TECBAR Review
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From the Chairman

A major part of the barrister's role is to exude confidence and calm when all about there is chaos and despair. For some practitioners this insouciant mien comes naturally; and at its zenith reflects a combination of profound inner certainty and the thickest of skins. Those qualities are not to be underrated. There can indeed be something rather attractive about the cheerful optimism of those who feel able to assure their client, after a day or month of unmitigated disaster, that the case is "well set up for a successful appeal"; and doubly so where the right of appeal is severely restricted by the provisions of the Arbitration Act.

Those lucky few should read this message no further. For ordinary mortals at the Bar there is the demanding daily test of judgment, on evidence and law and ethics; and then all the concerns which arise from life in Chambers. Any barrister of normal sensitivity and a modicum of self-awareness will readily recall those occasions when real anxiety and self-doubt intruded without warning. Did I do the right thing? What should I do next? Am I being treated fairly? Have I got it out of proportion? Why does the Code of Conduct confuse me? On such occasions the wise and established practitioner will typically resort to the advice and help of a trusted colleague in Chambers or elsewhere. His or her bank of reliable friends will have been developed and refined over the years, with the palme d'or for the willing and attentive listener; and the wooden spoon for those who immediately insist that the answer is straightforward.

But for many, particularly at the younger end of the Bar, that avenue may not so readily be open. The very fear of displaying uncertainty or anxiety – to a rival of similar Call; to a silk who may be looking for a junior; to a clerk with a relatively free hand to distribute junior work – can be the greatest inhibition to seeking necessary advice; and this despite the best efforts of Chambers to have appropriate counselling systems in place. For all these reasons I particularly welcome the inauguration of the 'TECBAR one-off mentoring scheme' which is notified elsewhere in this issue. I very much encourage senior practitioners to put themselves forward as willing to act as 'occasional mentors' to more junior members. It is one of the ways in which we can continue to demonstrate – against the attacks from so many outside agencies – the real strength and integrity of our profession.

Michael Soole Q.C., Chairman

From the Editor

As well as Fiona Sinclair's introduction to the TECBAR one-off mentoring scheme, this issue of the Review carries an article by Peter Land concerning matters consequential on adjudicators' decisions. In a valuable – as well as practical – exposition on the law as it stands, Peter seeks to bring harmony where there might (in the light of a recent conflict between decisions of the Court of Appeal in *Aspect* and *Walker*) be discord. Whether the Supreme Court may yet consider the need to bring truth where there is error in this particular area remains to be seen.

I hope that you find this Spring issue informative, helpful and stimulating.

Mark Chennells, Editor

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Undoing an Adjudicator's Doings

Introduction

The statutory right to adjudicate arises from s.108 of the Housing Grants Construction and Regeneration Act 1996. Section 108(3) (both before and after the amendments for construction contracts entered on or after 01 October 2011) provides (emphasis added):

> *"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."*

By s.108(5), if the contract does not make such provision, Part 1 of the Scheme applies, taking effect as implied terms[1]. Paragraph 23(2) of the Scheme is in similar terms save that it makes express the parties' obligation to comply with the decision (emphasis added):

> *"The decision of the adjudicator shall be binding on the parties, and they shall comply with it 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 between the parties."*

What is not set out in terms in the Act and the Scheme is what is to happen after "*the dispute is finally determined*" so that the decision of the adjudicator is no longer binding and the final determination has reached a different answer. The characterisation of the claim to correct the position as it stands following an adjudication has given rise to a difference of opinion at both first instance and in the Court of Appeal:

