What limitation period applies to payment claims made under the Scheme for Construction Contracts? Claim that the Scheme acts as a certification process given the (Henry) Boot….

By Dr Tim Sampson and James Culverwell

In Hirst & Another v Dunbar & Others *[2022] EWHC 41 (TCC) Mr Justice Eyre held that payment terms implied by the Scheme for Construction Contracts do not displace the common law rule set out in* Coburn v Colledge *[1897] 1 QB 702 that, in the absence of a special term to the contrary such as that found in* Henry Boot Construction Ltd v Alstom Combined Cycles Ltd *[2005] EWCA Civ 814, the cause of action for payment under a contract for services accrues on completion of the work.*

Given it is well-established that a cause of action for breach of contract accrues when the breach occurs, one may be forgiven for the assumption that, where parties agree for example '30 days from date of invoice for payment', the cause of action for non-payment would accrue 30 days after the date of the invoice. In fact, a recent case of the author's involved a limitation dispute in which solicitors and counsel had worked on that very basis. However, 125 years ago, the Court of Appeal in *Coburn v Colledge* [1897] 1 QB 702 comprised of Lord Esher MR and Chitty and Lopes LJJ determined that in the absence of a special term of the agreement to the contrary, a right to payment under a contract for services accrues as soon as the work is done. Moreover, the accrual of the right to payment perfects the cause of action and time begins to run for limitation purposes. It has subsequently been held, following this authority, that a process for invoicing is not a 'special term' of the agreement but rather a mechanism for billing and payment (see for example *ICE Architects Ltd v EPIC* [2018] EWHC 281 (QB)).

In the construction industry, where continuing payments under contracts and sub-contracts can acquire byzantine complexity and missed payments can be responsible for the collapse of entire businesses, it is not surprising that payment terms are heavily regulated and suites of standard form contracts with bespoke payment terms are published and updated regularly. It may therefore be anticipated that such contracts would contain 'special terms' as referred to by their Lordships. Where provision is made for an engineer to certify the works carried out and payment is conditional upon this certificate, the court has held that this constitutes a 'special term' of the agreement such that the cause of action accrues when the certificate is or ought to have been issued (*Henry Boot*). The role of the engineer in *Henry Boot* was not only to determine what was to be paid but whether any payment was due at all; consequently, the cause of action only arose once that determination had been made. As such, it made no difference for limitation purposes that the certification process took place more than six years after the completion of the works being valued.

It is nevertheless all too common for parties to overlook agreeing adequate payment terms. Fortunately (at least for lawyers, if not for clients), the law now steps in to imply terms for payment under the Scheme for Construction Contracts (England and Wales) Regulations 1998 (as amended) ('the Scheme') and this has been fertile ground for litigation since its inception. Despite the regularity with which the implied terms are called into action, the courts have not ruled on their impact on limitation. Are they merely "process" terms – determining what sum is to be paid and when – with no impact on the accrual of the cause of action, or, are they more akin to the special certification provisions applied in *Henry Boot* – and therefore go to the root of the cause of action and hence limitation.

On Friday 14th January, Mr Justice Eyre handed down judgment in *Hirst and Another v Dunbar and Others* [2022] EWHC 41 (TCC), which now determines which of those two possible alternatives is to be preferred.

<u>The Facts</u>

The parties were involved in works to complete a housing development in Bradford. In the words of Eyre J, 'little heed appears to have been paid on either side to the difference between the personal capacities of the individuals controlling the companies and the separate legal identity of the companies'. Here, as there, the parties are referred to as the Claimants and the Defendants.

The site, originally a farm, had been partially converted to an estate of 26 properties before the original developer folded. It was bought from liquidators by a company registered in Belize. The Claimants took on the job of completing the development and began work in October 2011. The primary dispute at trial was whether the Claimants had been contracted to complete the works by one or more of the Defendants, or whether they had taken the work on at their own risk with a view to purchasing the site themselves. Although the Defendants were not the registered owners, there was evidence that the purchase had been a joint venture between Mr Dunbar (D1) and the director of the Belizean corporation. The court ultimately found on the facts that there was no contract between the parties.

Nevertheless, it was not disputed that the Claimants carried out substantial works to the site and at trial it was accepted that practical completion had been certified on 4th December 2012. The Defendants had also carried out ground works to the site alongside the Claimants (allegedly having been contracted to do so by the Claimants) and in April 2012 D2 became the registered owners, taking over the remainder of the works in or around the summer of 2012. The properties were sufficiently complete that they could be let from around June/July 2012.

It was the Claimants' case that they had agreed to be paid after the works were done – there were no interim applications. Whilst there were some informal conversations in 2013, it was found that the first formal claim for payment was by letter enclosing an account of works done in March 2014 seeking £476,886.29. There was no response to this and in Autumn 2018, the Claimants sent further claims for payment including instructing quantity surveyors to draw up an account.

A claim for the reasonable price under a contract (or on *quantum meruit*) was brought on 2nd August 2019 and the Defendants raised a limitation defence. The second issue for the court was therefore whether the cause of action had accrued before 2nd August 2013.

