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CERTIFICATION, LIMITATION, AND PRESCRIPTION

A Comparative Analysis of Legal Frameworks in the UK and South Africa

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THE FACTS

- An Employer employs a Contractor to perform work consequent upon the conclusion between the parties of an earthworks contract.
- The work is performed over a period of 12 months.
- The Contractor, during the execution of the work, submits interim payment applications (IPAs) on a monthly basis to the Employer's Engineer and receives payment from the Employer of amounts which are certified by the Engineer, on a monthly basis. The Interim Payment Certificates (IPCs) which are issued by the Engineer and which give rise to the Contractor's entitlement to payment are, in each instance, dispatched by the Engineer shortly after each of the IPAs has been received by him: a total of 12 IPAs and IPCs are issued in respect of the work done by the Contractor.
- Two years, eleven months and twenty days (or five years eleven months and twenty days for English lawyers) after the last IPC is issued, the Engineer certifies and issues what he refers to as the Final Payment Certificate which reflects an amount of R 280 million (or £ 280 million) as being due by the Contractor to the Employer. The basis for the indebtedness is said by the Engineer, in the Final Payment Certificate, to be an overpayment made by the Employer during the 12 months during which the work took place.
- The Contractor contends that the Employer's claim has prescribed in terms of the **Prescription Act No. 68 of 1969** (or, is subject to Section 5 of the **Limitation Act of 1980**, for English Lawyers).
- The Employer contends that its claim has not prescribed as it could not have instituted its claim for repayment of the amount overpaid by it prior to it being certified by the Engineer.

LEGISLATIVE FRAMEWORK

Section 12 of the South African Prescription Act 68 of 1969

When prescription begins to run.

12. (1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt which does not arise from contract shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises:

Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

Section 5 of the Limitation Act of 1980

5 Time limit for actions founded on simple contract.

An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

Section 32 of the Limitation Act of 1980

32 Postponement of limitation period in case of fraud, concealment or mistake.

(1) Subject to **[F54**subsection (3)**][F54**subsections (3) **[F55**, (4A) and (4B)**]]** below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

THE LAW

The Oxford Architects Partnership v The Cheltenham Ladies College [2006] EWHC 3156 (TCC)

- Ramsey J observed that "*... Mr. Patrick Clarke, on behalf of the Architects, submits that Article 5 acts as an additional contractual limit on proceedings but does not otherwise affect the question of whether a cause of action is statute barred under the Limitation Act 1980. He accepts that if under the Limitation Act 1980, including any provision for extension, the limitation period lasted for more than six years after Practical Completion, the contractual limit would apply to preclude the commencement of proceedings. Depending on the period of limitation and the period chosen in Article 5 of CE/95 he says that a shorter or longer contractual period could be imposed than that under the Limitation Act*" (per paragraph 13 of the judgment) and "*(i)n this case I do not consider that Article 5 has the effect on statutory limitation periods for which the College contends. In summary it provides that 'No ... proceedings ... shall be commenced against the Architect after the expiry of six years … from the date of Practical Completion.' It therefore provides a contractual time limit on the College's ability to commence proceedings. It does not seek to prevent the Architects from relying on a statutory limitation defence, rather it is concerned with providing an additional contractual limitation on the ability of the College to bring a claim. It is convenient to consider an example. If a cause of action for breach of contract accrued one year before Practical Completion then, assuming a six-year limitation period applied under section 5 of the Limitation Act 1980, the cause of action would be statute barred five years after Practical Completion. The fact that Article 5 provides that no proceedings shall be commenced after the expiry of six years from Practical Completion would have no effect on the ability of the Architects to rely on the statutory limitation defence*" (per paragraph 16 of the judgment).
- **The essential lesson to be learned from the case is that** "*very clear words will be needed to achieve an extension of statutory limitation periods*" (per Legal Update Case Report published 6 February 2007).

Legal Services Commission and Aisha Henthorn [2011] EWCA Civ 1415

1. The principal issue on this appeal is when time starts running under the Limitation Act 1980 ("the 1980 Act") in relation to a claim by the Legal Services Commission ("the Commission"). The claim is for the recovery of an alleged overpayment of money paid to counsel on account of fees, in respect of work done under a civil legal aid certificate, which is not prematurely revoked or discharged.

2. At first instance, His Honour Judge Anthony Thornton QC, sitting as a High Court Judge, held that time runs from the date that the work under the certificate is actually completed - [2010] EWHC 3329 (QB). The Commission appeals against that decision, contending that time only starts to run (i) when the overpayment is demanded, (ii)when the Commission makes a finding that there has been an overpayment, (iii) when the taxation or assessment of costs has been completed, or (iv), but only where costs have been assessed by the court, when the result of the assessment are reported to the Commission by the solicitor with conduct of the case.