1. In *Jim Ennis Construction Ltd v Premier Asphalt Ltd* [2009] EWHC 1906 (TCC) Stephen Davies HHJ held (without the benefit of oral argument the parties having agreed to deal with the point by written submissions) that there was an implied 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*"[2] and alternatively a restitutionary claim by analogy with the principles relating to recovery of money paid pursuant to a court order that is subsequently overturned on appeal or set aside[3].
2. *In Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2013] EWHC 1322 (TCC) Akenhead J held there was no implied term and no separate cause of action in restitution. The "*primary and initiating relief*" was a claim for a declaration of liability in relation to the underlying dispute. Any return of money would be a matter of secondary, consequential relief although the basis of that consequential relief was not identified. Akenhead J had dismissed the suggestion that there was a restitutionary claim by analogy with the principle relating to repayment following appeal or set aside of a judgment[4].
3. In the Court of Appeal[5] the first instance decision in *Aspect* was reversed, it being held that there was an implied term, answering in the affirmative the preliminary issue "*Was it an implied term of the parties' contract that an unsuccessful party to adjudication would be entitled to seek a final determination by litigation and, if successful, recover payment made.*" In the course of the judgment the wording of the term sought to be implied was taken from the TCC judgment as "*that in the event that any dispute between the parties was referred to adjudication pursuant to the Scheme and one party paid money to the other in compliance with the adjudicator's decision made pursuant to the Scheme, that party remained entitled to have the dispute finally determined by legal proceedings and if or to the extent that the dispute was finally determined in its favour, to have that money repaid to it*"[6]. There was no argument on the restitution point and it was expressly not addressed by the court[7].
4. In *Walker Construction (UK) Limited v Quayside Homes Limited*[8] (a case where the appeal was heard by a differently constituted Court of Appeal one month before, but the decision was handed down two months after, the appeal hearing and giving of judgment in *Aspect*) it was suggested *obiter* that the analysis of Akenhead J in *Aspect* was to be preferred over that in *Jim Ennis* so that no new cause of action arose either as a result of an implied term or in restitution[9].

The view in the decided cases[10] is therefore 3:2 in favour of an implied term (but with the decision of the Court of Appeal in *Aspect* that there is an implied term currently being binding authority) and 3:1 against a restitutionary claim by analogy with the reversal of judgments following appeal (the Court of Appeal in *Aspect* abstaining on the point). In *Walker* the question of the character of the claim was considered in the context of where the burden of proof lay in the final determination; in *Jim Ennis* and *Aspect* the question was whether the final determination was time barred by the provisions of the Limitation Act 1980.

Burden of Proof

In *City Inn Limited v Shepherd Construction Limited*[11] the adjudicator awarded the contractor an extension of time

1 HGCRA s.114(4)
2 Paragraph 24
3 Paragraphs 28 to 29
4 Paragraphs 47 to 48
5 [2013] EWCA Civ 1541
6 Paragraph 10
7 Paragraph 19
8 [2014] EWCA Civ 93
9 Paragraph 63
10 Counting the Court of Appeal as one rather than three in each case and including the decision in *Walker* at first instance set out in more detail below.
11 [2001] ScotsCS 187

together with repayment of £150,000 which had been levied by the employer in respect of LADs. The claimant employer sought final determination of the completion date asserting that it was as stated in the contract and an award in respect of LADs. In defence the contractor maintained it was entitled to the extension granted by the architect of four weeks together with the five weeks found by the adjudicator. No question of limitation arose but part of the LAD claim was founded on a repayment of the sum itself repaid to the contractor pursuant to the adjudicator's decision. The case dealt with preliminary issues as to whether the notice provisions precluded any claim for extension of time and whether the adjudicator's decision affected the onus of proof. The basis on which any corrective repayment could be ordered did not arise for consideration. Nor did that question arise in the final determination of the contractor's entitlement to an extension of time: the contractor was awarded a 9 week extension of time[12] so there was no need for a corrective payment. In respect of the preliminary issue relating to onus of proof Lord MacFadyen in the Scottish Outer House held, answering whether the contractor that had obtained an extension of time from the adjudicator still had to justify that extension in the final determination (the extension of time being deployed as a defence to the LAD claim):

> *"It is, in my view, no part of the function of an adjudicator's decision to reverse the onus of proof in any arbitration or litigation to which the parties require to resort to obtain a final determination of the dispute between them. … The burden of proof in any such action lies where the law places it, and is unaffected by the terms of the adjudicator's decision."*[13]

In the substantive final determination at first instance[14] it was said by Lord Drummond Young that the adjudicator's decision:

