Neutral Citation Number: [2009] EWHC 1906 (TCC)
Case No: TCC 48/09

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
TECHNOLOGY AND CONSTRUCTION COURT

Manchester Civil Justice Centre,
1 Bridge Street West,
Manchester, M60 9DJ

Date handed down: 24 July 2009

Before:

His Honour Judge Stephen Davies

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Between :

JIM ENNIS CONSTRUCTION LIMITED **Cla**

- and -

PREMIER ASPHALT LIMITED **Defe**

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Ms Alice Sims, counsel (instructed by **Halliwells LLP, Liverpool**) for the **Claimant**

Mr Charles McDermott (of **Bermans LLP, Liverpool**) for the **Defendant**

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JUDGMENT

Introduction

1. This judgment determines the preliminary issue as to whether or not the Claimant's claim is statute-barred under the Limitation Act 1980 . The particular issue raised, as to which there appears to be no previous authority directly on point, is the nature and date of accrual of the cause of action where a losing party to an adjudication brought under Part II of the Housing Grants, Construction and Regeneration Act 1996 ('HGCRA') subsequently commences court proceedings to seek a final determination of the matters decided by the adjudicator with a view to recovering monies paid to the winning party in compliance with the adjudicator's decision. In summary, the Claimant contends that the cause of action is separate and distinct from the cause of action in respect of the dispute referred to adjudication, and does not arise until the date of payment in compliance with the decision, whereas the Defendant contends that the cause of action is no different from the dispute referred to adjudication and thus arises at the same time as that underlying cause of action. If the Claimant is right, this action is not statute-barred; if the Defendant is right, it is statute-barred.

Factual background

2. The facts of the case as pleaded in the Amended Particulars of Claim, which are not in dispute so far as the determination of the preliminary issue is concerned, can be briefly stated as follows:

(1) The Claimant was employed by Taylor Woodrow as subcontractor to construct the road works to the main entrance of a Tesco supermarket at Centenary Way, Burnley, Lancashire. Taylor Woodrow was the main contractor and the employer was Lancashire County Council ('LCC').

(2) By an order dated 9 April 2002 the Claimant sub-sub-contracted the supply, laying and rolling of the bituminous macadam surfacing to the Defendant.

(3) The resultant contract contained no express adjudication provision, so that by virtue of s.108(5) and s.114(4) HGCRA the adjudication provisions of Part I of the Scheme for Construction Contracts ('the Scheme') were incorporated as implied terms of the contract.

(4) On 29 May 2002 LCC's Engineer wrote to Taylor Woodrow complaining about the base course laid by the Defendant. The Claimant removed it and on 18 June 2002 the Defendant replaced it. At that stage there was no agreement as to who, if anyone, should bear the costs associated with this work.

(5) Some months later, on 17 December 2002, the Defendant made what appears to have been its final application for payment, within which was included a claim for £16,821.94 (net of 2.5% discount) for the cost of the replacement works. The Claimant refused to pay that claim, asserting that the Defendant was not entitled to be paid for the replacement works because they were necessary to remedy the Defendant's original defective work. Furthermore, the Claimant also claimed to be entitled to deduct from the Defendant's final account its cross-claims for loss and damage alleged to have been caused by the laying of the original base course. The total amount deducted from the Defendant's final account amounted to £38,647.22.

(6) The Defendant did not take any steps by way of adjudication or litigation to challenge that deduction at the time, but almost 6 years later, on 15 September 2008, it referred the dispute about the deduction to adjudication. This was of course within the applicable 6 year limitation period for a claim in contract founded on the non-payment of its final application for payment, but was outside the 6 year period for the Claimant to advance a claim for damages for breach of contract in relation to the alleged defects in the Defendant's original work.

(I should record that the Claimant, rightly in my opinion, does not advance a case to the effect that by waiting until September 2008 the Defendant was deliberately seeking to secure the benefit of a limitation defence in any subsequent litigation; that would be to attribute to the Defendant a Machiavellian degree of anticipation of future events.)

