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The construction & energy law specialists

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Issue 262 - April 2022

Dispatch

Limitation and the Scheme

RHP Hirst & Anr v Dunbar & Others
[2022] EWHC 41 (TCC)

Here, Eyre J had held that the Claimants' case failed because there was no contract. They performed the Works at their own initiative and at their own risk rather than at the request of the Defendants. Although it was now an "academic" point, the Judge went on to consider whether the claim was, in addition, statute barred.

The claim form had been lodged at court on 2 August 2019. Practical completion was achieved by 4 December 2012. After that point, attendance on site in 2013 was very limited, involving dealing with snagging problems and/or warranty works. The Defendants said time ran from the substantial completion of the Works, i.e., 4 December 2012.

The Claimants said that the Scheme applied to the contract which meant that time did not begin to run until a payment notice under paragraph 9 of the Scheme had been or should have been issued by the Defendants. This should have happened not later than five days after the letter of 6 March 2014, i.e., the date of the making of a claim under paragraph 6 of the Scheme.

The court's starting point when determining the date of the accrual of a cause of action was summarised by HHJ Coulson QC in B*irse Construction Ltd v McCormick (UK) Ltd* [2004] EWHC 3053 (TCC):

"the date of the accrual of a cause of action for sums due under a contract for work or services will usually depend on the terms of the contract itself. However, it is important to note that the starting point for any consideration of this question is the established principle that, in the absence of any contractual provision to the contrary, a cause of action for payment for work performed or services provided will accrue when that work or those services have been performed or provided. In such circumstances, the right to payment does not depend on the making of a claim for payment by the party has provided the work or services ..."

A right to payment arises when the work in question was completed unless the terms of a particular agreement led to a different result.

Sometimes, a potential payee's cause of action accrues not when the work is completed, but only when some further condition is satisfied. This was the position in *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 814. Under clause 60 of the ICE Standard Form (6th ed), the employer was to make payment in the amount certified by the engineer as being due. This meant that the issue of a certificate was a condition precedent to the contractor's entitlement to payment with the effect that the right to payment arose when a certificate was issued or should have been issued and not when the work was completed.

Here, the Judge said it was necessary to distinguish between (a) contractual terms (or statutory provisions) such as that in *Henry Boot Construction* which are conditions precedent to a right to payment arising and (b) provisions which impose conditions for the bringing of proceedings and which are concerned with limiting the right to bring an action to enforce an entitlement to payment.

In the case of *Ice Architects Ltd v Empowering People Inspiring Communities* [2018] EWHC 281 (QB), Lambert J said there was a difference between an agreement determining when an entitlement to payment arose and, on the other hand, an agreement or term "concerning only the process of billing and payment":

"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."

Here, the Judge said that the Scheme here was concerned with arrangements for the "process of billing and payment" so that there are mechanisms for determining the dates for payment, and for identifying the parties' positions as to the sums due, and for resolving disputes as to those matters.

The Claimants said that the effect of paragraph 9 of the Scheme was to make the issue of a payment notice a precondition of their right to payment. It was the equivalent of the engineer's certificate. This meant that time only began to run from the date when such a payment notice was given or, in the absence of such a notice, the date when it should have been given. It followed that the demand of 6 March 2014 gave the base line for calculation of the date from which time began to run. That was because that was the date when the Claimants made a claim and so when the payment of the contract price became due.

The Judge disagreed. The provision at paragraph 9 of the Scheme for a payment notice from the paying party was different in nature from the requirement for an engineer's certificate. Paragraph 9 was concerned with the process of billing and payment, not the question of when the Claimants' entitlement to payment arose. Therefore, what mattered was that the right to payment arose when work was completed.

Here, that cause of action accrued on 4 December 2012 and the claim was statute-barred.

In the *Henry Boot* case, there was no way in which the parties could know what, if anything, was due in the absence of the engineer's certificate. It was that certificate which was to identify the sum due, and which gave the right to payment. In providing a certificate under the ICE conditions, an engineer is performing an independent and avowedly determinative role. The payment notice under paragraph 9 had to be provided by the Defendants and state the sum they considered due.

The cause of action is the right to payment of a reasonable sum for the Works. The only element which is needed for that cause of action to be complete is the completion of the Works; once the Works had been performed, the Claimants had done all that they were required to do under the Contract to earn their right to payment, and there was no further qualification needed or any further requirement to be met.

