LIMITATION AND ADJUDICATION: REVISITING THE DEBATE FOLLOWING LJR INTERIORS LTD V COOPER CONSTRUCTION LTD [2023] EWHC 3339 (TCC)

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The question of whether limitation applies to adjudication has long been a source of academic debate. The consensus would seem to be that limitation does (or must) apply to adjudication (eventually) but it is not clear how or when.

There were earlier passing, obiter, statements by the Court that adjudication was subject to limitation in *Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd* [2010] EWHC 1529 (TCC) and *Connex South Eastern Limited v M J Building Services Group Plc* [2005] EWCA Civ 193.

However, the recent Judgment of the TCC in *LJR Interiors Ltd v Cooper Construction Ltd* [2023] EWHC 3339 (TCC) was the first time that this question was properly considered by the Court. HHJ Russen KC (sitting as a judge of the High Court) held that an adjudication was an "action" for the purposes of the Limitation Act 1980.

In this article we will consider:

1. The reasoning in *LJR*.
2. Lessons which can be learnt from the (historic) approach to arbitration.
3. Whether the commencement of adjudication interrupts the limitation period for other purposes.
4. The consequences of our analysis for future adjudications and enforcements.

1. Reasoning in LJR

The Limitation Act 1980 prevents an *"action"* being brought when the relevant limitation periods have expired. Section 38(1) provides that "action" "includes any proceeding in a court of law, including an ecclesiastical court (and see subsection (11) below)". These definitions are subject to an introductory proviso: they apply *"unless the context otherwise requires–…"*

Subsection (11) provides further clarity on what is not an "action":

> *"References in this Act to an action do not include any method of recovery of a sum recoverable under—*
>
> *(a) Part 3 of the Social Security Administration Act 1992,*
>
> *(b) section 127(c) of the Social Security Contributions and Benefits Act 1992, or*
>
> *(c) Part 1 of the Tax Credits Act 2002,*
>
> *other than a proceeding in a court of law."*

An adjudication is not a proceeding in a court of law. Nor is an arbitration. However, section 13 of the Arbitration Act 1996 deals with this lacuna: *"The Limitation Acts apply to arbitral proceedings as they apply to legal proceedings."* It might be said that the debate around adjudication stems from the fact that there was not a similar provision in the Housing Grants, Construction and Regeneration Act 1996 (**"HGCRA"**).

This problem was recognised by the Judge in *LJR*, stating at para. [61] that *"an adjudication might not fall within the definition of an "action"."* Nevertheless, he ultimately concluded at para [69] that *"the context does require the term "action" in the non-exhaustive definition provided by section 38 of the 1980 Act to be read as including adjudication proceedings."*

With respect to the Judge (and noting that, as identified at para. [15] of the judgment, his conclusions and reasoning were not the subject of proper adversarial legal argument), his reasoning is (at least) open to question:

1. He described section 38(1) of the Limitation Act 1980 as providing a *"non-exhaustive"* definition of "action". It is correct that section 38(1) provides that "action" "*includes* any proceeding in a court of law…" (emphasis added). It does not follow that the word *"action"* can include any other form of dispute resolution. In order to understand the true effect of section 38(1), the starting point is that "action" is a legal term of art. *"The primary sense of 'action' as a term of legal art is the invocation of the jurisdiction of the court by writ, 'proceeding' the invocation of the jurisdiction of a court by process other*

than writ": *Herbert Berry Associates Ltd v Inland Revenue Commissioners* [1977] 1 WLR 1437, 1446. The effect of section 38(1) is therefore to sweep away (for limitation purposes) fine and technical distinctions such as the difference between *"action"* and *"proceeding"* as expressed in *Herbert Berry*, as well as to make it clear that an ecclesiastical court counts as a "court of law" for these purposes. Nothing in the "non-exhaustive" extent of section 38(1) detracts from the principle that the proceeding in question must still be taking place in a court in order to be an *"action"*.

2. In *Braceforce Warehousing Ltd v Mediterranean Shipping Company (UK) Ltd* [2009] EWHC 3839 (QB), the parties had apparently been of the shared view that the Limitation Act 1980 applied to an expert determination. Ramsey J remarked (but did not need to decide) that this *"does not seem to be correct"*, presumably on the basis that an expert determination is not an *"action"*: para. [16]. This observation was not cited in *LJR*. It was cited with approval (albeit still obiter) in the even more recent case of *Bastholm v Peveril Securities (Dalton Park Retail Ltd* [2023] EWHC 438 (Ch) at para [222]. Neither of these cases discussed the arbitration cases referred to below.