(7) An adjudicator was duly appointed and on 13 November 2008 he gave his decision, which upheld the Defendant's claim and required the Claimant to pay the principal sum of £38,647.22 together with interest thereon of £14,829.10, a total of £53,476.32.

(8) Although the Claimant did not accept the adjudicator's decision, it recognised that by virtue of paragraph 23(2) of the Scheme the decision was binding on it and that it was obliged to comply with the decision until the dispute was finally determined by legal proceedings, arbitration (if applicable) or agreement, so that it paid the £53,476.32 to the Defendant.

(9) On 18 December 2008 the Claimant sent a letter of claim to the Defendant pursuant to the Pre-Action Protocol for Construction and Engineering Disputes, advising of its intention to seek a final

determination of the dispute by legal proceedings. There being no agreement, on 15 April 2009 the Claimant issued the instant proceedings in the Manchester Technology and Construction Court.

Procedural history

3. Shortly before the first Case Management Conference the Defendant made an application to strike out the claim on the ground that it was statute-barred under the Limitation Act . The argument advanced was that by virtue of s.5 Limitation Act the time limit for a claim founded on simple contract is 6 years from the date on which the cause of action accrued, that the cause of action in contract arises on breach, and that on the Claimant's pleaded case the breaches complained of against the Defendant must have occurred before 29 May 2002, when the LCC Engineer wrote to Taylor Woodrow complaining of the laying of the original base course.

4. The Claimant responded to that application by producing a skeleton argument, prepared by Ms. Sims of counsel, in which she contended that:

(1) The cause of action in contract arises pursuant to an implied term. As pleaded, the Claimant contends that it was an implied term of the contract that where a dispute arises which is referred to adjudication then the 'losing party' who complies with the adjudicator's decision and pays sums to the winning party is entitled to reclaim those sums in legal proceedings, or (as pleaded as an alternative formulation) to re-argue the dispute in subsequent court proceedings and, if successful, to be repaid all sums paid.

(2) On a true analysis, the cause of action arises not earlier than either the date of the adjudicator's decision or the date of payment in compliance with that decision.

(3) In the alternative, on a true analysis the cause of action is restitutionary, which is a claim for equitable relief, and s.36 Limitation Act operates to disapply s.5 and s.9 in such case

(4) In the further alternative, by waiting until after 6 years from the date of its breach before referring the dispute to adjudication the Defendant has either waived its right to plead limitation as a defence or is estopped from relying on the limitation defence.

5. Ms Sims also submitted that at the very least these points were not bound to fail, so that it would be inappropriate to strike out the claim. At the Case Management Conference it was agreed that the limitation issue was better determined once and for all as a preliminary issue rather than on a strike out application. Ms Sims, recognising that the Particulars of Claim did not plead a claim in restitution and, furthermore, that the pleaded claim went further than the implied term in seeking to recover all losses said to have been suffered as a result of the Defendant's breach rather than limiting the claim to the amount paid under the adjudicator's decision, asked for and received permission to file an amended Particulars of Claim before the preliminary issue was decided. The Amended Particulars of Claim filed pursuant to that permission included a claim in restitution and also limited the claim to the amount paid under the adjudicator's decision.

6. The parties also agreed that the preliminary issue could most conveniently be determined by exchange of written submissions without the need for a further hearing and, pursuant to the order made at the Case Management Conference, I received written submissions from the Claimant and the Defendant. I also received supplementary submissions from the Claimant and from the Defendant.

The respective submissions

7. The Defendant's submissions were concise. The Defendant:

(1) repeated its case that the claim was one for damages for breach of contract occurring before 29 May 2002, to which s.5 Limitation Act applied;

(2) contended in relation to any alternative claim in restitution that since the adjudicator decided that the Defendant was entitled to have been paid its December 2002 application in January 2003, any cause of action ran from that date;

(3) contended that the Claimant was not compelled by law to comply with the adjudicator's decision, and did so voluntarily, as opposed to awaiting enforcement proceedings in the TCC.