The difference is one between a provision which gives rise to an entitlement or right to payment and one which identifies when payment is due. One identifies when an entitlement to payment has arisen (and is relevant for determining whether a cause of action has or has not accrued), the other lays down a mechanism for identifying when payment is due, or for identifying disagreement about the amount due, is not a provision determining the accrual of a cause of action.

Coincidentally, Jacobs J had to consider the same question in the case of *Consulting Concepts International Inc v Consumer Protection Association (Saudi Arabia)* , [2022] EWHC 461 (Comm). The Judge referred in particular to the *Ice Architects* case. Words requiring payment within 90 days, were not sufficiently clear to displace the established principle that the cause of action arises when the work was performed.

The parties were not agreeing that the entitlement to payment did not arise until 90 days after receipt of the invoice. Adopting the "reasonable person" test, that an individual, in the position of the parties, would have understood the words in the clause to be an agreement concerning only the process of billing and payment. There was nothing to suggest that the entitlement to payment did not arise when the work was done. Clear words were needed if the timing of the accrual of the cause of action in an action for work or services were to be displaced.

When does a dispute arise?

Soteria Insurance Ltd v IBM United Kingdom Ltd

[2022] EWCA Civ 440

At first instance, amongst other issues, the Judge held that IBM had wrongfully repudiated the contract with CISGIL. The Judge found that, in accordance with clause 11.7 of Schedule 5 of the contract, CISGIL disputed the AG 5 invoice in good faith, and that, in consequence, IBM could not rely on the non-payment of that invoice to justify termination. The CA agreed.

In reaching this conclusion, the CA had to consider whether or not there was a dispute. Coulson LJ said that the "best simple summary" was provided by Mr Justice Akenhead in the case of *Whitley Town Council v Beam Construction (Cheltenham) Ltd* [2001] EWHC 2332 (TCC), where the Judge said that:

"a dispute arises generally when and in circumstances in which a claim or assertion is made by one party and expressly or implicitly challenged or not accepted."

Coulson LJ also considered that construction adjudication was relevant to the Judge's, at first instance, description of the overall scheme set out in paragraph 11 of Schedule 5 as being one in which, "*unless CISGIL disputed the invoice in good faith in accordance with paragraphs 11.11 and 11.12, it was obligated to pay the invoice within 7 Business Days of receipt*."

Those provisions were "clear and unambiguous and introduced a 'pay now, argue later' principle" - the basic principle underlying construction adjudication.

The first issue was whether or not the AG 5 invoice was disputed by CISGIL. Coulson LJ said that it was. CISGIL said in an email that they: "*cannot accept this invoice for payment*." A claim had been made by IBM in the form of the invoice, and that claim was expressly not accepted by CISGIL because of the absence of the Purchase Order Number. There was, therefore, in the plainest terms, a dispute as to the AG 5 invoice.

The suggestion that there was no dispute because CISGIL did not use the word "dispute" or similar and/or did not trigger the dispute machinery under clause 11 was rejected. This was not necessary for there to be a dispute in law. The email was also not "*simply (making) an administrative request for the invoice to be resubmitted with a Purchase Order.*" That is not what the email said.

LJ Coulson noted that these arguments ignored the common-sense approach to the meaning of "dispute." They were also an overly-technical approach to the construction of notices. A reasonable recipient of the notice would have the terms of the contract well in mind and the contract required a unique Purchase Order number for every invoice. The CA also considered whether CISGIL acted in good faith. Coulson LJ was of the view that, unless the contracting party has acted in bad faith, it is difficult to see how they can be in breach of an obligation of good faith. Here, IBM had conceded that IBM accepted that no individual acted dishonestly or in bad faith. If no-one acted in bad faith, there could not have been a breach of the obligation to dispute invoices in good faith.

The Judge, at first instance, found that CISGIL acted fairly and honestly towards IBM and did not conduct itself in a way which was calculated to frustrate the purpose of the contract or act in a way that was commercially unacceptable. There was no intentional or objectively reprehensible conduct, and so, no room for a good faith challenge.

That left the so-called prevention principle. However, given that the invoice was disputed and that CISGIL acted in good faith, it followed that CISGIL complied with the contract. That leaves no room for the prevention principle, which simply provides that a contract should not be construed in a way that allows the contract-breaker to take advantage of his own breach. Here, there was no breach in the first place.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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Edited by **Jeremy Glover, Partner**
jglover@fenwickelliott.com
Tel: + 44 (0)20 7421 1986
Fenwick Elliott LLP
Aldwych House
71 - 91 Aldwych
London WC2B 4HN

www.fenwickelliott.com