> *"… is not, of course, conclusively binding, and the matters argued before the adjudicator fall to be determined in the present proceedings as if no determination had been made by the adjudicator."*[15]

In *Walker*, Quayside, the developer of an estate of 300 residential homes, engaged Walker to carry out drainage and highway works. The contractor's claim for payment of around £23,000 was met with allegations of defective works. The contractor started court proceedings which were stayed to allow for settlement but during the stay the contractor referred broadly the same dispute to adjudication and was successful. The adjudicator dismissed the developer's assertions that some of the extra works in respect of which the contractor claimed payment (to the tune of £8,941.16) were needed as a result of defective works and that the developer had a counterclaim more generally for defective works. By the end of 2008 the contractor had therefore obtained in the interim through adjudication broadly the relief it had been seeking through the court proceedings (save for an amount of £1,773.65 in respect of one aspect of retention). The stay on the court proceedings was lifted and following several amendments by the developer, the matter proceeded to trial in September 2012. The contractor claimed the £1,773.65 of further retention it had not pursued in the adjudication. The developer counterclaimed around £84,000 which included the £8,941.16 awarded in the adjudication in respect of additional works that the developer contended should not have been awarded (asserting, as it had in the adjudication, that those works were the result of the contractor's defective works). Those proceedings therefore had the effect of seeking a final determination of:

(1) the contractor's entitlement to payment of £1,773.65 of retention;

(2) the developer's counterclaim for defective works that the adjudicator had dismissed; and

(3) whether part of the additional works were needed to rectify the contractor's defective work and if so, the repayment of the sum of £8,949.16 awarded by the adjudicator in respect of those additional works.

The TCC judge awarded a net sum of just over £10,000 to the developer but dismissed its claim for repayment of £8,949.16. The developer had argued that the contractor had given no evidence to support its claim for payment for the additional works and therefore that sum should be repaid. Bailey HHJ formed the view that he was in no way bound by the adjudicator's decision stating:

> *"Once the question that the contractor is entitled to monies paid under [an] adjudicator's award is validly raised in subsequent legal proceedings, the contractor must prove his entitlement in the usual way. He may not rely on the award as proof. The question does have to be raised in legal proceedings."*[16]

However, the Judge considered that he could not award the repayment unless the developer had identified and properly pleaded a cause of action. He formed the view, following *Jim Ennis* (*Aspect* at first instance not being heard or handed down for another 7 and 8 months respectively) that there was an implied term in any construction contract that "*the contractor would repay to the employer any money paid by the employer under the terms of an adjudicator's award in respect of which the liability to pay was not substantiated in subsequent legal proceedings*"[17]. The judge found there was no assertion in the developer's statement of case of a breach of contract[18].

12 The rather better known first instance and appellate decisions where it was held there was to be an apportionment exercise in relation to concurrent delay ([2008] BLR 269; [2010] BLR 473).

13 Paragraph 58

14 [2008] BLR 269

15 Paragraph 3

16 Paragraph 113 at first instance quoted at paragraph 38 of the Court of Appeal judgment

17 It is not clear if this is the precise wording or if it has been paraphrased by the Court of Appeal at paragraph 39.

18 The Court of Appeal decision does not show why the judge thought a claim for breach was necessary as opposed to a claim under the implied term; perhaps that had not been pleaded either.

He further concluded that whilst a restitutionary claim was pleaded, no such claim could exist as a matter of law, considering that the principle relied on in *Jim Ennis* applied only to decisions of courts and not adjudicators. In this regard his reasoning[19] matches that subsequently explained by Akenhead J in *Aspect*, apparently without the benefit of the citation of the first instance decision in *Walker* which was heard by the TCC judge in the Central London County Court. He ultimately concluded as follows:

> *"It is not for me to speculate as to why Walker did not adduce the evidence necessary to support its case on the work for which they obtained an adjudicator's decision, nor indeed why Quayside did not do more than prepare to meet a case that payment was due beyond proof that PBA did not certify it, although Quayside's approach is the more understandable. Both sides arrived at trial to argue this claim on a purely technical basis. At the end of the day this court may only award money judgments to litigants who establish that they have a good cause of action for the money, and demonstrate that the cause of action in question has been pleaded within the rules. In this respect Quayside fails. In the circumstances, I will not order repayment of the sums awarded in adjudication"*[20]

The contractor appealed the costs order[21] and the developer cross-appealed the refusal to award the repayment (permission having been granted by the first instance judge).