8. The Claimant's submissions ran to 13 pages and referred to a number of authorities and academic texts. In summary, the Claimant's arguments were 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 the Claimant 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 6 years after the date of the breaches complained of by the Claimant the Defendant is estopped from raising the limitation defence in the subsequent court proceedings.

(5) Unless the Claimant 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 the Claimant could have done to protect itself from the result contended for by the Defendant, and to find for the Defendant 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 the Claimant 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.

9. The Defendant's submissions in response took issue with all of these points.

Discussion

10. It is convenient to consider the Claimant's submissions in the same order as they appear above, dealing with the Defendant's submissions at the appropriate point.

Adjudicator's decision gives rise to an independent cause of action

11. The Claimant's starting point is that when the successful party to an adjudication commences court proceedings to enforce the decision its cause of action is the decision itself, not the cause of action the subject of the underlying dispute. This argument is founded on the premise that by virtue of s.108(3) HGRCA and paragraph 23(2) of the Scheme there is a specific contractual obligation to comply with the decision of the adjudicator. According to Ms Sims it derives support from an article published by Alexander Nissen, QC in the Construction Law Journal entitled 'The Format for Litigation and Arbitration after Adjudication'

12. The Defendant relies upon an observation of HH Judge Humphrey Lloyd, QC in Glencot Development v Ben Barrett [2001] EWHC 15 (TCC), referred to by Mr Nissen in his article, to the effect that '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' (paragraph 33). In his article Mr Nissen argued that the adjudicator's decision does give rise to an independent cause of action, and in support referred to the reasoning of HH Judge Hicks, QC in VHE Construction v RBSTB Trust Co [2000] 70 Con LR 51 where, in paragraphs 51-54, Judge Hicks, QC expressed the opinion that the true nature of enforcement proceedings was that they were proceedings to enforce the contractual obligation to comply with the adjudicator's decision.

13. In his book 'Construction Adjudication' HH Judge Coulson, QC (as he then was) referred to these decisions and then, approvingly, to the analysis of HH Judge Thornton, QC in Bovis Lend Lease v Triangle Development [2002] EWHC 3123 (TCC), in which the learned judge, examining a submission that there was a conflict between 2 different lines of authority represented by these decisions, held that: (1) there was no conflict; (2) all that Judge Lloyd, QC was saying in Glencot was that the underlying cause of action survives, does not merge in, and is not superceded by, the adjudicator's decision; (3) the adjudicator's decision gives rise to a separate contractual obligation to comply with the decision.

14. I also note that in the case of Ringway Infrastructure Services v Vauxhall Motors (No 2) [2007] EWHC 2507 (TCC) Akenhead J, considering an argument in an adjudication enforcement action that the court had a discretion to award interest under s.35A Supreme Court Act 1981 over a period and at a rate different to that allowed by the adjudicator, held that:

'14. The nature of enforcement of adjudicators' decisions is contractual. Clause 39A.7.2 here requires the parties to 'comply with the decision of the Adjudicator'. The Adjudicator's decision may be right or wrong but, whether right or wrong, it is to be complied with. The failure … to comply with the decision of the Adjudicator and pay the sum ordered was a breach of Clause 39A.7.2.

15. Thus, the cause of action upon which Ringway had to rely and indeed did rely in their Particulars of Claim is the breach of Clause 39A.7…

16. Thus … the date when the cause of action arose was the date when Vauxhall failed to honour the Adjudicator's decision. The Adjudicator ordered Vauxhall to pay the sums which he decided were due no later than 21 August 2007. Accordingly, by 22 August 2007, the cause of action had arisen upon which Ringway not only did rely but had to rely.'

15. For completeness, I note that the editors of Keating on Construction Contracts (8 th edition, paragraph 17-049) consider that there is an express or implied obligation to comply with the decision, and this gives rise to a cause of action.