3. The defendant to the proceedings and the respondent to the appeal is Aisha Henthorn. She was a practising barrister, until she disbarred herself voluntarily in 2001, owing to poor health resulting from a motor car accident in September 1998. The Law Society and the Bar Council have intervened, and have made written and oral submissions supporting the contention of Ms Henthorn that the judge's decision was right.

4. The proceedings before the judge were brought by the Commission for the recovery of alleged overpayments which it said had been made to Ms Henthorn in respect of a number of different cases. It is only fair to Ms Henthorn to record that there is, and has been, no allegation or suggestion of any impropriety on her part in relation to any of the cases. Indeed, this is something of a test case for the Commission, who have agreed not to seek costs from Ms Henthorn if this appeal is successful.

Legal Services Commission and Aisha Henthorn [2011] EWCA Civ 1415 Cont.

6. It is and was common ground that six years is the relevant limitation period – see section 9 of the 1980 Act. The judge dismissed the proceedings in their entirety, because, at least in relation to all but one of the individual claims, the work concerned was carried out by Ms Henthorn more than six years before the proceedings were commenced. The first issue is whether he was right. If the claims are not time-barred, (i) Ms Henthorn contends that the proceedings are an abuse of process, and, if she fails on that, (ii) she contends that she nonetheless has a defence in relation to some of the sums claimed, and, if she does, (iii) the Commission argues that it can nonetheless succeed in a claim based on restitution.

8. The primary issue of principle, namely when time starts to run, turns on when the Commission's "cause of action accrued" to use the words of section 9 of the 1980 Act. That question has to be determined by reference to the provisions of the 1988 Act and the Regulations, which, *inter alia*, govern the way in which legally aided work is to be paid for. The Regulations have been amended on a very large number of occasions, and counsel conveniently agreed to work from the version in force on 19 March 2000. I shall do so too, and all references hereafter to regulations are to regulations in that version.

9. As the judge explained, the 1988 Act and the Regulations "defined the type of proceedings and the courts or tribunals that qualified for legal aid representation and which applicants were eligible on financial grounds and what test as to the merits of an applicant's case should be applied by the [Commission] when deciding whether to grant an application for it" – [2010] EWHC 3329 (QBD), para 19. (As the judge also mentioned, the Commission replaced the Legal Aid Board - "the Board" - which was the relevant body at the time during which most of the sums under consideration in these proceedings were paid to Ms Henthorn, so any reference to the Commission includes the Board).

10. The essential features of the Regulations at the relevant times were as follows.

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19. So far as the actual assessment process was concerned, where a certificate was revoked or discharged, regulation 84(a) stated that, "the costs of the proceedings to which the certificate related … shall, as soon as practicable after the determination of the retainer, be submitted for taxation or assessment", (and, as mentioned above, the retainer determined on service of notice of revocation or discharge on the solicitor). In that regulation, the reference to "assessment" was to assessment by an Area Director of the Commission under regulation 105, and "taxation" was assessment by a taxing officer of the court. Under the new terminology of the Civil Procedure Rules, "taxation" by a "taxing officer" was replaced by "assessment" by a "costs judge", and so, in subsequent versions of the Regulations, the reference is to "detailed assessment". For the purpose of this judgment, assessment under regulation 105 is irrelevant, and I will simply refer to "assessment" to mean assessment by a costs judge.

20. Regulation 84(b) stated that the fund should "remain liable for the payment of any costs so [assessed]". Regulation 86(1)(a) provided that where a certificate has been revoked, the Commission had "the right to recover from the person to whom the certificate was issued the costs paid or payable under regulation 84(b) …".

25. The Commission's case is that its recoupment claims are governed entirely by regulation 100(8), and that, in relation to any such claim, time therefore begins to run from the date it makes the "demand" referred to in the regulation, or alternatively from the date of the assessment referred to in the regulation.

26. Ms Henthorn's case, supported by the Bar Council and the Law Society, is that time begins to run from the date that the work covered by the certificate in issue was completed, and regulation 100(8) is simply concerned with a condition precedent before a demand can be made.

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27. As a matter of ordinary language, regulation 100(8) can be fairly said to be tolerably clear. It is concerned with the almost inevitable consequence of a "payment of sums on account", namely that a balancing payment has to be made following the eventual striking of the final account, as there will normally be a net balance one way or the other.