The Court of Appeal upheld the dismissal of the developer's repayment claim but for different reasons. Gloster LJ accepted the contractor's submission that the repayment claim was, in effect, a counterclaim for damages for defective drainage works (that the additional works had been carried out and the correct price for those works were not in dispute[22]; the dispute related to why the works were required). The contractor (who remained claimant[23], the proceedings being those issued before the referral to adjudication) had asserted the small retention claim which had nothing to do with the drainage aspect of the works. It was therefore for the developer to prove its counterclaim but the developer had not called any evidence at trial to show that the original works had been defective and therefore in breach of contract. Irrespective of any pleading deficiency, there was simply no evidence before the judge on which he could make a final determination in the developer's favour in respect of defects in the works and the consequences thereof. The developer had fought the case on the basis that the contractor had to prove its case that it was entitled to payment of the sum awarded by the adjudicator and had failed as it had taken no steps in that regard. Gloster LJ held:

> *"In circumstances where Walker was not making any claim in respect of the sum of £8491.60, I cannot see that Walker had any obligation to do so."*[24]

Gloster LJ, however, expressed that she had difficulty with the concept of temporary finality of an adjudicator's decision and what the consequences are in the event of final determination. She posited the question:

> *"how "binding" is the adjudicator's decision, or how significant is the fact that payment has been made under the award, when the court comes to consider the outstanding disputes between the parties, and their respective obligations, as at the date of trial but before the court "finally" determines the dispute"*[25]

Having cited *City Inn* and the commentary in the second edition of *Coulson on Construction Adjudication*[26], Gloster LJ accepted that the court was to determine the dispute anew, but commented *obiter* that she had:

> *"real difficulty with Lord MacFadyen's analysis that the adjudication has* ***no effect whatsoever*** *on the onus of proof in subsequent proceedings"*(original emphasis)[27]

but ultimately declined to find that *City Inn* had been wrongly decided. There had been no detailed argument and a decision on the point was uneccessary in light of her findings that the developer was required to establish its set off and counterclaim and had failed to do so. Using the example of *City Inn* Gloster LJ wondered why the final determination would have to proceed on the incorrect hypothesis that the claimant was the contractor seeking an extension of time.

Gloster LJ then went on to consider, *obiter*, the characterisation of a claim for repayment in respect of an adjudicator's decision and, although finding it of little assistance in resolving the question of burden of proof, as summarised in the introduction above preferred the analysis of Akenhead J in *Aspect*:

> *"I agree that, for limitation purposes, no new cause of action arises either as a result of an implied contractual term, or on the basis of a restitutionary claim, and that, when an unsuccessful party to the adjudication subsequently brings court proceedings, it is doing so on the basis of its original rights under the construction contract to claim payment under the contract, damages for breach of contract or a negative declaration that it is not in breach."*[28]

What is beyond doubt, it is suggested, is that the final determination is not influenced by the substantive decisions of the adjudicator – the court comes to the matter anew. To

19 Paragraphs 122 to 124 at first instance quoted at paragraph 40 of the Court of Appeal judgment

20 Paragraphs 126 at first instance quoted at paragraph 40 of the Court of Appeal judgment

21 Said, in a dispute where the difference between the parties was under £86,000, to total in excess of one third of a million pounds (that being the costs of just one party and not including the costs in the Court of Appeal).

22 Paragraph 44

23 The case is atypical in this regard at least. The majority of final determination claims will only be commenced after the adjudication. Had that been the case here it seems likely that the developer would have been claimant – it is hard to believe that the contractor would have started court proceedings to obtain payment of less than £2,000 in respect of sums retained when it had the benefit of a favourable adjudicator's decision.