16. I respectfully consider the analysis of HH Judge Hicks, QC, HH Judge Thornton, QC and Akenhead J. to be correct, and I follow it. I also adopt with gratitude the analysis of HH Judge Thornton, QC of the decision of HH Judge Lloyd, QC in the Glencot case, which demonstrates that it does not conflict with the other decisions referred to. I conclude, therefore, that the obligation to comply with the adjudicator's decision does indeed give rise to a new cause of action in favour of the successful party to compel the losing party to comply with that decision.

17. Of course that conclusion is not in itself sufficient for the Claimant in this case, because the Claimant is seeking to have the court finally determine the dispute decided by the adjudicator, as opposed to seeking to enforce the adjudicator's decision. It does however provide the platform for the Claimant's second submission that there is additionally an implied term that an unsuccessful party is entitled to bring court proceedings to have the dispute referred to the adjudicator finally determined and, if successful in persuading the court to reach a conclusion different to that reached by the adjudicator, to be repaid all sums paid by him in compliance with the decision.

Implied Term

18. Both s.108(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 Defendant, on the other hand, contends that there is no such right. Its case appears to be that the only legal basis for relief is a claim brought on the underlying cause of action, being the dispute referred to the adjudicator, so that if a claim founded on the underlying cause of action is statute-barred then so is any action finally to determine the dispute in order to obtain a repayment.

19. If it is the referring party who is dissatisfied with the adjudicator's decision, so long as he is within the limitation period applicable to the underlying cause of action he can simply bring legal proceedings in respect of that cause of action. It is difficult to see how he can suggest that his right to have the dispute finally determined by legal proceedings entitles him to commence those proceedings outside the limitation period applicable to the underlying cause of action. Where, however it is the responding party who is dissatisfied with the adjudicator's decision, then the question arises as to the source of his right, which has never been disputed, to challenge the decision by legal proceedings and recover sums paid in compliance with it. Although there are of course some cases where the dispute referred to adjudication is not about money that is relatively unusual; typically the dispute referred to adjudication is a money claim. In such cases, the responding party may simply assert a pure defence, it may (subject to compliance with the withholding requirements of the HGCRA) assert a defence by way of set-off or cross-claim, or it may (as in this case) assert both a pure defence (to the claim for payment for the replacement works) 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). In all such cases, however, the responding party has not suffered any actual loss as at the date of referral precisely because he has refused to pay the responding party and thus is not out of pocket. It follows that he would not on a conventional analysis have a cause of action against the referring party at that stage, other than perhaps one for nominal damages for breach of contract.

20. Although not conceded in terms, it is I think implicit from the footnote to paragraph 20 of Ms Sims' submissions that she accepts that in principle it would be open to the Claimant to bring legal proceedings seeking a negative declaration, i.e. that it had no liability to the Defendant. These legal proceedings could be brought either before the adjudication, in response to a threatened claim by the Defendant, or after an adjudication, if resulting in a decision adverse to the Claimant. It is clear from the decision of the Court of Appeal in Messier-Dowty v Sabena [2000] 1 WLR 2040, referred to in the current White Book Service 2009 at paragraph 40.20.2, that the court has a discretion, which should be approached pragmatically, whether or not to grant a negative declaration, that it should not be reluctant to do so where to do so would help to achieve the aims of justice, but that since to do so would reverse the usual role of claimant and defendant and thus might result in procedural complications and lead to potential injustice, caution should be exercised in deciding whether or not to exercise the discretion. It may well be, therefore, that the court would be more inclined to make a negative declaration on an application by the losing party to the adjudication than it would before an adjudication had even been commenced, unless some good reason could be shown for seeking a declaration at that stage. Ms Sims' point is, I think, that one undesirable result of a finding by this court that this case was statute-barred would be to lead parties in the position of this Claimant to issue proceedings for a negative declaration out of an abundance of caution in every case where a claim which had been made but neither referred to adjudication nor agreed was approaching the expiry of the relevant limitation period.