28. Consistently with the Commission's argument in these proceedings, the regulation appears to provide in simple terms that this balancing payment is to be paid "after … assessment". In other words, subject to any other point to the contrary, the plain and natural reading of regulation 100(8), when read in the context of regulation 100 as a whole, is that time cannot start running against the Commission (if the balance is in its favour) or against the solicitor or counsel (if the balance is in their favour) until the assessment has occurred.

29. At any rate on the face of it, the only features of regulation 100(8) which appear to give rise to any potential difficulty in this connection are (i) the contrast between "the final costs of the case" where the balance is owed to the Commission, and "the total costs" where money is the balance by the Commission, and (ii) the inclusion of "on demand" where the balance is owed to the Commission but not where it is owed by the Commission. Nobody suggested that feature (i) had any significance, and I agree.

30. So far as feature (ii) is concerned, it founds the basis of the Commission's contention that time only starts running against it when it first demands any balance found to be due following assessment, rather than once the assessment has taken place. I would reject that contention. In my view, all that the words "on demand" carry with them is an obligation on the Commission to make a demand before taking any steps to enforce its right to recover the balance.

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32. In the case of regulation 100(8), I consider that there is a perfectly simple interpretation which pays proper regard to the words, but does not have the disadvantage of the Commission having complete control over when time starts running against it. Time starts running once the assessment is completed in the sense that the Commission has a claim to any balance in its favour from that point, but, in order to be entitled to recover that balance, the Commission must first demand it from the solicitor or counsel concerned. That analysis appears to be consistent with commercial common sense and with the natural implication that the expression "on demand" imposes an extra duty, not an extra benefit, on the Commission when the balance is in its favour, as opposed to when the balance is against it.

33. At any rate at first sight, the notion that the balance becomes payable once assessment has been completed, rather than (as Ms Henthorn's case suggests) when the work under the certificate in question has been completed, appears sensible. The date of assessment will be the earliest date on which the balance will have been quantified. In my view, therefore, the natural meaning of regulation 100(8), having what (at any rate at first sight) is proper regard to its language, its purpose and its context, is as the Commission, albeit as its alternative argument, contends.

34. I turn, then, to address the reasons why it is submitted that, on closer analysis, the effect of regulation 100(8) is that, rather than running from the assessment, time starts from the date the relevant work done under the relevant certificate is completed. First, it is said that a closer analysis of the Regulations demonstrates that regulation 100(8)does not mean that time only starts to run against the Commission's claim to recoup a payment made on account once a final assessment of the costs has been effected. Secondly, the view that the balance only becomes due once the assessment is completed is said to be impracticable. Thirdly, the view is said to be inconsistent with a number of authorities, which, while not concerned with the Regulations, give general guidance on this sort of issue. Fourthly, the view is said to be inconsistent with the common law position. Finally, it is argued that the view is inconsistent with a decision of this court which was concerned with the Regulations, namely *Legal Services Commission v Rasool* [2008] EWCA Civ 154, [2008] 1 WLR 2711. I shall consider these arguments in turn.

49. I turn to the argument that the right to recover overpayments made on account under regulation 100 should be governed by the same rules as would apply to a solicitor's right to recover his remuneration under normal privately paid arrangements. In *Coburn v Colledge* [1897] 1 QB 702, the Court of Appeal held that time started to run against a solicitor when the work was completed, and the fact that section 37 of the Solicitors Act 1843 precluded a solicitor from bringing proceedings for his remuneration until a month after sending his bill did not delay the commencement of the limitation period until the expiration of that month.

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50. I do not consider that the reasoning and conclusion in *Coburn* [1897] 1 QB 702 assists in this case (save that it provides some support for my view that the Commission cannot delay time running against it by delaying service of a "demand"). First, as in the later case of *Glass* [1992] 1 QB 844, only the solicitor who had to serve the bill could be entitled to a payment, and, unlike the client, the solicitor knew what was owing; it is wholly different under regulation 100(8), where the payment could go either way, and, until assessment, nobody can be sure what the amount will be. Lopes LJ at [1897] 1 QB 702, 709 was clearly impressed with the point that the solicitor should not be able to control the date from which time ran, given that it would always be the solicitor who was claiming.

51. Secondly, *Coburn* [1897] 1 QB 702 was concerned with a provision which simply imposed a procedural step on enforcing a claim which was assumed already to exist in common law, whereas regulation 100(8) is part of what is an essentially self-contained regulatory scheme, and appears to create the right to recover, and the concomitant obligation to pay, whatever balance is found to be due. The rules applicable to privately funded work are by no means always a safe guide to the rules applicable to legal aid work: that is plain from the very different terms of the Regulations when compared with the legislation and common law rules governing private client work.

