Trinity Term
[2015] UKSC 38
On appeal from: [2013] EWCA Civ 1541

JUDGMENT

Aspect Contracts (Asbestos) Limited (Respondent) *v* Higgins Construction Plc (Appellant)

before

Lord Mance
Lord Wilson
Lord Sumption
Lord Reed
Lord Toulson

JUDGMENT GIVEN ON

17 June 2015

Heard on 14 and 15 April 2015

Appellant
Andrew Bartlett QC
Isabel Hitching
(Instructed by Silver Shemmings LLP)

Respondent
Fiona Sinclair QC
Richard Liddell
(Instructed by Mills & Reeve LLP)

LORD MANCE: (with whom Lord Wilson, Lord Sumption, Lord Reed and Lord Toulson agree)

Introduction

1. This appeal raises difficult and important issues about the effect of adjudication pursuant to provisions implied into a construction contract under section 108(5) of the Housing Grants, Construction and Regeneration Act 1996, read with the Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998 No 649). The construction contract (within the broad meaning assigned by section 104(2) of the 1996 Act) was a contract by the respondent, Aspect Contracts (Asbestos) Ltd ("Aspect"), to carry out an asbestos survey and report on blocks of maisonettes in Hounslow which the appellant building contractor, Higgins Construction Plc ("Higgins"), was considering redeveloping.

2. The survey was conducted in March 2004 and the report was dated 27 April 2004. During the redevelopment in early 2005, Higgins allegedly found and had to have removed asbestos containing materials which had not been identified in the report. A dispute consequently arose with Aspect.

3. Negotiation and mediation having failed, Higgins referred the dispute to adjudication, claiming £822,482 damages plus interest. The claim was for breach of contractual and/or conterminous tortious duties to exercise reasonable skill and care. By a decision dated 28 July 2009, the adjudicator, Ms Rosemary Jackson QC, concluded that Aspect had been in breach of such duties causing Higgins loss in various, though not all, respects alleged by Higgins, and ordered that Aspect pay Higgins £490,627, plus interest which amounted, at the date of the decision, to £166,421.05. She also ordered Aspect to pay her own fees of £8,750 plus VAT. On 6 August 2009 Aspect duly paid Higgins £658,017, a sum which included further interest from the date of the decision.

4. Higgins did not commence any proceedings, whether to recover the balance of its claim, £331,855 plus interest, or otherwise. The limitation period expired on the face of it on or about 27 April 2010 for any action by Higgins founded on breach of the construction contract and at the very latest by early 2011 for any action founded on tort: Limitation Act 1980, sections 2 and 5. Higgins was evidently content to let matters rest. It did not, so far as appears, ask Aspect to agree, and Aspect did not agree, to treat the adjudicator's decision as final.

Aspect's claim

5. Only after the expiry of both the above-mentioned limitation periods did Aspect on 3 February 2012 itself commence the present proceedings seeking to recover the sum it paid on 6 August 2009. It did so without giving prior notice that it was dissatisfied with Ms Jackson's decision or going through any pre-action protocol procedure.

6. Aspect confines itself expressly to a contention that no sum was due to Higgins on an examination of the merits of the original dispute, regarding the alleged failure to identify and report the existence of asbestos containing materials beyond those mentioned in its report. It claims that the sum of £658,017 is repayable accordingly. Higgins however seeks to counterclaim for the £331,855 balance of its claim and interest. Only in relation to this balance does Aspect raise a limitation plea, under sections 2 and 5 of the Limitation Act. These sections provide that any action founded on, respectively, tort or simple contract "shall not be brought after the expiration of six years from the date on which the cause of action accrued".

7. Aspect rests its claim on an implied term, alternatively in restitution. The implied term is that:

> "in the event that a 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 decision 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."