21. There is, it appears to me, a real difference between issuing legal proceedings seeking only a negative declaration (i.e. that the claimant is not liable to the defendant), and issuing legal proceedings seeking the return of sums paid in compliance with an adjudicator's decision on the footing that on a final determination of the dispute the claimant has no liability to the defendant. In the latter case the claimant is asserting a state of affairs which entitles him to a substantive remedy, viz the repayment of money, which therefore seems to me to be in substance the assertion of a cause of action for the repayment of that money. However, what is the cause of action on which the claimant in such a case can rely?

22. In support of her case in relation to the implied term, Ms Sims submitted that the implied term contended for by the Claimant satisfied all of the 5 conditions for the implication of a term stated by the Privy Council in BP Refinery v Shire of Hastings (1978) ALJR 20, namely that:

(a)
It must be reasonable and equitable;

(b)
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;

(c)
It must be so obvious that it goes without saying;

(d)
It must be capable of clear expression;

(e)
It must not contradict any express term of the contract.

23. Although the Defendant contests the Claimant's case, its case consists merely of a bare denial; it does not advance a positive case as to why the requirements for implication are not met. Insofar as the Defendant appears to be saying that there is no need for the implication of such a term because the Claimant has his cause of action in relation to the underlying dispute, that does not seem to me to answer the objection that the only claim which a losing party in the position of the Claimant here could assert in relation to the underlying dispute would be either a claim for nominal damages for breach of contract or a claim for a negative declaration. It does not seem to me that any claim on the underlying cause of action could include a claim for the substantive relief of an order for repayment of the monies which he has paid in compliance with the adjudicator's decision. The other possible counter-argument, which the Defendant does not make because it appears not to accept that there is any claim in restitution, is that the availability of a claim in restitution means that there is no need for any implied term. However it does not seem to me that the availability of an alternative claim in restitution is fatal to the implication of an implied term; indeed if anything it supports it, because it shows that 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.

24. In my judgment the implied term contended for by the Claimant satisfies the 5 requirements identified in the BP Refinery case, for the reasons set out by Ms Sims in her submissions. It is a reasonable and equitable term which applies equally to both parties to the contract; it is essential to give effect to the reasonable expectation of the parties (that a losing party to an adjudication who has to 'pay now challenge later' will have the right to recover such payment by legal proceedings finally determining the dispute); it is obvious that such a term is required to give effect to the reasonable expectations of the parties; it can clearly be expressed; it supports rather than contradicts the terms of the Scheme which form part of the contract between the parties. 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.

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. Although standard form contracts will typically make express provision for that eventuality, in my judgment if they did not such a right would undoubtedly be implied.

Limitation period applicable to the claim founded on the implied term

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 s.5 Limitation Act applies, because it is a claim founded on a simple contract, so that the losing party has 6 years from the date of payment in which to bring legal proceedings to recover that payment.

27. It could I suppose be objected that this could result in unacceptable delay, where for example a party launches an adjudication shortly before the expiry of the 6 year limitation period for his claim, succeeds and receives money, only to be met by a claim for repayment just before the expiry of the 6 year limitation period for that claim to be made, with the result that the court would have to adjudicate on a stale claim 12 years old. However the first counter-argument is that the initial delay cannot be the fault of the losing party, and the second is that this still appears to me to produce a fairer result than the one for which the Defendant is contending in this case. In any event, given that adjudication is employed in the vast majority of cases precisely because it is a quick remedy, I doubt very much that cases such as the present case are likely to occur frequently, still less the extreme example which I have just given.