56. Accordingly, in agreement with the Commission and differing from the judge, I consider that time did not begin to run against the Commission in respect of claims falling within regulation 100(8) until the assessment there referred to had taken place. Accordingly, it is necessary to consider the other defences which have been raised on Ms Henthorn's behalf.

ICE Architects Limited v Empowering People Inspiring Communities [2018]

2. The Appellant ("ICE") is an architectural practice and the Respondent ("EPIC") a registered provider of social housing. In 2007, it was agreed that ICE would provide design services for a social housing scheme in Stoke on Trent which was in the process of development by EPIC. Discussions between the parties were ongoing from around May 2007. On 10th July 2007 a letter was sent by Ms Claire Moyes, the Project Manager at EPIC, to Mr Michael Rushe, the Director of ICE, appointing ICE as the architects for the housing project. The letter set out that there was a current annual limit of £50,000 for architectural services; that ICE was commissioned to start design work on the housing project in accordance with the specification which had been submitted by ICE; that although the specification was acceptable, this may be subject to change depending on the level of capital funding available. The specification, which was attached as an appendix t o the letter, described the scope of the design work, the anticipated duration of the contract and associated fees. Ms Moyes also recorded that, whilst the budget for each individual component of the specification was acceptable, this also was subject to EPIC receiving the anticipated level of grant funding from the City Council.

3 The letter included the following under the heading " *Basis of Payment* ": "You will invoice EPIC on a monthly basis for work completed to date. The basis of payment proposed in the appendix t o the document described above is acceptable. EPIC Ltd will endeavor to make payment within 30 days of receipt (unless otherwise stated)."

5. On 23rd April 2009, ICE issued an invoice (number 04-260) for services provided under the terms of the contract. The invoice was in the sum of £42,375 plus VAT. The sum claimed in the invoice was disputed by EPIC. Following an adjudication process, ICE was awarded £24,033.85. On 21st May 2015 ICE commenced civil proceedings for recovery of the balance of the invoice sum of £24,697.40. HHJ Parfitt ruled that the claim was statute barred under section 5 of the Limitation Act 1980, proceedings having been commenced more than 6 years after the accrual of the cause of action which he found to be the date of performance of the services which were the subject of the invoice.

7. The central argument advanced by EPIC before HHJ Parfitt was that the cause of action relied on by ICE arose at the latest when the relevant design work (for which payment was claimed in the invoice) was completed. The Judge found (and it was not disputed before me) that, whilst some of the work may have been completed as late as December 2008, most of the work in respect of which payment was sought had been completed in March 2008. Given that proceedings were commenced on 21st May 2015, nothing turned on the Judge's conclusion on this point: whether completed in March 2008 or December 2008, if the cause of action accrued at the conclusion of the design work, the claim was statute barred. ICE contended before HHJ Parfitt that the relevant limitation period was 12 years on the basis that the parties had entered into an agreement to that effect (the Project Partnering Agreement); alternatively, that the cause of action did not accrue until 30 days after receipt of the invoice either because "RIBA SFA 99" had been incorporated into the agreement or because this is what had been agreed by the parties in the letter of 10th July 2007.

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8. HHJ Parfitt found that neither the terms of the Project Partnering Agreement nor RIBA SFA 99 had been incorporated into the parties' agreements. ICE does not appeal the Judge's conclusions on those two points. The sole focus of the arguments on the appeal before me therefore related to the Judge's conclusions on the effect of the letter of 10th July 2007 on the time of accrual of the cause of action.

9. On this point, HHJ Parfitt [*a quo*] found, as follows (at paragraph 26 of his judgment):

   i) on the authority of *Coburn v Colledge [1897] 1 QB 702* , in the absence of agreement to the contrary, the starting point is that a provider of services is entitled to be paid once the work has been done and so its cause of action for payment arises at that time;
   ii) the agreement reached between the parties in *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd [2005] EWCA Civ 814* provided an illustration of an agreement to the contrary;
   iii) in *Coburn* the Court of Appeal identified a material distinction between (as described by HHJ Parfitt) "facts which are a necessary part of the right to be paid and those matters which might bar that right (such as limitation itself but also facts such as a failure to comply with statutory requirements eg statutes about solicitors bills in Coburn)."

