it short if it does. Rather, all it has to show is that there is a decision and that it has not been complied with in accordance with the contractual (and indeed statutory) obligations. Judge Davies agreed and noted:

> Of course that conclusion is not in itself sufficient for [JEC] in this case, because [it] is seeking to have the court finally determine the dispute decided by the adjudicator, as opposed to seeking to enforce the adjudicator's decision.

Following on from that is the question of what facts and matters JEC would have to prove to win that case. The answer is that its cause of action would have to encompass a contractual right to open up review and revise the adjudicator's decision. The analogy would be with an engineer's decision under an Institute of Civil Engineers (ICE) standard form of engineering contract. This is binding only until revised by an arbitrator's award. The problem is that whereas the arbitration clause in the ICE contract is a sufficient contractual right, s108(3) HGCRA 1996 is not so explicit. It merely states:

> The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement. The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

There needed to be an implied term to make it into a positive right, as the Court noted:

> 18. Both s108(3) HGCRA and paragraph 23(2) of the Scheme make it clear that the decision of the adjudicator is only to be binding on the parties until the dispute is finally determined by legal proceedings, by arbitration (if provided for) or

> by agreement. However neither the HGCRA nor the Scheme purport to confer an express right on a losing party to an adjudication to bring legal proceedings finally to determine the dispute referred to adjudication and, if successful, to recover sums paid to the winning party in compliance with the decision. The Claimant contends that this right is one which arises by way of contractual implied term.

The implied term

As Lord Simon said in *BP Refinery (Westernport) v Shire of Hastings* [1978], for the court to allow such a term:

> (1) it must be reasonable and equitable;
>
> (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
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> (3) it must be so obvious that 'it goes without saying';
>
> (4) it must be capable of clear expression;
>
> (5) it must not contradict any express term of the contract.

The Court considered the paucity of response that a losing respondent to an adjudication would have in the absence of such an implied term. Given that there is money in issue the Court thought that the responding (losing) party:

> ... may simply assert a pure defence, it may... assert a defence by way of set-off or cross-claim, or it may (as in this case) assert both a pure defence... and a cross-claim (setting off its cross-claim for losses flowing from the defective original works against money otherwise admitted due to the Claimant).

Evidently the losing party would need to go several steps beyond that if it were to gain the return of its money. It would have to assert a positive case that the adjudicator had got it wrong and that the underlying facts showed that there had been no breach of contract, or that money was (or was not) due under the terms of the contract, or indeed, that it was due (or the opponent was not due) an extension of time under the contract.

This impotence of the losing party to assert anything more than a 'claim for nominal damages for breach of contract or a claim for a negative declaration' helped to persuade the Court that there was the need for a remedy in the form of an implied term, holding:

> 24. In my judgment the implied term contended for by the [JEC] satisfies the five requirements identified in the BP Refinery case, for the reasons set out by Ms Sims in her submissions... I am satisfied therefore that in a contract such as this to which the adjudication provisions of the Scheme apply there is to be implied a term that where one party has paid monies to the other party in compliance with the decision of an adjudicator then that party is entitled to have that dispute finally determined by legal proceedings and, if or to the extent that the dispute is finally determined in his favour, to have those monies repaid to him.
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> 25. It seems to me that the implied term is necessary to make fully workable the concept of the temporary finality of the adjudicator's decision which lies at the heart of the policy behind the adjudication provisions of the HGCRA. It is in substance no different to the state of affairs which exists in many construction contracts where there is provision for interim payments under interim certificates based on interim valuations, with the final valuation, certificate and payment to be made at the end of the contract. If it transpires at that stage that the contractor has been overpaid under the interim certificates, then it cannot be doubted that the employer has a cause of action to recover the overpayment.

Underneath the bar

Given that reasoning, what is the limitation period for a claim for review of the adjudicator's award? The Court held:

> 26. It is clear in my judgment that the cause of action under the implied term can only arise when the losing party pays monies to the winning party in compliance with the adjudicator's decision. It is also apparent that this is a claim to which s5 Limitation Act applies, because it is a claim founded on a simple contract, so that the losing party has six years from the date of payment in which to bring legal proceedings to recover that payment.

To win its case in an enforcement action the claimant has to show that there is a decision and that it has not been complied with in accordance with the contractual obligations.

Plugging the gap

Jim Ennis Construction addresses a significant anomaly with the drafting of the original statute and statutory instrument, and is to be welcomed. The facts that gave rise to this case will probably rarely occur. However, it will almost invariably be the case that an unsuccessful adjudicant will want to frame its cause of action as an opening up and revision of the adjudicator's decision, and this case provides assistance in framing the cause of action in that way. ■

Bovis Lend Lease v Triangle Development
[2002] EWHC 3123 (TCC)
BP Refinery (Westernport) v Shire of Hastings
[1978] 52 ALJR 20
Glencot Development & Design v Ben Barrett & Son Ltd
[2001] EWHC 15 (TCC)
Jim Ennis Construction Ltd v Premier Asphalt Ltd
[2009] EWHC 1906 (TCC)
VHE Construction plc v RBSTB Trust Co Ltd
[2000] Vol 1 BLR 187