Restitution

28. Although strictly unnecessary given my previous conclusion, I should also address the Claimant's alternative argument that it has a cause of action for the repayment of money in restitution. Ms Sims relied upon the principle, summarised in Goff & Jones' The Law of Restitution (7 th edition, 2007) at paragraph 16-001, that where a party to legal proceedings has paid money or transferred property to another party in compliance with a court order, then if that order is subsequently reversed or set aside the paying party is entitled by way of restitution to recover the money or property paid or transferred. The Defendant does not challenge that principle, but disputes that it has any application to monies paid in compliance with the decision of an adjudicator. Whilst I can see that there is a difference between adjudication, which is the creature of contract (albeit one which statute requires be written in to the contract whether the parties like it or not), and legal proceedings, it nonetheless seems to me that the end result is still the same, namely that the claimant has been required to pay the defendant money under compulsion as a result of the decision of a decision-maker with jurisdiction to rule on the relevant dispute, so that if the decision is subsequently set aside a restitutionary claim ought in both cases to lie to recover the payment. If the only point of difference is that an adjudication is contractual in origin, then presumably the same objection would apply to an arbitration award subsequently set aside on an appeal to the court on a point of law, which would at first blush produce a surprising and unjust result. The Defendant's suggestion that the payment by the Claimant was voluntary is completely at odds with the express obligation imposed by the HGCRA and the Scheme to comply with the decision; it can scarcely be supposed that a claimant would have to require the defendant to issue enforcement proceedings in the TCC to obtain a judgment to enforce the decision before a subsequent claim in restitution would be available to him.

29. I therefore conclude that the Claimant has a cause of action to recover the monies paid over in restitution in addition to the cause of action founded on the implied term.

Limitation period applicable to the claim in restitution

30. Ms Sims contended that the Limitation Act does not apply to restitutionary claims. She relied upon the fact that restitutionary claims are not specifically dealt with in the Limitation Act , and she refers to a discussion by Professor McGee in his publication Limitation Periods (5 th edition, 2006) at paragraphs 4.006 – 4.007 to support her argument to this effect. Although it is true that Professor McGee does suggest that the view, expressed by Hobhouse J. (as he then was) in Kleinwort Benson v S Tyneside MBC [1994] 4 All ER 972, to the effect that a claim for money had and received fell within s. 5 Limitation Act , should be treated with caution, it is clear that this view is not shared by Goff and Jones, who in chapter 43 of their book, devoted to the defence of limitation in restitution claims, accept that the assumption (that s.5 applies to money had and received cases) 'must be made, though

the words used cannot be regarded as felicitous' (paragraph 43-001). Although Goff & Jones do not specifically consider the case of claims for the recovery of money paid over under a court order, the general approach appears to be that in personal restitutionary claims at law a 6 year limitation period will apply by virtue of s.5 Limitation Act .

31. In any event, since it is clear in my judgment that even if the usual 6 year limitation period applies it will run from the date of payment (see Goff & Jones , paragraph 43-002), so that the Claimant's claim in restitution is not statute-barred even on that basis, there is nothing to be gained from my expressing any concluded opinion as to whether the claim in restitution is subject to any limitation period at all, which is far better left for a case in which the point does directly arise for decision. I am wholly unable to accept the Defendant's argument that the limitation period in restitution runs from the date when the adjudicator decided that the Claimant should have paid the Defendant, viz January 2003. There is no logical basis for this argument, and it is inconsistent with the cases cited in paragraph 43-002 of Goff & Jones.

Estoppel

32. The Claimant's fallback argument was that the Defendant, by referring the dispute to adjudication after the expiry of the limitation period for any underlying claim by the Claimant for breach of contract and shortly before the expiry of the limitation period for its claim, was estopped from raising limitation as a defence. If I had needed to decide this point, I would have found great difficulty in seeing how the Defendant could be estopped in those circumstances from raising limitation as a defence properly available to it in these proceedings but, given the conclusions I have already reached, I need not express any decided opinion on the point.

Conclusion

33. It follows, in my judgment, that the Claimant's claim is not statute-barred by limitation, and the preliminary issue must be answered accordingly.