10. HHJ Parfitt considered the authority of *Legal Services Commission v Henthorn [2011] EWCA Civ 1415* , noting the obiter statement of Lord Neuberger MR that, save where it is the essence of an arrangement between the parties that a sum is not to be paid until demanded, "clear words would normally be required before a contract should be held to give a potential or actual creditor complete control over when time starts to run against him". He considered *Levin v Tannenbaum [2013] EWHC 4457* , albeit briefly, commenting that the case was an application of the so-called Coburn principle. He then set out the question which he considered was at the heart of identifying the time of accrual of the cause of action: " *what has to happen for an entitlement to be paid to arise* ?". He said that in a case where the right to payment is based on a demand, or the issue of a certificate, then it was those facts which are essential to the cause of action; when however the entitlement to be paid is based on work having been done then, once that work is done, the entitlement and right to be paid for it arises.

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11. It was against this legal framework that HHJ Parfitt considered the construction of the relevant section of the letter of July 2007. He set out in paragraph 30 of the judgment the following: "the invoicing arrangements provided for by the 10th July 2007 letter are to invoice monthly for work completed to date. The issuing of the invoice is not the fact which entitles the Claimant to be paid (although the non-issue of the invoice might provide the Defendant with a defence to the claim) but the fact that work has been done both entitles the Claimant to be paid and the Claimant to *issue an invoice* ". He concluded that the fact that invoices were to be paid monthly made no relevant difference as the invoices related to work done; nor did it make a difference that the 30 days were given for payment. He considered that this provision may be a matter of " *potential defence* " but it did not impact on the Claimant's substantive right to be paid for what it has done. Accordingly, the Judge ruled the Claimant's cause of action to be statute barred.

12. There was much common ground between the parties on the relevant general legal principles. Both agreed that the "default position" (as described by Mr Wright for the Appellant) in an action for payment for works or services was that the cause of action arose at the time of completion of the work. The central question for the Court was whether that default position had been displaced by the contractual terms set out in the letter of 10th July 2007. Stripped back to its essentials the exercise for the Court was the objective interpretation of the intentions of the parties derived from the letter.

13. Both parties relied upon *Coburn v Colledge [1897] 1QB 702* ; the first clear iteration of the default position. The Claimant n *Coburn* was a solicitor who was suing for outstanding fees. He appealed a ruling that his claim was out of time under the relevant statute of limitations. He argued that the effect of section 37 Solicitors Act 1843 , which provided that " *no solicitor shall commence an action for recovery of fees until the expiration of one month from delivery of the bill* " was to delay the accrual of his cause of action until one month following his delivery of the bill of costs. Lord Esther MR rejected the argument. In the case of a person "who does work for another person at his request on the terms that he is to be paid for it, unless there is some special term of the agreement to the contrary, his right to payment arises as soon as the work is done". Lord Esher said that the effect of section 37 was not to delay the accrual of the cause of action but to set up a procedural bar to the right of the solicitor to bring an action directly the work was done; it did not " *take away his right to payment for the work, which was the cause of action* ". Lopes LJ agreed: upon proof that the work had been done, prima facie, the plaintiff was entitled to recover. Section 37 assumes that there is a cause of action but postpones the bringing of an action upon it until the period of one month from the delivery of the bill. Lopes LJ observed that any other construction of the provision would lead to the anomalous and inconvenient result that a solicitor could, in theory at least, delay in serving his bill for a considerable period of time, say 20 years, and then deliver it and sue after the expiration of one month. Chitty LJ also agreed. He added that the objective of the statutory limitation period was to protect against stale demands and that a fixed statutory period for bringing a claim avoided the Courts becoming embroiled in determining whether a solicitor had delayed reasonably in delivery of the bill.

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15. *Henry Boot* concerned a claim for payment by a contractor who had undertaken civil engineering work. The contract provided that the monthly statements of payments claimed by *Boot* would be considered by an engineer who would then certify the amount which in his opinion was due. One of the questions for the Court was whether, on a construction of the contractual provisions, the cause of action arose on the completion of the works by *Boot* or following the issuing of the certificate by the engineer. The Court concluded that on a construction of the contract as a whole the certificates were a condition precedent to the contractor's entitlement and that the right to payment arose, not therefore when the work had been done, but when a certificate was issued. The Court noted that the function of the engineer in this context was to certify what, in his opinion, was due on the basis of the statement supplied. The contractor's liability was to pay the amount certified by the engineer and not the "true value" of the work done by *Boot* .