3. The interpretation in *LJR* was largely driven by the *"context"*: para. [69]. This appears to be a reference to the introductory proviso to the definitions in section 38(1). However,

    a. This appears to be a misuse of the *"unless the context otherwise requires"* proviso. That proviso is *"a standard device to spare the drafter the embarrassment of having overlooked a differential usage somewhere in his text" (Secretary of State for Work & Pensions v M* [2004] EWCA Civ 1343, [2006] QB 380, para. [84]). It is intended to capture the scenario where some specific use of the defined term diverges from the overarching definition because of the context of that specific use. It is not intended to redraw the underlying definition for all purposes. (Indeed, *Bennion,* Bailey and *Norbury on Statutory Interpretation* (8th edn.) observes at section 18.8 that the use of such a proviso is redundant.)

    b. Moving beyond that proviso, context can be a legitimate aid to statutory interpretation. However, as a matter of legal principle, the starting point is for the Court to interpret Parliament's intent from the language used. If the words used have a clear and unequivocal meaning (which, as set out above, it is submitted that they do), then the Court should be slow to reach a different meaning based on wider context.

    c. Statutory construction adjudication of course did not exist at the time the Limitation Act 1980 was passed. It is difficult to see how it could form part of the 'context' so as to inform the interpretation of that Act.

4. Beyond the common-sense starting point (discussed further below) that adjudication should not be a vehicle to subvert limitation, the *"context"* relied on in *LJR* was provisions of the Scheme. There are two potential problems.

    a. The Scheme does not apply to all adjudications. Part I of the Schedule to the Scheme contains default provisions on adjudication which apply if, and only if, a construction contract does not comply with sections 108(1) to (4) of the HGCRA.

    b. The three provisions of the Scheme identified were paras. [12], [20] and [23(2)]. The latter two[1] cannot be said to make adjudication subject to limitation. Only on the former, could such an argument be made: *"The adjudicator shall —…reach his decision in accordance with the applicable law in relation to the contract"*. The argument would be that the Limitation Act 1980 is part of the applicable law. This is touched on below, but the problem in short is that the argument appears to be circular: even if the Limitation Act 1980 is part of the applicable law, the question is whether under that applicable law an adjudication is an *"action"*, which (for the reasons given above) it is not.

5. While it is correct that the Limitation Act 1980 would apply to legal proceedings or arbitration that is because of the express words of the Limitation Act and the Arbitration Act 1996.

The alternative answer put forward in *LJR*, at para. [70], was that the Limitation Act 1980 must bite on a Part 8 claim to meet the enforcement proceedings because that is an action. The Part 8 claim would meet the test of proceedings in a court of law. However, the problem with this analysis is the mismatch between the "action" identified as engaging the Limitation Act 1980 and the "action" which it is seeking to bar (as that is the effect of the Act). The two actions must be the same. The Part 8 cannot therefore assist the defendant as the only action it could engage the Limitation Act to bar would be the Part 8 itself.

If the Court had in mind the enforcement proceedings as the action, then that approach would, normally, fail on the question of whether the limitation period has expired. It is now well established that the enforcement of an adjudicator's decision is based on an obligation to comply with the decision (which will be implied if it is not express), rather than the underlying obligation subject to the adjudicator's decision: *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38. The cause of action in the enforcement proceedings therefore accrues on the date of the decision, meaning it cannot be said that the limitation period for that cause of action has expired.

In summary, while the ultimate answer in *LJR* may be thought to be correct, the reasoning appears to be wrong, in that the judge ends up saying that the Limitation Act 1980 applies in terms to adjudication proceedings.

The question, therefore, is whether there is any alternative analysis which reaches the same result.

1 *Paragraph 20 "The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute."*

Paragraph 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."