The present proceedings

8. By consent on 31 January 2013 Akenhead J ordered the trial of a preliminary issue as to (a) the existence of the implied term, (b) the limitation period applicable to any such implied term, (c) the limitation period applicable to the counterclaim, and (d) the existence or otherwise of a claim for restitution. By a clear and comprehensive judgment dated 23 May 2013, he held that there was no such implied term as alleged, that Aspect could have claimed a declaration of non-liability at any time within six years after performance of the contract, upon the grant of which declaration the court would then have had ancillary and consequential power to order repayment, but that any such claim was now time-barred. He also held that there was, in these circumstances and in the absence of any recognised basis like

mistake or duress and of any right to have the adjudicator's decision set aside, no claim in restitution.

9. The Court of Appeal (Longmore, Rimer and Tomlinson LJJ) [2014] 1 WLR 1220, in a concise judgment given by Longmore LJ, reached an opposite conclusion. It held that the Scheme implied that any overpayment could be recovered. It noted that Higgins's contrary case faced a number of difficult questions, such as, first, the fairness of a conclusion that required any claim for repayment to be made within six years of the original contractual performance, second, the juridical basis for a conclusion that a declaration of non-liability would carry with it a right to order repayment and, third, the correctness of the judge's conclusion that a declaration of non-liability was liable to be time-barred. Aspect did not pursue its pleaded restitutionary claim before the Court of Appeal.

10. The present appeal follows by this court's permission. In giving permission, the court informed the parties that:

> "without prejudging whether it would be open to [Aspect] to raise any positive point on restitution, the Supreme Court may wish as part of the context to have explained the legal position regarding restitution."

The parties accordingly exchanged cases which addressed the position regarding restitution, and, during the course of the hearing, Miss Fiona Sinclair QC for Aspect sought permission to raise a case in restitution based on the payment made. Mr Andrew Bartlett QC for Higgins resisted this, and the court heard submissions on it *de bene esse*. In the event, since the issue was raised at first instance and is one of pure law, I consider that permission should be granted to Aspect to rely upon restitution as an alternative to its primary claim based on an implied term.

The legislation

11. Section 108 of the Housing Grants, Construction and Regeneration Act 1996 (in its original form, as in force before its presently immaterial amendment by the Local Democracy, Economic Development and Construction Act 2009) provides:

> "108.- Right to refer disputes to adjudication.
>
> (1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose ‘dispute’ includes any difference.

(2) The contract shall -

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;

(e) impose a duty on the adjudicator to act impartially; and

(f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

(3) 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.

(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply”

12. Section 114 provides that:

> "(1) The Minister shall by regulations make a scheme ('the Scheme for Construction Contracts') containing provision about the matters referred to in the preceding provisions of this Part.
>
> ….
>
> (4) Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned."

13. The Scheme contained in the Schedule to the Regulations is in parallel terms to those indicated in section 108(1) to (4), with slight differences which no-one suggests are significant. It provides:

> "1(1) Any party to a construction contract (the 'referring party') may give written notice (the 'notice of adjudication') at any time of his intention to refer any dispute arising under the contract, to adjudication. …
>
> (3) The notice of adjudication shall set out briefly -
>
> > (a) the nature and a brief description of the dispute and of the parties involved,
> >
> > (b) details of where and when the dispute has arisen,
> > …
>
> 19(1) The adjudicator shall reach his decision not later than -
>
> > (a) twenty eight days after receipt of the referral notice mentioned in paragraph 7(1), or
> >
> > (b) forty two days after receipt of the referral notice if the referring party so consents, or

> (c) such period exceeding twenty eight days after receipt of the referral notice as the parties to the dispute may, after the giving of that notice, agree.
>
> …
>
> 23(2) 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."

14. By providing that the decision of an adjudicator is binding and that the parties shall "comply with it", paragraph 23(2) of the Scheme makes the decision enforceable for the time being. It is enforceable by action founded on the contractual obligation to comply with the decision combined, in a normal case, with an application for summary judgment. The limitation period for enforcement will be six years from the adjudicator's decision. But the decision is only binding and the obligation to comply with it only lasts "until the dispute is finally determined" in one of the ways identified. By use of the word "until", paragraph 23(2) appears to contemplate that there will necessarily be such a determination. The short time limits provided by paragraph 19(1) also indicate that adjudication was envisaged as a speedy provisional measure, pending such a determination. But there is nothing to prevent adjudication being requested long after a dispute has arisen and without the commencement of any proceedings. Further, it seems improbable that the Scheme imposes on either party any sort of obligation to start court or arbitration proceedings in order to confirm its entitlement. Either or both of the parties might understandably be content to let matters rest.