24 Paragraph 57

25 Paragraph 47

26 Other works are available.

27 Paragraph 51

28 Paragraph 63

continue the *City Inn* example, the adjudicator's decision does not preclude the employer from asserting in its claim for a final determination that the completion date is that stated in the contract and that in consequence it has an entitlement to LADs; it is then for the contractor to plead and prove its extension of time entitlement in defence of that claim. *City Inn* was perhaps therefore not the best example to choose to illustrate any burden of proof difficulty. In any event, the question is perhaps more generally a sterile one. Whether a final determination will ultimately come down to burden of proof is perhaps doubtful, particularly in circumstances where both parties put in evidence on the point being finally determined:

> *"… in the end when all the evidence has been brought out, it rarely matters where the onus originally lay; the question is which way the balance of probability has come to rest"*[29]

There appears to be no reason to suggest that sentiment applies any less to a final determination following adjudication than where the dispute is being determined in circumstances where there had never been an adjudication. Whilst there may be a reversal of the roles of claimant and defendant when compared to the position absent an adjudicator's decision (the successful claimant in the adjudication being likely to sit tight) and claims for negative declarations rather than claims of breach, the question of where the burden lies will likely only become material if one party (or indeed both as appeared to be the case in *Walker*) chooses to fight the final determination on a technical basis without adducing evidence. Following the decision in *Walker* that should now be a rare case indeed – there are no safe shortcuts[30] to achieving a favourable final determination other than pleading and proving the underlying claim in the usual way. In any event, a reversal of roles should not affect the ultimate outcome: the Court will wish to resolve the underlying dispute on its merits. As Alexander Nissen QC pointed out in his 2003 article 'The Format for Litigation and Arbitration after Adjudication'[31]:

> *"Proving there is **no** entitlement to an extension of time is difficult to achieve. It is suggested that the solution lies in the court's case management powers which enable the court to direct the [party that successfully obtained an extension of time in adjudication] to present its case first".*

Limitation

The decision of the Court of Appeal in *Aspect* is binding so there is a new cause of action for repayment of sums awarded by an adjudicator based on an implied term, within which the original dispute can be determined even if it was otherwise time barred, which accrues following payment being made pursuant to an adjudicator's decision. That approach leads to some surprising results, in particular the asymmetric extension of the limitation period for the paying party's claims, but not the successful party's claims even if they were not awarded at the full value claimed. Where the underlying claims are time barred by the time the adjudicator gives his decision, it is the end of the road for the referring party but not the responding party. The implied term also does not appear to come to the assistance of even the responding party in a non-monetary decision where the question of repayment does not arise. So where a contractor has referred its claim for an extension of time (but not seeking any financial consequences) and succeeds so there is an award of time but not money, the employer does not appear to get an extension to its limitation period to have the extension of time finally determined. It also appears to lead to the possibility that two parts of the quantum of a single claim are treated differently (at least in effect) for the purposes of limitation. Absent a very widely drafted notice or agreement between the parties, a respondent to an adjudication cannot obtain a payment to it as a result of a counterclaim raised in defence of a referral. The best it can achieve is to defeat the claim. Where its counterclaim in fact exceeds the sum claimed, it would appear that limitation is only extended in respect of the repayment and not the balance of the counterclaim. These anomalies and the differences of opinion in the Court of Appeal and at first instance suggest that *Aspect* may not be the whole answer. It is understood that permission to appeal to the Supreme Court has been sought.

It is suggested that the following propositions relating to the nature of an adjudicator's decision provide a helpful starting point for the consideration of the nature of a claim to undo the adjudicator's work:

1. The adjudicator's decision, although not finally determinative, may give rise to an immediate payment obligation. That obligation can be enforced by the courts. But the adjudicator's determination is capable of being reopened in subsequent proceedings[32].
2. An adjudicator's decision does not alter or replace the original cause of action that was the subject of the dispute[33]; nor does it create or modify a right or liability under the contract[34].
3. If there is a dispute as to the validity of the decision, the claiming party is still free to rely on its entitlement to judgment or an interim payment based on the underlying cause of action that had been dealt with by the Adjudicator since that cause of action survives and does not merge in, and is not superseded by, the disputed Adjudicator's decision[35].