2. A look back: lessons from arbitration

We have identified at least one alternative route to the same conclusion which has the support of a string of historical arbitration cases.[2]

As mentioned above, section 13 of the Arbitration Act 1996 provides for the Limitation Acts to apply to arbitral proceedings *"as they apply to legal proceedings"*. This is the statutory successor of (in reverse chronological order) section 34 of the Limitation Act 1980; section 27 of the Limitation Act 1939; and section 16 of the Arbitration Act 1934. Before that point, however, no such provision existed, and the courts were required to grapple with the question of whether, and if so on what basis, the terms of limitation statutes applied to arbitrations.

The arbitration cases

That question was touched on in a number of cases in the late nineteenth and early twentieth centuries:

- *In re Astley and Tyldesley Coal and Salt Company* and the Tyldesley Coal Company (1899) 68 LJ (QB) 252, 80 LT 116.
- *Cayzer, Irvine & Co v Board of Trade* [1927] 1 KB 269 and [1927] AC 610.
- *Ramdutt Ramkissendass v E D Sassoon & Co* [1929] WN 27 (PC), 56 Ind App 128.

It was finally answered in the affirmative by the House of Lords in *NV Handels en Transport Maatschappij "Vulcaan" v J Ludwig Mowinckels Rederi* A/S [1938] 2 All ER 152 (HL), (1938) 60 Ll L Rep 217 (HL); (1937) 57 Ll L Rep 69 (CA); (1936) 54 Ll L Rep 324.

By way of brief overview:

- The *Astley* case concerned a dispute between two adjoining mineowners, which they agreed to submit to arbitration. It does not appear to have been argued as such that an arbitration was not an "action",[3] but instead that the agreement to arbitrate amounted (on the facts) to a *"fresh promise to pay whatever damages the arbitrator shall find"* and so displaced the Limitation Act 1623. The Divisional Court rejected that argument, holding instead that if the parties intended to exclude limitation, there should have been express provision to that effect.
- The *Cayzer* case concerned the loss of a ship requisitioned during the First World War on a charterparty which provided for arbitration. The arbitration clause was in *Scott v Avery* form – in other words, it prevented any cause of action from accruing until after the arbitrator's award had been made. As a result, the actual basis of the decision was that time did not even start to run until after the award (and so the plea of limitation failed in any event).[4]
    - Most of the judges who expressed a view (Rowlatt J at first instance; Romer J in the Court of Appeal; Viscount Cave LC and Lord Phillimore in the House of Lords) supported the view that limitation would ordinarily apply to arbitration, or at least were prepared to assume that this was correct. Viscount Cave LC said that he was *"far from wishing to throw doubt"* on the *"commonly held"* view that *"an arbitrator acting under an ordinary submission to arbitration is bound to give effect to all legal defences, including a defence under any statute of limitation"*, albeit he declined to express a final opinion.
    - However, Scrutton LJ expressed more doubts. He said that the question was a *"very difficult one"*, which *"has not yet been properly considered"* and was *"probably one which does not admit of an absolute rule being laid down applicable to all arbitrations"*. He was *"very doubtful"* that such a term was *"so necessary and so obvious"* that it could be implied.
- In the *Ramdutt* case (which concerned the Indian Limitation Act), the Privy Council referred to the judgments in *Astley* and *Cayzer* and concluded that the law was correctly stated in *Astley*:

  "Although the Indian Limitation Act does not in terms apply to arbitrations, they [i.e. their Lordships of the Privy Council] *think that in mercantile references of the kind in question it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every defence which would have been open in a Court of law can be equally proponed for the arbitrator's decision unless the parties have agreed (which is not suggested here) to exclude that defence."*

  This again treated the matter as one of interpretation of, or implication into, the parties' arbitration agreement, and focused expressly on *"mercantile"* references.

When the matter arose in the *Vulcaan* case, therefore, the tenor of the authorities was clear that the Statute of Limitations could not literally apply to an arbitration, but nevertheless was generally in favour of applying its provisions (at least in ordinary mercantile or commercial arbitrations where legal rights fell to be determined), on the basis that a term to that effect should generally be implied into the arbitration agreement.

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2 We are indebted to the editors of *Kendall on Expert Determination* for drawing attention to this line of cases in chapter 12 of the fifth edition.

3 This point was picked up in argument for the claimants at first instance in the *Cayzer* case. If the point was taken, the report of the case at 80 LT 116 indicates that Bruce LJ gave it short shrift.

4 In this respect, the decision has been reversed by section 13(3) of the Arbitration Act 1996 and its statutory predecessors referred to above.