15. Section 108(3) of the Act and paragraph 23(2) of the Scheme might in the above circumstances have been more realistic if they had expressed the binding nature of an adjudicator's decision as extending "unless and until". As already explained, it seems clear that neither party is obliged ever to commence legal proceedings, and that if neither does the adjudicator's decision continues to bind. In this respect, an adjudication cannot be equated with an interim payment ordered by the court in the course of court proceedings. The recipient of such an interim payment cannot discontinue the proceedings without the payer's consent or the court's permission, and is therefore at risk of being ordered to make repayment as a condition of discontinuance: see CPR 25.8(2)(a) and 38.2(2)(b).

Analysis of the question on this appeal

16. The key question is how far a paying party, here Aspect, is able to disturb the provisional position established by an adjudicator's decision, by itself commencing proceedings after the time has elapsed when Higgins could bring any claim founded on the original breach of contract or tort. That depends upon the basis of any claim by Aspect to recover the sum it has provisionally paid under the adjudicator's decision. Just as Higgins has a right to enforce payment pursuant to an adjudicator's decision, so Aspect must on some basis be able to recover such a payment, if it is established, by legal proceedings, arbitration or agreement, that such sum was not due in respect of the original dispute.

17. Without the ability to recover such a payment, the Scheme makes no sense. Adjudication is conceived as a provisional measure. At a cash flow level, Higgins remains entitled to the payment unless and until the outcome of legal proceedings, arbitration or negotiations, leads to a contrary conclusion. But at the deeper level of the substantive dispute between the parties, the parties have rights and liabilities, which may differ from those identified by the adjudication decision, and on which the party making a payment under an adjudication decision must be entitled to rely in legal proceedings, arbitration or negotiations, in order to make good a claim to repayment on some basis. Aspect's case is, as I have noted, that this entitlement arises from the payment, to the extent that this is subsequently shown not to have been due, and is based on an implied term or alternatively restitution.

Higgins's primary case

18. In contrast, on Higgins's case, Aspect's only entitlement is to seek declaratory relief, and, after obtaining a declaration, to rely on a power in the court to grant consequential relief by way of an order for repayment. Higgins submits that any such claim to declaratory relief became time-barred in contract in April 2010 and in tort at the same date (or at latest by early 2011), so that there is now no way in which Aspect can in the present proceedings ask the court to order repayment. That corresponds with the result at which Akenhead J arrived. It involves in Higgins's submission an appropriate correlation of the time limits within which Higgins can pursue claims against Aspect and Aspect can pursue claims against Higgins.

19. I have no difficulty in accepting that Aspect could at any time, from at least the development in early 2005 of the original dispute, have asked the court to declare that it had not committed any breach of contract or incurred any tortious liability to Higgins, and that the court would have regarded proceedings of this nature for a declaration as entirely admissible and appropriate. But, in common with the Court

of Appeal, I cannot accept that this is a complete analysis of the route by which Aspect could and should have pursued the claim which it now brings. It ignores a core ingredient of and the immediate trigger to Aspect's current claim, which is that it has been ordered to make and has made a large payment in 2009. It is artificial to treat a claim to recover that sum as based on an alleged cause of action accruing in 2004 or early 2005. To treat Aspect's remedy as being to seek a declaration, and then to invite the court to use its alleged consequential powers in order to grant the relief which is the true object of the proceedings, is equally artificial.