16. In *Services Commission v Henthorn* , the Commission sought recoupment of the balance of fees which had been paid to Counsel on account to the extent that those fees exceeded the final costs following assessment or taxation. It was argued on behalf of Counsel that the recoupment claim was statute barred as the Commission's cause of action arose at the time when Counsel had undertaken the work. The Court found that, on a proper construction of the relevant regulation (Regulation 100(8) of Civil Legal Aid (General) Regulations 1989) time only started running once the assessment or taxation was completed and it was only at this point that the Commission had a claim to any balance in its favour. Lord Neuberger MR, giving the judgment of the Court, considered that this construction was also sensible and practical, given that the date of assessment would be the earliest date upon which the balance could have been quantified by the Commission. Whilst the case concerned the interpretation of a regulation rather than a contract, Lord Neuberger MR commented obiter that "save where it is the essence of the arrangement between the parties that a sum is not payable until demanded, it appears to me that clear words would normally be required before a contract should be held to give a potential or actual creditor complete control over when time starts running against him, as it is such an unlikely arrangement for an actual or potential debtor to have agreed".

17. In *Levin v Tannenbaum* , Nugee J construed the provisions of a guarantee to ascertain the intention of the parties concerning entitlement to payment under the guarantee. Upon his construction of the relevant term, he concluded that the guarantor's liability arose 14 days following the issue of the demand, rather than the time that the underlying debt became due or immediately upon demand.

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22. I do not accept Mr Wright's submission that, on an objective interpretation of the relevant paragraph of the letter of 10th July 2007, the parties were agreeing that ICE's entitlement to payment did not arise until 30 days after receipt of the invoice. A reasonable person in the position of the parties would have understood the words in the letter to be an agreement concerning only the process of billing and payment, namely the monthly provision of an invoice with payment within 30 days thereafter. This construction arises from a plain reading of the section of the letter under scrutiny. Further, in the context of the letter, it is common sense that both parties would have wished to reach some agreement concerning the billing and payment arrangements; the design work was not a single piece of work, but a rolling design project which was to be ongoing over a period of many months. In these circumstances, some agreement concerning billing and payment would have been important and on an objective construction of the intention of the parties the payment terms of the letter reflect just such an agreement. The letter elsewhere refers to the budgeting constraints which affected EPIC and the agreement to the costings proposed by ICE only on the condition that Council funding was available. Monthly invoicing would therefore have been important, certainly for EPIC, as a means of keeping a running check on the financial outlay on design services.

23. Nothing in the language of the relevant paragraph, viewed in isolation or in the context of the letter as a whole therefore suggests that the parties were intending that ICE's entitlement to payment did not arise when the work was done. I do not accept that the phrase "Basis of Payment" bears the construction which Mr Wright imposes on it, namely, that it shifts ICE's entitlement to payment until the end of the 30 day period for payment. The phrase, in context, is consistent with an arrangement as to the mechanics of payment. Mr Wright relies upon the further reference to "basis of payment" within the paragraph in which Ms Moyes cross refers to the design proposal which had been submitted by ICE and which sets out the modules of design work and associated monthly costings. The use of the phrase in that context suggests only that she is accepting the proposed specification and associated monthly fees and not that ICE only become entitled to payment 30 days after the receipt of an invoice.

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24. Further, I accept Mr Finn's submission that the obiter statement of Lord Neuberger in *Henshaw* , that clear words are needed if the timing of the accrual of the cause of action in an action for work or services is to be displaced, is relevant. Mr Wright relies upon the requirement in the letter that invoices should be provided by ICE each month as an answer to the potential mischief that otherwise the creditor would have control of the time at which the limitation period starts running. However, this is not a satisfactory answer to the point. Chitty LJ in *Coburn* was clear that the central purpose of the statutory limitation regime is to provide the creditor with a degree of protection by the certainty (my emphasis) of a fixed period during which a claim can be brought and to avoid the Courts becoming embroiled in collateral issues such as, in the context of *Coburn* , whether there was unreasonable delay in submitting a bill of costs or, in the context of the appeal, whether the invoice had, in fact, been delivered within a month of completion of the relevant work; if not, whether there was a reasonable explanation or excuse; whether the Respondent had paid within 30 days or "endeavoured" to do so, or otherwise stated (which is the relevant term in the letter of 10th July 2007). In these circumstances, it seems to me that clear words are needed if the Court is to construe an agreement between the parties in such a way as to give the creditor control over the start of the limitation period and/or to avoid the Courts becoming engaged in determining satellite issues which deprive the limitation provisions of their central purpose: certainty and the avoidance of stale claims. Such clear words do not appear in the letter.