The exception was the view of Scrutton LJ in *Cayzer*, who had doubted whether such a term met the test for implication. It may be worth recalling that it was Scrutton LJ who, in *Reigate v Union Manufacturing Co* [1918] 1 KB 592, 605, had said that a term would only be implied:

"if it is such a term that it can be confidently said that if at the time the contract was being negotiated someone had said to the parties 'What will happen in such a case?', they would have replied: 'Of course, so and so will happen; we did not trouble to say that; it is too clear.'"

The broad effect of the *Vulcaan* case was to endorse the position as stated in *Ramdutt*, and as supported by Viscount Cave LC in *Cayzer*: that, as a general rule, in an ordinary commercial or other legal arbitration, it would be an implied term of the arbitration agreement that limitation defences would be available in the same way as they would have been in court.

However, *Vulcaan* also introduced an alternative or parallel line of reasoning (put forward by Lord Wright MR in the Court of Appeal and adopted by Lord Maugham LC in the House of Lords). This went as follows:

- Before the merger of law and equity by the Judicature Acts 1873 and 1875, proceedings in the courts of equity were by way of "suit", and not by way of "action". The Statutes of Limitation had not applied literally to such proceedings.
- Nevertheless, the courts of equity had applied the Statutes of Limitation by analogy where (for example) the validity of a legal debt arose.
- An arbitrator was required to apply both law and equity, and so to apply the Statutes of Limitation by analogy in the same way.

By the time of the decision in *Vulcaan*, section 16 of the Arbitration Act 1934 (referred to above) had come into effect, rendering the matter of historical interest only in the arbitration context. It is therefore to be regarded as the final word on the subject.

Where does that leave us now?

The question then arises: what does this historical digression on the position in relation to arbitration mean for adjudication?

The first point is that it confirms the view (as set out above) that the Limitation Act does not literally or directly apply to adjudications (and, accordingly, that insofar as the reasoning in *LJR* says otherwise, that reasoning is not correct).

The second point is that the courts have never been averse to stretching a point in order to avoid the conclusion that limitation statutes simply do not apply. In that respect, while the reasoning may be subject to criticism, the actual result in *LJR* is not out of step with history.

The third point is whether either or both of the *Vulcaan* justifications (the 'implied term' approach and the 'equitable analogy' approach) can be applied to adjudications.

At first glance, there are some obvious difficulties with applying the implied term approach to adjudication, where that adjudication is governed by the HGCRA and / or the Scheme. It is significantly harder to imply a term into a statute or statutory instrument than it is to imply a term into a commercial contract (though not impossible). In particular, where the HGCRA applies, it might be difficult to read much into the 'shared intentions' of the parties as far as their adjudication agreements are concerned – especially if they have failed to make any (compliant) agreement and have been thrown back on the Scheme by statutory implication.

Having said that, there are in fact cases in which the courts have found implied terms governing adjudications (whether there is an express adjudication agreement or the statutory implication of the Scheme). By way of example:

- Before the HGCRA and the Scheme were amended to make provision for a slip rule, it was held that there was an implied slip rule in any event: *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Limited* [2000] BLR 314; *YCMS Ltd v Grabiner* [2009] BLR 211; *O'Donnell Developments Ltd v Build Ability Ltd* [2009] EWHC 3388 (TCC).
- There is an implied (if not express) obligation to comply with an adjudicator's decision: *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38, and *Keating on Construction Contracts* (11th edn), para. 18-066.
- There is also an implied right for a party which is unsuccessful in adjudication to have money repaid if the dispute is finally determined in its favour: *Aspect v Higgins*.

It might be said that the implication of limitation provisions takes matters a step further than those cases. Nevertheless, for all the reasons given in the arbitration cases, it seems likely that such a term can be implied as a corollary of the (express or implied) adjudication provisions in a construction contract.

Where the Scheme applies, there is (as the judge noted at para. [68] of *LJR*) an express requirement that the adjudicator: *"shall reach his decision in accordance with the applicable law in relation to the contract"*.