The obligation to comply with the decision arises when it is issued, but it is clear from the foregoing that the underlying dispute, rights and obligations remain unaltered. On the plain

29 Per Lord Reid in *McWilliams v Sir William Arrol & Co Ltd* [1962] 1 WLR 259 at 307

30 In light of the magnitude of the costs incurred in *Walker* it does not appear that the "technical" approach taken by the parties was a shortcut in any event.

31 (2003) 19 Const. L.J. 179

32 *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2001] All ER (Comm) 1041 (CA)

33 *Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd* [2001] BLR 207

34 *David McLean Housing Ltd v Swansea Housing Association Ltd* [2002] BLR 125

35 *Bovis Lend Lease Ltd v Triangle Development Ltd* [2003] BLR 31

wording of s.108(3) and the scheme, that obligation to comply ceases when "*the dispute*" has been finally determined. Within the context of s.108 "*the dispute*" must be a reference to the dispute initially referred to adjudication identified in the opening paragraph of s.108. It is not a reference to a dispute as to whether there is a right to repayment of any sums paid in respect of the adjudicator's decision. That is not "*the dispute*" that the Act anticipates is to be finally determined if the decision is to be no longer binding. It therefore appears that the undoing of an adjudicator's decision is a two stage process as suggested by Akenhead J[36]. The first stage is the final determination of the original dispute which would appear to be subject to the normal limitation period. "*Until*" that determination the parties remain bound by the decision. Once that determination has taken place, the parties are no longer bound by the decision of the adjudicator and are bound by the final determination. That final determination may then have consequences requiring further relief – the second stage identified by Akenhead J – but there must necessarily first be a final determination of "*the dispute*" before any further consequences of that final determination can be considered.

If there can be no final determination because "*the dispute*" has become time barred, then "*until*" never comes and the adjudicator's decision remains binding. That clearly has the possibility of causing injustice where a party becomes permanently bound by an incorrect adjudicator's decision. The Court of Appeal in *Aspect* appears to have been reticent to require parties to seek protective negative declaratory relief to avoid that potential injustice. Whilst that is understandable as it is an action that is likely to breed a defensive counterclaim that may otherwise have never been brought as a free standing claim, as identified by Akenhead J[37] any injustice is likely to be limited to a very small number of cases (in light of both the small proportion that ever reach final determination at all, and the even smaller proportion that do so as limitation approaches). There does not, however, appear to have been any particular prospect of injustice in either *Jim Ennis* or *Aspect*. In the former case, the contractor's defect claim would have been time barred in any event had the sub-contractor gone straight to litigation of its payment claim; the contractor would have had to protect its position in that regard in any event irrespective of any right to adjudicate[38]. In the latter case the final determination had become time barred as a result of Aspect's (or its advisor's) own dilatory conduct, having waited 2.5 years from the adjudicator's decision to bring its claim for final determination.

However, once the limitation position is understood appropriate drafting in future contracts can remove that small risk of limitation related injustice. It would be straightforward for parties to include a provision in their contracts that, unless a claim was already barred by limitation before the notice of adjudication was given, neither party may rely on a limitation defence to any claim for final determination of a dispute decided by an adjudicator where the claim for final determination is started within 28 days, say, of the adjudicator communicating his decision. The JCT forms already contain similar provisions providing savings in relation to the conclusive effect of a final certificate in certain circumstances[39]. Such a provision would avoid there being any particular need (in consequence of there being a right to adjudicate) for a party to seek declaratory relief specifically to protect its position as limitation loomed, would address the position where there is a non-financial decision of an adjudicator and would apply equally to both parties so that a partially successful referring party may also achieve a final determination of its claim.