20. Mr Bartlett did not, to my mind, identify any authority for the proposition that a court can or should make orders consequential upon a declaration of non-liability for the payment of any sums which the recipient would not have a right to claim on some independent juridical basis. The majority judgments in *Guaranty Trust Company of New York v Hannay* [1915] 2 KB 536 do not support such a proposition. They show that declarations may be given in situations where there is, or is as yet, no cause of action. A common example is where a claim is made by an insured against liability insurers seeking a declaration that they will be liable to indemnify him in respect of any third party liability which he may be found to have. But consequential relief depends, as Pickford LJ indicated at pp 558-559, upon the existence of a cause of action, or interference, actual or threatened, with a right. When Bankes LJ said at p 572 that the word "relief" was "not confined to relief in respect of a cause of action", he was referring to the requirement under the Judicature Act 1873, section 100 and the then RSC O XVI rule 1 that there must in every action be a person seeking relief, and to the possibility of claiming "relief" by way of a declaration when no such cause of action exists. He was not suggesting that a claim for such a declaration could be accompanied by consequential relief ordering a payment to which there was no independent right.

21. I am furthermore unable to accept that a claim for a declaration that a person has not committed a tort or breach of contract is a claim falling within, respectively, section 2 or 5 of the Limitation Act 1980, or that either section could be applied by analogy as Higgins also submitted. A claim for a declaration that a contractual right has accrued has been held at first instance to be a claim involving a cause of action founded on simple contract: *P&O Nedlloyd BV v Arab Metals Co (The "UB Tiger")* [2005] EWHC 1276 (Comm), [2005] 1 WLR 3733, para 20. Accepting without considering that analysis, a claim for a declaration that a person has not broken a contract might also be regarded as a claim "founded on simple contract" (though a claim that a person was not party to any contract certainly could not be); however a claim that a person has not broken a contract could not be a claim in respect of which it could sensibly be said that any "cause of action" had accrued, still less accrued on any particular date. On that basis section 5 could not apply, directly or by analogy.

22. As to section 2, a claim that a person had not committed a tort could not in any circumstances sensibly be regarded as a claim founded on tort, quite apart from the impossibility of identifying any "date on which the cause of action accrued", for the purpose of applying section 2 either directly or by analogy. The special time limit for negligence claims provided by section 14A of the Limitation Act 1980 would also be impossible to apply in relation to a claim for negative declaratory relief as to the absence of any liability in tort. Miss Sinclair submitted that what the adjudicator described as Higgins's "coterminous" tort claim was capable of being submitted to adjudication, along with its contract claim. In support of that proposition, Miss Sinclair referred to *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40, as superseding the more limited approach taken in *Fillite (Runcorn) Ltd v Aqua-lift* (1989) 45 BLR 27 (CA) - see also *Woolf v Collis Removal Service* [1948] 1 KB 11, 18-19, *Astro Vencedor Co Na SA v Mabanaft GmbH* [1971] 2 QB 588, 595, *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA* [1983] 2 Lloyd's Rep 171, 183 and *Chimimport plc v G D'Alexio Sas* [1994] 2 Lloyd's Rep 366, 371-372; Mr Bartlett did not accept that the approach taken in *Premium Nafta* could apply to statutory adjudication, but I am very content to proceed on that basis. But Mr Bartlett went on to submit, with reference to section 108(1) of the 1996 Act and paragraph 1(1) of the Scheme, that this would necessarily mean that any tort claim which Higgins has must, even if it could be the subject of adjudication at all, be capable of being regarded as a claim "arising under" the contract, and to submit that such a claim would not be subject to section 14A of the 1980 Act (or, presumably, to section 2). It is unnecessary to say more than that I do not, as at present advised, accept this submission. Assuming, as I am presently prepared to, that a coterminous tort claim can fall within the language of section 108(1) of the 1996 Act and paragraph 1(1), it does not follow that it ceases to be a tort claim for limitation purposes. So the usual rule would apply that limitation periods in contract and tort are separate matters, even where the tort claim is based essentially on negligence in the performance of contractual obligations: see eg *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, esp at p 185E-G per Lord Goff. Finally, I understand Mr Bartlett also to suggest that, whatever the limitation position, Aspect, having been adjudicated liable in both contract and tort, would need to bring proceedings to establish that it was not liable within the limitation periods applicable to both, if it was to recover anything. Suffice it to say that I am unpersuaded by this suggestion, though this is not critical to the decision of this appeal in view of what follows below.