27. Nor do I accept that HHJ Parfitt was wrong in his analysis of either *Boot* or *Henthorn* . Although the cases were not the subject of a detailed analysis, this should be understood in the context of a hearing and a judgment which considered two other substantial arguments deployed by the Claimant in support of its case that the claim was not statute barred. It is common ground that whether the cause of action accrues on completion of the work, or at some other time, is a matter of construction of the relevant contractual term or other statutory provision. *Boot* and *Henthorn* were both examples of the Court undertaking that exercise. In both of those cases, the outcome of the objective construction exercise was bolstered by common sense and logic. In neither case could it be sensibly concluded that the cause of action accrued at the time of completion of the works or services in question. In neither case could the quantum of the debt have been identified at the completion of the work in question. In *Boot* the entitlement was not to the true value of the work completed but the value attributed to the work by the engineer. Likewise in *Henthorn* the extent of the recoupment of the sums paid on account could only be known following taxation. No such difficulty arises in respect of the ICE invoices which require no further analysis or assessment.

Consulting Concepts International Inc v Consumer Protection Association (Saudi Arabia) [2022] EWCA Civ 1699 [2023] 4 W.L.R. 15

Summary

When considering whether a claim for unpaid invoices was time-barred, there was a critical distinction between terms in the agreement between the parties which were conditions precedent to the right to payment arising, and those which imposed conditions on the bringing of proceedings. The latter were concerned with limiting the creditor's right to bring an action to enforce an entitlement to payment and were procedural obstacles which did not prevent time running unless they were covered by one of the exceptions in the Limitation Act 1980.

Abstract

The appellant appealed against the striking out of its claim, on limitation grounds, for sums allegedly due from the respondent. In June 2013, the parties entered into an agreement for the appellant to provide services to the respondent relating to asthma research. The agreement provided for the appellant to submit invoices for payment within 90 days. That agreement was extended orally for the provision of further services relating to non-asthma studies. All the work done for which the appellant sought payment was completed by 17 December 2013. It issued its claim form on 27 December 2019 in respect of three unpaid invoices under the main agreement.

… .

The claim was struck out. The judge held that the cause of action accrued when the services were provided, irrespective of whether the invoiced amounts were encompassed in the amount of the undertaking. Permission was granted to appeal on that issue. When applying for permission to appeal on another issue, the appellant failed to enclose draft grounds of appeal, contrary to the Commercial Court Guide para.J.12.3.

Held

Appeal dismissed.

Consulting Concepts International Inc v Consumer Protection Association (Saudi Arabia) [2022] EWCA Civ 1699 [2023] 4 W.L.R. 15 cont.

Limitation issue:

Accrual of cause of action - Where one party did work for another for payment, the service provider's right to be paid arose as soon as the work was done, unless there was a "special term" to the contrary, and did not depend upon the making of a claim for payment, *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd [2005] EWCA Civ 814, [2005] 1 W.L.R. 3850, [2005] 7 WLUK 79* and *Coburn v Colledge [1897] 1 Q.B. 702, [1897] 4 WLUK 2* followed. Accordingly, the starting point was that the right to payment accrued as soon as the work was complete. Any "special term" to the contrary had to be one which meant that the service provider's right to be paid for the work arose at some later time, or depended on the fulfilment of a condition. There was a critical distinction between terms which were conditions precedent to the right to payment arising and those which imposed conditions on the bringing of proceedings, which were concerned with limiting the creditor's right to bring an action to enforce an entitlement to payment. Terms imposing conditions on the bringing of proceedings were procedural obstacles which did not prevent time running unless they were covered by one of the exceptions in the Limitation Act 1980. The parties had agreed that all invoices would be paid within 90 days, not that payment would not fall due until the 90th day. Affording the debtor time to pay did not postpone the accrual of the cause of action, although it might afford them a defence to a claim brought before the expiry of the credit period. Clear words were needed to displace the default position, especially if the "special term" gave the service provider complete control over the running of time for limitation purposes, *Legal Services Commission v Henthorn [2011] EWCA Civ 1415, [2012] 1 W.L.R. 1173, [2011] 11 WLUK 878* followed, *ICE Architects Ltd v Empowering People Inspiring Communities [2018] EWHC 281 (QB), [2018] T.C.L.R. 3, [2018] 2 WLUK 367* applied. The appellant's case would lead to the respondent being unable to postpone the limitation period indefinitely by not submitting an invoice (paras 24-25, 34-36, 41, 45-46, 48).

Conclusion - The judge was right to find that the claims for work done on or before 17 December 2013 were time-barred, regardless of which agreement they were performed under or whether the services were covered by the invoices, the undertaking or both. He would have been entitled to strike out any claims for payment for work done based solely on invoices for nonasthma related services arising under the oral agreement on the further and independent ground that the claim form did not include claims for sums arising under that agreement (paras 52-53).