Despite the ultimate finding in *Jim Ennis*, the reasoning of the Judge along the way appears to have been consistent with Akenhead J's approach of there being a primary and secondary claim. It was said:

> *"on an objective basis the parties must be taken to have understood that there was a right to repayment of monies paid in compliance with the adjudicator's decision if the final determination of the dispute by legal proceedings produces a different result"* [40]

In *Aspect* in the Court of Appeal it was said:

> *"If the final determination decides that a particular party has paid too much, repayment must be made. To the extent that there is no reference to such repayment in paragraph 23(2) of the Scheme it is implicit. But it is as close to being explicit as it is possible to be."* [41]

In both of those extracts the right to repayment appears to be being treated as a separate entitlement that only arises in the event of the final determination producing a different result, not that the final determination is of the right to repayment itself. It is only later in the decisions that the two become conflated into a single and, it is submitted, unnecessarily wide implied term and cause of action which has led to the partial[42], inconsistent and perhaps somewhat arbitrary extension of limitation periods. That conflation would appear to be the merger of the original dispute in the adjudicator's decision contrary to the decision in *Bovis*[43].

Even adopting the two-stage analysis, what remains opaque is the basis of any financial relief in the second stage once the decision of the adjudicator is no longer binding and the decision

36 Paragraph 48 of *Aspect* at first instance

37 Paragraphs 29 and 45 of *Aspect* at first instance

38 There is insufficient background in the judgement to be able to discern whether there may nevertheless have been the possibility of an abatement of price in defence of the claim for payment.

39 For example Clauses 1.9.3 and 1.9.4 of the JCT 2005 Design and Build form, and see *Jerram Falkus Construction Ltd v Fenice Investments (no.4)* [2011] EWHC 1935 (TCC)

40 Paragraph 23

41 Paragraph 12

42 In both meanings of the word.

43 See fn.35 above

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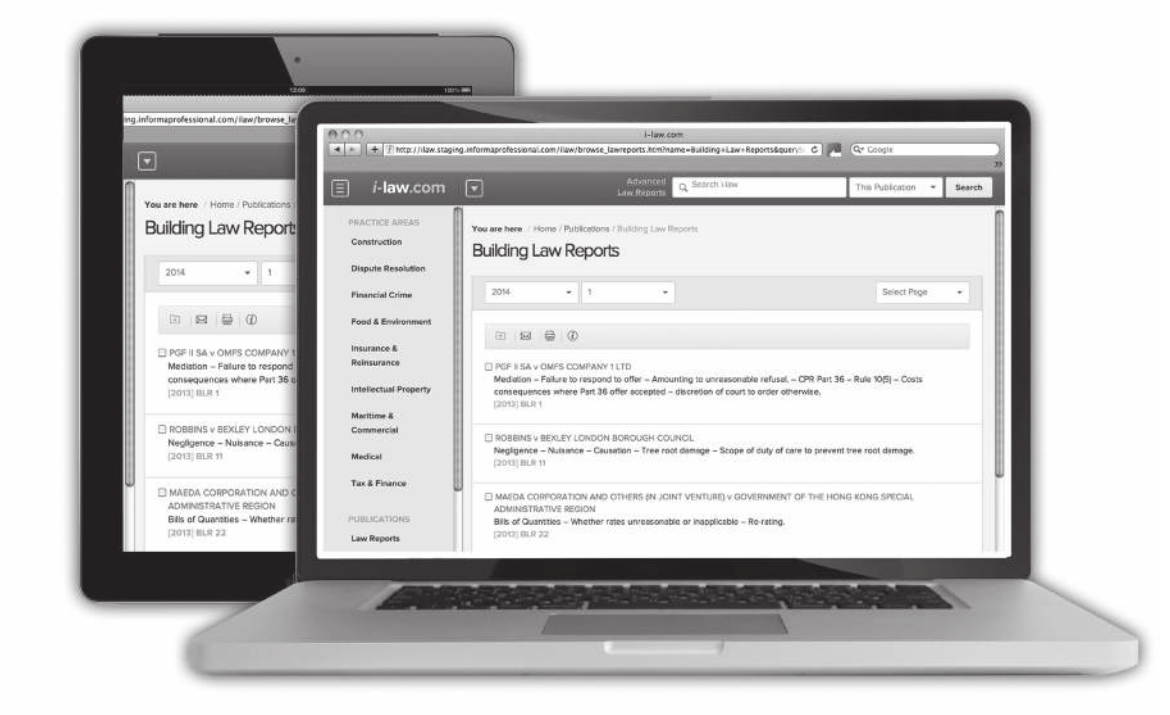