23. In my view, it is a necessary legal consequence of the Scheme implied by the 1996 Act into the parties' contractual relationship that Aspect must have a directly enforceable right to recover any overpayment to which the adjudicator's decision can be shown to have led, once there has been a final determination of the dispute. I agree with the Court of Appeal that the obvious basis for recognition of this right is by way of implication arising from the Scheme provisions which are themselves implied into the construction contract. I prefer to express the implication in the way I have, because it focuses on the core element of Aspect's claim which is to recover

an alleged overpayment. The implied term which Aspect pleads tends to open the way to Higgins's argument, which I reject, that the essence of Aspect's claim is to declaratory relief and that this is relief which Aspect has always been ("remained") entitled to pursue, since the contract was first performed, and has now become time-barred.

24. I emphasise that, on whatever basis the right arises, the same restitutionary considerations underlie it. If and to the extent that the basis on which the payment was made falls away as a result of the court's determination, an overpayment is, retrospectively, established. Either by contractual implication or, if not, then by virtue of an independent restitutionary obligation, repayment must to that extent be required. The suggested implication, on which the preliminary issue focuses, goes to repayment of the sum (over)paid. But it seems inconceivable that any such repayment should be made - in a case such as the present, years later - without the payee having also in the meanwhile a potential liability to pay interest at an appropriate rate, to be fixed by the court, if not agreed between the parties. In restitution, there would be no doubt about this potential liability, reflecting the time cost of the payment to the payer and the benefit to the payee: see eg *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, [2008] AC 561. Whether by way of further implication or to give effect to an additional restitutionary right existing independently as a matter of law, the court must have power to order the payee to pay appropriate interest in respect of the overpayment. This conclusion follows from the fact that, once it is determined by a court or arbitration tribunal that an adjudicator's decision involved the payment of more than was actually due in accordance with the parties' substantive rights, the adjudicator's decision ceases, retrospectively, to bind.

25. Since Aspect's cause of action arises from payment and is only for repayment, it is, whether analysed in implied contractual or restitutionary terms, a cause of action which could be brought at any time within six years after the date of payment to Higgins, ie after 6 August 2009. For this purpose an independent restitutionary claim falls to be regarded as "founded on simple contract" within section 5 of the Limitation Act: *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890, 942-943, per Hobhouse J, not questioned by the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, when it had to consider whether, in the circumstances of that case, section 32(1)(c) of the Act operated so as to extend the normal six-year limitation period.

26. Higgins complains that this gives Aspect a one-way throw and undermines finality. By delaying commencement of the present claim until 2012, Aspect can sue to recover all or part of the £658,017 paid to Higgins, without having the risk of ending up worse off, since Higgins is barred by limitation from pursuing the £331,855 balance of its original claim.

27. That consequence follows, however, from Higgins's own decision not to commence legal proceedings within six years from April 2004 or early 2005 and so itself to take the risk of not confirming (and to forego the possibility of improving upon) the adjudication award it had received. Adjudication was conceived, as I have stated, as a provisional mechanism, pending a final determination of the dispute. Understandable though it is that Higgins should wish matters to lie as they are following the adjudication decision, Higgins could not ensure that matters would so lie, or therefore that there would be finality, without either pursuing legal or arbitral proceedings to a conclusion or obtaining Aspect's agreement.

28. Further, as Akenhead J pointed out in para 43 of his judgment, this is not one of those "very typical" building contract cases where there are set-offs and cross-claims on each side, each allegedly over-topping the other. In such cases, if there is an adjudication award within six years from 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 them. Any further proceedings would be limited to a claim for repayment by the party required by the adjudication to pay a net balance to the other.