HHJ Russen KC, in the case of LJR Interiors Limited v Cooper Construction Limited and Cooper Construction Limited v LJR Interiors Limited [2023] EWHC 3339 (TCC),

- The case dealt with an employer, LJR Interiors Limited, which sought enforcement, by way of summary judgment against a contractor, Cooper Construction Limited, of a decision of an adjudicator and, simultaneously, with the same contractor against the employer for a declaration that the adjudicator's decision was void and unenforceable by reason of the adjudicator having decided in the employer's favour in respect of a claim which was barred by virtue of the provisions of the Limitation Act.
- It is important to note that the employer's claim was a claim submitted as a Part 7 Claim whilst that of the contractor was submitted as a Part 8 Claim.
- The learned Judge, in paragraph 7 of his judgment noted that "*(t)he initial approach on the Part 8 Claim was simply that the cause of action had accrued no later than completion of the works under the contract between the parties in October 2014, so that LJR's claim for payment made on 31 July 2022 ('Application No. 4') was statute barred by the time it was referred to adjudication in September 2022*" (per paragraph 7). He went on to record, in paragraph 20 of his judgment that "*(o)n 31 July 2022, almost 8 years after they had finished works under the Contract, LJR submitted to Cooper Application No. 4 in the sum of £3,256.58 excluding VAT*" (per paragraph 20).
- Paragraph 53 of his judgment, simply for purposes of completeness, records that Section 13 (1) of the Arbitration Act 1996 extends the scope of the Limitation Acts to apply as much to arbitral proceedings as they do to legal proceedings.

The nub of the decision is to be found in paragraph 79 and 80 of the judgment:

79. *Keating* (op. cit.) states, at para. 16-029:

"Most standard forms for construction works provide for interim certification of sums due. Where such certificates are a condition precedent to the right to payment, the contractor's cause of action to be paid and to challenge the adequacy of the certificate accrues when the certificate is issued or ought to have been issued in accordance with the contract and not when the work giving rise to the certified sum is carried out. Further, depending on the precise wording of the contract, a further cause of action may arise when the final certificate is issued or ought to have been issued even though the sum in issue happens to be the same as that arising under an interim certificate."

80. The decision of the Court of Appeal in *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 814; [2005] 1 W.L.R. 3850 is cited in the text to support of that last proposition. In that case the court held that, on the true construction of the contract between the parties, the contractor's entitlement to payment, whether an interim or final payment, arose not when the work was done but when the engineer certified the amount to be paid by the employer, or ought to have certified it on the basis that the contractor was entitled to have a certificate issued. An amount which the contractor was entitled to have certified for interim payment, but which was not so certified, could give rise to a separate cause of action arising out of the certification of the final payment, given the different nature of the provisional and final certifications under the contract, but the claim to interest on that amount was statute barred to the extent it was based on an entitlement which arose more than 6 years prior to the commencement of the arbitration.

SOME CLOSING REMARKS:

- **“McKenzie’s Law of Building and Engineering Contracts and Arbitration”**

  edited by: Peter Ramsden, at page 209, contains the following statements, viz:

  “(n)ot only may the issue of a certificate indicate when payment is due, but in certain cases the issue of a certificate is a condition precedent to payment. For a certificate to be treated as a condition precedent for payment, the contract must provide for it clearly; such an intention must either be demonstrated by express words, or be clear upon reading the document as a whole. Moreover, where the granting of a certificate is a purely administrative function, the production thereof is not a condition precedent to the recovery of payment”; and

  “*(i)n certain cases, even though in terms of the contract the issue of a certificate is a condition precedent to payment, the contractor may nevertheless recover payment without a certificate having been given. This would apply in the event of a principal agent being in collusion with the employer and improperly refusing to certify*”.

- A contractual intention to subvert or otherwise detract from a common law postulate must necessarily be expressed in the clearest possible language. Absent the use of such language, the postulate is not readily or easily controverted. This is the lesson which is to be learned from slide **9** which reads as follows:

  > "*very clear words will be needed to achieve an extension of statutory limitation periods*" (per Legal Update Case Report published 6 February 2007).

- A contractor who is a party to a written contract "*... may nevertheless recover payment without a certificate having been given*" is if the common law affords such contractor such relief.

- Absent a statute, regulation or contractual arrangement which establishes that a debt is due, owing and payable, the common law position must pertain. Thus, if an employer claims from a contractor monies which it contends were paid by it to the contractor in error, the employer's entitlement to recovery of the amount overpaid falls due immediately the overpayment is made. To hold otherwise creates a prescriptive period or limitation prohibition which is elastic in the hands of the creditor. This is not a situation which either the Prescription Act or the Limitations Act would countenance.

Questions and/or discussion?