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of the final tribunal is binding in its place – the consequential relief suggested by Akenhead J[44]. Possibilities include:

1. A much narrower implied term that following final determination the parties will make such payments as are necessary to give effect to the final determination including where necessary repayment of sums awarded by the adjudicator. The implied term in *Aspect* goes further than is necessary by providing for both the final determination and the repayment.
2. Some species of restitutionary claim. In their commentary on *Aspect* in the Court of Appeal[45] (which also refers to the decision in *Walker*) the learned editors of the *Building Law Reports* suggest (and prefer over an implied term) the possibility of a policy based restitutionary claim specific to erroneous adjudication decisions.

To avoid the possibility of having to engage in arguments on the outer edges of the principles of restitution, parties can again help themselves in future contracts by including an express term providing for repayment along the lines set out above. Any entitlement to such consequential relief will not arise until after the dispute has been finally determined and the secondary claim would not accrue until then, there being a further six years to bring that claim for consequential relief. The reality is that such a claim would be made in the proceedings for final determination.

Conclusion

The questions of burden of proof and limitation discussed above may ultimately be of little practical importance. Parties will need to avoid getting themselves in a tangle by trying to shortcut the final determination of a dispute that is the subject of an adjudicator's decision. They must plead the original claim in the usual way and support that claim with the necessary evidence. They can further help themselves in future by drafting terms along the lines of those set out above addressing any perceived limitation unfairness and putting the basis of the right to repayment beyond doubt.

For existing contracts the decision of the Court of Appeal in *Aspect* is, for the moment at least, binding and practitioners should therefore plead the implied term as the basis for repayment in any final determination.

Peter Land, Atkin Chambers

44 See paragraph 15 in *Aspect* in the Court of Appeal

45 [2014] BLR 79

TECBAR One-off Mentoring Scheme

At some time or other in our careers at the Bar, most of us feel the need to talk to somebody who can offer advice and the benefit of their experience. Often someone in Chambers or a former pupil supervisor can fulfil that role, but sometimes those people may not be appropriate. This is when a Mentor – an informed, objective and supportive barrister who practises in a similar field but is outside your immediate workplace – can provide a sympathetic ear and impartial guidance on how you might achieve your career goals.

Some specialist Bar Associations operate "role model" mentoring schemes, which aim to generate a relationship over time through regular contact between Mentor and Mentee. Since TECBAR is a relatively small association, what we propose instead is "one-off" or "occasional" mentoring. This is a scheme which enables a TECBAR member to consult with a Mentor on a one-off basis and so receive support, advice or encouragement in dealing with a particular professional concern or crisis. A member seeking support would be invited to speak with a more experienced member – all on a scrupulously confidential and non-judgmental basis.

For this purpose, we need to build up a resource bank of members practising at senior levels who are willing to act as occasional Mentors. The commitment required of Mentors should be no more than a couple of hours a year. If you are a senior junior or silk who is willing to help TECBAR build a support and advice network for our members in this way, please contact one of TECBAR's Equality and Diversity Officers: Fiona Sinclair QC (f.sinclair@4newsquare.com) and Sian Mirchandani (s.mirchandani@4newsquare.com) at 4 New Square (020 7822 2000).

Please note that the scheme is not intended to operate only for the benefit of more junior members. Sometimes experienced practitioners can benefit from discussing a problem with someone at a similar level but outside their own Chambers. One-off mentoring will be available to any member, whatever your seniority. If you have a question about how the scheme will operate, please contact Fiona or Sian.

Fiona Sinclair Q.C., 4 New Square

Readers are invited to submit material by email to be considered for possible publication. This may consist of correspondence, short articles or case notes, news of forthcoming cases or events, book reviews, or other matters of interest to members of TECBAR or SCL.
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