29. Aspect accepts by its pleadings and Miss Sinclair confirmed in her oral submissions that what Aspect contends for, in support of its claim for repayment, is the determination of the parties' original rights and liabilities as they stood when they were adjudicated upon by the adjudicator. Aspect does not suggest that it is of any relevance that the limitation period would now have expired, if Higgins were now assumed to be bringing an action for the total of £822,482 plus interest originally claimed, or for the £490,627 plus interest awarded by the adjudicator. Aspect is in my view correct in this approach. What the Scheme contemplates is the final determination of the dispute referred to the adjudicator, because it is that which determines whether or not the adjudicator was justified in his or her assessment of what was due under the contract.

30. The Scheme cannot plausibly mean that, by waiting until after the expiry of the limitation period for pursuit of the original contractual or tortious claim by Higgins, Aspect could automatically acquire a right to recover any sum it had paid under the adjudicator's award, without the court or arbitration tribunal having to consider the substantive merits of the original dispute, to which the adjudicator's decision was directed, at all. If and so far as the adjudicator correctly evaluated a sum as due between the parties, such sum was both due and settled. A subsequent court or arbitration determination to the same effect would simply confirm that such sum was due and was correctly settled as being due. Any limitation period which would apply to a claim for such a sum, if it had not yet been settled, is in these circumstances quite irrelevant.

31. I accept, without further examination, that the final determination of the dispute might be affected in a particular case by circumstances occurring after the adjudicator's decision, and that in such a case any payment ordered by the adjudicator might be shown now to have been more than was, in the light of subsequent events, justified. A claim for an adjustment could then exist, but it would exist on the basis of those subsequent events. As I have already indicated, the justification for an adjudicator's decision cannot however be undermined by pointing out that, if payment of a sum which was due when ordered had not in fact been ordered and made, it would have become too late by virtue of limitation to pursue a separate claim for such sum by whatever date the proceedings for final determination were begun. If the adjudicator's order was justified on the basis of the underlying dispute, the payment made pursuant to it was due: the payment met obligations which the payer had. It meant that the payee had no claim to any further payment, while retaining the right to ask the court finally to determine that this was the case.

32. One further point requires stating. In finally determining the dispute between Aspect and Higgins, for the purpose of deciding whether Higgins should repay all or any part of the £658,017 received, the court must be able to look at the whole dispute. Higgins will not be confined to the points which the adjudicator in his or her reasons decided in its favour. It will be able to rely on all aspects of its claim for £822,482 plus interest. That follows from the fact that the adjudicator's actual reasoning has no legal or evidential weight. All that matters is that a payment was ordered and made, the justification for which can and must now be determined finally by the court. Similarly, if Aspect's answer to Higgins's claim to the £490,627 plus interest ordered to be paid had been not a pure denial of any entitlement, but a true defence based on set-off which the adjudicator had rejected, Aspect could now ask the court to re-consider and determine the justification for that defence on its merits.

Higgins's alternative case

33. Higgins also submitted that, if, as I conclude, Aspect had six years from the making of payment under the adjudication in which to commence proceedings for repayment, asking the court for this purpose to determine the original dispute, the corollary ought to be that Higgins also has a fresh six-year period from the making of such payment in which to bring proceedings for any balance which the adjudicator refused to award. But there is no basis upon which to recognise a payee as acquiring by virtue of the receipt of a payment a fresh right to claim any further balance allegedly due. Higgins argued that the adjudicator's refusal of the balance might be regarded as an "allowance", analogous to a payment. Even if, contrary to the fact, the balance had been disallowed because of some set-off which Aspect had asserted, I would not accept this argument. Higgins would have had a claim to the balance

which it could and should have pursued within six years of the cause of action for such balance first arising on performance of the contract or the commission of any tort by Aspect.

Conclusion

34. It follows that, in my opinion, the Court of Appeal was correct in its disposal of the present appeal. A differently constituted Court of Appeal in *Walker Construction (UK) Ltd v Quayside Homes Ltd* [2014] EWCA Civ 93, [2014] 1 CLC 121 indicated, obiter, that it would follow the decision of Akenhead J in the present case, without having had drawn to its attention the present Court of Appeal's decision, given during the interlude between submissions and judgment in *Walker*. It follows from the present judgment that the obiter observations in *Walker* were wrong and must be over-ruled, and that the present appeal should be dismissed.