<u>The Limitation Dispute</u>

It was the Claimants' case that the contract did not contain an adequate mechanism for payment and therefore the Scheme implied payment terms, including that—

- the final payment was due on the later of 30 days following completion of the works or the Claimants making a claim;
- that the Defendant was required to serve a payment notice 5 days after the due date for payment; and

- in the absence of a payment notice, the sum in the claim would become the notified sum payable by the Defendant.

The payment notice was said to be akin to the certificate in *Henry Boot* because unlike *ICE Architects*, this was a case in which the sum to be paid was not known until it had been assessed under the payment mechanism which the parties were obliged to follow under the contract. Further, whilst there was no direct authority on the point, the editors of *Wilmot-Smith on Construction Contracts*, 4th edition, stated at 10.30 that contracts under the Scheme addressed a lack of certification through the use of payment notices thus drawing the comparison between certificates and payment notices. It was therefore submitted that a claim by the Claimants and a payment notice under the terms implied by the Scheme was the contractual mechanism by which payment was determined, without which the parties could not know what was to be paid. This was therefore a 'special term' in accordance with *Coburn* which displaced the common law position.

The Defendants case was that the Scheme did not apply and then even if it did no terms from Part II of the Scheme were required to be implied because the contract (assuming there was a contract at all) already contained an adequate payment mechanism. This was held to be "untenable" by the court. However, the Defendants primary contention was that the Claimants' cause of action had accrued when the works were completed and that the contract did not contain a special term that would defer that entitlement. Furthermore, were the Claimants analysis of the Scheme held to be correct, then this would have the wholly undesirable effect of placing the accrual of the cause of action for payment, under the terms of the Scheme, in the hands of the Claimants and thereby permit stale claims from being raised years after the works in question had been completed.

The Decision

The court set out the law in this area at paragraphs 89 to 112 of the judgment. The judge considered the position set out in *Coburn* (as above) and noted the comments of Lopes LJ that were the cause of action to accrue on the service of a bill, that would allow the solicitor the power to wait 20 years before serving their bill and then have another six years within which to commence proceedings. This observation was echoed in judgments since, with the court observing in *Legal Services Commission v Henthorn* [2011] EWCA Civ 1415 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'.

However, the judge stated at paragraph [102] that when considering whether a term of the contract displaced the common law position, 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."*

The judge noted the observations in *Henthorn* and *ICE Architects* on this point, as well as the decision of the House of Lords in *Sevcon Ltd v Lucas CAV Ltd* [1986] 2 All ER 104 in which their Lordships considered the purpose of the Limitation Act in conjunction with bars to enforcement of causes of action. Lord Mackay stated that the 'true principle …is that time runs generally when a cause of action accrues and that bars to enforcement of accrued causes of action which are merely

procedural do not prevent the running of time unless they are covered by one of the exceptions provided in the 1980 Act itself'.

It was noted that *Henry Boot* was a situation in which the proper construction of the parties' contract was that the potential payee's cause of action accrued not when the work was completed but only when some further condition was satisfied. Dyson LJ held in that case 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.

Having considered those principles, the judge applied them to the Claimants' case. It was held that 'the difficulty' with that case was that the date of the payment notice (demand) – under paragraph (6) of Part II of the Scheme - was wholly within the control of the Claimant because it relied on the Claimant making a claim. The judge did not accept the Claimants' submission that such a claim for payment would still have to be made within a reasonable time following completion of the works, holding that there was no basis for such an implication, and this had the potential to create satellite litigation concerning what amounted to a reasonable period of time.

In any event, the judge distinguished the situation under the instant contract with that in *Henry Boot* on the basis that (had a contract existed) the Claimants had a right to a reasonable sum in respect of the works and a payment notice under paragraph 9 of the Scheme to be issued by the Defendant was not comparable to the certificate issued by a third party engineer. It was thus held at [122] that, if there had been a contract and thus the implied terms under the Scheme were implied, the Claimant had a right to payment at a date to be determined in accordance with the Scheme but it was a right which had accrued from the moment the works had been completed (in December 2012) and in respect of which the Claimants did not need to take any further action for the right to be crystallised.

The contractual claim was therefore statute-barred as the cause of action accrued in December 2012 at the latest. The same statutory bar also applied to the alternative claim for a *quantum meruit* payment is respect of the Claimants' works.

Conclusion

Drawing together the principles of the previous authorities on accrual of the substantive cause of action permitting claims for payment of a sum due under a contract and the effect of contractual terms and/or statutory regulation of the procedural right to pursue those claims at a particular time, the court held that payment terms implied by the Scheme do not displace the common law position from *Coburn*. Rather, they are mechanisms for identifying when payment is due or for identifying disagreement about the amount due and are not provisions determining the accrual of a case of action.

This decision now provides authority as to how the terms implied by the Scheme impact limitation. However, whether or not a construction contract contains implied terms, or terms that may impact the accrual of the cause of action, the effect of limitation on a claim always warrants extreme caution. Parties are best advised to err on the side of caution and issue within six years of the completion of works rather than running the risk that their contract does not provide the protection they thought it would.

The Claimants were represented by Dr Tim Sampson and James Culverwell of Lamb Chambers.