On one view, it is begging the question to suggest that this supports the application of the Limitation Act to adjudications: if the law is that limitation applies to actions, then (by definition) it does not fall to be applied during an adjudication. Equally, the *"applicable law"* would ordinarily be read as meaning the applicable substantive law, which does not include a procedural statute governing the remedy and not the right. On the other hand, in the arbitration cases, there are several remarks which support the view that giving effect to limitation, and deciding the matter in the same way a judge would, is part and parcel of deciding the matter in accordance with the applicable law.

Finally, there appears to be no obstacle to saying that an adjudicator should apply the principles of equity in the way described by Lord Wright MR and Lord Maugham LC, so as to allow him or her to apply the Limitation Act 1980 by analogy if need be. However, if the implied term analysis is correct, this alternative analysis is unnecessary.

3. Adjudication and the stopping of time

If the Limitation Act 1980 is to be applied to adjudication, what is the date at which time stops running? In *University of Brighton v Dovehouse Interiors Ltd* [2014] EWHC 940 (TCC), Carr J (as she then was) held that an adjudication was 'commenced' for the purposes of a contractual provision when the notice of intention to refer a dispute to adjudication was given. It is likely that the same approach would apply for limitation purposes.

The follow up question is: what proceedings is time stopped for? In particular, is time stopped just for the adjudication or is it also stopped for subsequent Court or Arbitration proceedings?[5]

In general, the stopping of time is likely only to apply to the adjudication, which is a separate process from any court proceedings or arbitration. Any other interpretation would be unworkable where there is no time limit to when a subsequent arbitration or court proceeding must be brought following the adjudication. Even if there were such a time limit (for example, a requirement in the contract to bring any court proceedings within 28 days of the adjudicator's decision), the Limitation Act would fall to be applied afresh to those proceedings. The remedy for a referring party who is near the end of the limitation period is to issue protective proceedings as well as commencing an adjudication.

This position is in accordance with the, apparently correct, principle that if a party commences an adjudication but only succeeds in part, the limitation period if it wanted to pursue the remainder of its claim which was unsuccessful is unaffected by the adjudication and runs from when the original cause of action accrued: see *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38, para. [27].

It may be that a different view could be taken if there is a tiered dispute resolution clause, where each prior step is an impediment to pursuing the claim in arbitration or Court and there are precise time limits between each step. These clauses are increasingly popular, particularly in the FIDIC form. Conceptually, there is an argument that the earlier tiers/steps are part of the overall Court or Arbitration action. That is the approach taken in South Africa. In *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* (1984) (1) All SA 571 (A), there was a tiered dispute resolution clause leading to Court. The first step was for a dispute to be referred to the engineer appointed under the contract. The contract was terminated in 1976. On 7 June 1978, the dispute as to the validity of the termination was referred to the engineer. However, he did not make a decision until April 1980. By that point the 3 year primary limitation (or prescription) period in South Africa had passed since the date of the termination. The South African Court at first instance and on appeal held that the claim was not time barred because the submission of the claim to the engineer meant that it was *"a dispute subjected to arbitration"* for the purposes of section 13(1)(f) of the Prescription Act No. 68 of 1969, thereby delaying the completion of the limitation period.

5 We are grateful to Douglas Simpson at LexisNexis for raising this interesting question for our consideration, as well as his assistance in commissioning, editing and formatting the original version of this article.

The only equivalent to section 13(1)(f) in English law is section 33B of the Limitation Act 1980. This states as follows:

> *"(2) Subsection (3) applies where—*
>
> *(a) a time limit under this Act relates to the subject of the whole or part of a relevant dispute;*
>
> *(b) a non-binding ADR procedure in relation to the relevant dispute starts before the time limit expires; and*
>
> *(c) if not extended by this section, the time limit would expire before the non-binding ADR procedure ends or less than eight weeks after it ends.*
>
> *(3) For the purposes of initiating judicial proceedings, the time limit expires instead at the end of eight weeks after the non-binding ADR procedure ends (subject to subsection (4))."*

There are two preliminary points to note here (1) the non-binding ADR procedure must be started before the limitation period expires, and (2) the understanding of Parliament is that the non-binding ADR procedure would not otherwise stop time running.

However, other than potentially impacting how the other provisions are to be interpreted, section 33B is unlikely ever to apply to a construction adjudication:

- A *"relevant dispute"* must be between a trader and a consumer. Almost all construction adjudications take place between two traders.
- Adjudication is unlikely to satisfy the definition of a *"non-binding ADR procedure"* – *"an ADR procedure the outcome of which is not binding on the parties"* – although the interim nature of an adjudicator's decision may give rise to an interesting debate on this point.
- An *"ADR procedure"* must be a procedure provided by the intervention of an approved *"ADR entity"* under the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015. None of the *"competent authorities"* listed in Schedule 1 to those regulations have anything to do with the construction industry, and (to the authors' knowledge) none of the approved ADR entities under those regulations are adjudicator nominating bodies.

Ultimately, the more likely safeguard under English law to prevent compliance with a multi-tiered dispute resolution clause impacting a party's ability to issue proceedings within the limitation period is that the Court claim, or arbitration[6], could be commenced but would then be stayed unless and until the prior steps are complied with – *Ohpen v Invesco* [2019] EWHC 2246; *Kajima Construction Europe (UK) Ltd v Children's Ark Partnership Ltd* [2023] EWCA Civ 292.

4. Concluding thoughts

As explained above, there are good reasons to consider that *LJR* is wrong to say that an adjudication is an *"action"* subject to the Limitation Act 1980. There is, however, an alternative analysis which reaches the same conclusion without running into the same difficulties, and which has the support of a series of arbitration cases from the late nineteenth and early twentieth centuries. That better view is that the relevant provisions of the Limitation Act apply by way of an implied term in the parties' adjudication agreement (and / or because the adjudicator is required to apply them by analogy in accordance with the historical approach of a court of equity), as was held to be the analysis in respect of arbitrations before the Arbitration Act 1934. This accords with the view which both lawyers and businesspeople would probably share, that a party with a time-barred claim should not in practical terms be able to circumvent limitation by pursuing its claim in adjudication.

The effect of that analysis is that an adjudicator who fails to consider a properly raised limitation defence on the basis that adjudication is not an "action" is very likely to commit a breach of natural justice rendering any decision unenforceable: *Pilon Ltd v Breyer Group Plc* [2010] EWHC 837 (TCC), 130 Con LR 90.

On the other hand, if the adjudicator does consider the question of limitation, his decision on that point is likely to be binding on the parties in the usual way, unless it can be challenged as obviously wrong by way of a Part 8 claim. As a matter of first principles:

a. Whether a claim is time-barred is a question of fact or law.

b. Whether a decision by an adjudicator on a such a question (including whether the Limitation Act 1980 applies in the first place) was right or wrong is irrelevant on enforcement.

c. The unsuccessful party should comply with the decision and then bring Court proceedings seeking to overturn it (pay now, argue later).

These principles were recognised in *LJR* where the Court approached the issue of limitation – with (understandable[7]) hesitation – under the narrow exception in *Hutton v Wilson* for points of law which can be finally determined on enforcement. If such a claim is permissible, it would have to be based on a submission that the cause of action was time barred at the time when the dispute was submitted to the adjudicator, not at some later date such as the commencement of enforcement proceedings or of the Part 8 claim itself. It is clear from the guidance in *Hutton v Wilson* that the issue must have arisen in the adjudication itself.

The best answer, ultimately, may be for Parliament to amend either the Limitation Act 1980 or the HGCRA to clarify that adjudication[8] is to be considered an action – or, at least, that the Limitation Act is to apply to adjudications in the same way as it does to actions and arbitrations. In the interim, however, *LJR* reaches what appears to be the correct practical answer, albeit for the wrong reasons; and the analysis in the arbitration cases offers historical support for that conclusion, albeit by a different analytical route.

6 There is a debate in arbitration as to whether the failure to comply with earlier steps would deprive the tribunal of jurisdiction. That debate is outside the scope of this article. There was a recent discussion of this topic in which a requirement to wait until a settlement period had expired before commencing an arbitration was held to go to admissibility not jurisdiction: *The Republic of Sierra Leone v SL Mining Limited* [2021] EWHC 286 (Comm).

7 Given that the Judge accepted at para. [116] that limitation issues raised by the Part 8 *"could not be properly aired and fairly decided within the expedited 90 minute hearing initially set aside for the summary judgment application"*, there is a reasonable argument that it did not meet the *Hutton v Wilson* guidance. Certainly, it is unusual for an issue which required two hearings with further evidence and submissions to be regarded as a *"short and self-contained issue"*.

8 There would need to be a careful and precise definition of adjudication.