

Limitation defences, under contracts for services

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Introduction

1. Where a contract for services provides that “*all invoices submitted by [the service provider] will be paid within 90 days...*”, does a cause of action accrue for limitation purposes when the work is completed, or on the later date when 90 days has elapsed from service of an invoice for that work? The Court of Appeal has authoritatively considered that issue in *Consulting Concepts International Inc v Consumer Protection Association (Saudi Arabia)* [2022] EWCA Civ 1699.
2. Andrews LJ (Whipple and Peter Jackson L.JJ. agreeing) upheld the lower court’s decision that the claim for unpaid invoices was out of time. The clock starts ticking from the point when the work is completed, because that is ordinarily when the liability arises. A special contract term may displace that, but must clearly postpone the liability to pay, and not simply regulate the creditor’s ability to bring a claim (at [33]-[35]).

Background of the case

3. The Appellant, (“CCI”) was a company incorporated in New York, and the Respondent, (“CPA”) was an organisation incorporated under Saudi Arabian laws.
4. CCI and CPA signed an agreement on 10 June 2013, to develop strategies and policies to address various issues in relation to Asthma, particularly with reference to Saudi Arabia (the “June 2013 Agreement”). (CCI also relied on a second purported agreement, but it was held not to have been properly pleaded.)
5. It was a term of the June 2013 Agreement that (the “Term”):

“All invoices submitted by CCI will be paid within 90 days if funds of Stakeholders are available, by [sic] submission of said Invoice by Consumer Protection Association to a Bank account designated by CCI.”

6. The funds of stakeholders were available to CPA at all times. CCI issued three invoices to CPA, for services provided by CCI to CPA before 17 December 2013 pursuant to the June 2013 Agreement. These invoices totalled 15,129,800 USD. CPA did not pay any of the sums on the invoices, nor pursuant to the Undertaking.
7. CCI also relied on a further contractual document composed in Arabic, entitled “Undertaking and Commitment”, by which CPA provided an undertaking to CCI to pay a sum of an equivalent of 43,055,500 USD to CCI by 31 December 2013, (the “Undertaking”).
8. On 27 December 2019, CCI issued a claim in the England and Wales jurisdiction to recover the sum of 15,129,800 USD due on the invoices, as well as 43,055,500 USD pursuant to the Undertaking. CCI had submitted the invoices to CPA less than 90 days before 27 December 2013 (*i.e.*, within the limitation period if—but only if—the cause of action had accrued 90 days following presentation of an invoice).
9. CPA brought an application to strike out the claim on the grounds that the claim was out of the relevant limitation period. Section 5 of the Limitation Act 1980 provides a limitation date for contractual claims, by which such a claim shall not be brought after the expiration of six years from the date on which the cause of action accrued.

Decision of the High Court

10. Jacobs J. dealt with CPA’s application to strike out the claim at first instance.
11. CCI relied on the Term of the June 2013 Agreement prescribing a 90-day payment window for the invoices from when the work was completed, and submitted that for the purposes of limitation, the clock started ticking on the expiration of the 90-day period, *i.e.*, on the 90th day pursuant to that term. It relied on *Coburn v Colledge* [1897] 1 QB 702, (“Coburn”), albeit a case relating to a statutory deadline under the Solicitors Act 1843, rather than limitation under the Limitation Acts.
12. CPA relied on *Ice Architects Ltd v Empowering People Inspiring Communities* [2018] EWHC 281 (QB), (the “Ice case”) and *Hirst v Dunbar* [2022] EWHC 41 (TCC), in submitting that the Term was to be interpreted as stating the mode of payment, rather than the accrual of the cause of action for the purposes of limitation. Therefore, in this matter, the cause of action accrued upon the completion of the services, on 17 December 2013.

13. As to the Undertaking, in its written argument CCI described the Undertaking as an amount to be paid for work done in the June 2013 Agreement, and for future work to be done. The Undertaking was also described as arising out of concerns about non-payment for the services rendered pursuant to the June 2013 Agreement.
14. CPA argued that the Undertaking referred to services being rendered by CCI, and not to any further services to be provided by CPA. On this basis, CPA argued that the Undertaking was also subject to the limitation period of six years, which accrued no later than 17 December 2013, and as such, was not a 'special term' which could override the six-year limitation period.
15. In his judgment, Jacobs J. considered the case of *Coburn*, and found that "*matters have developed in the years since Coburn*". He distinguished it on the basis that the entitlement to payment in that case was not a contractual provision, relating to the mechanisms of payment, but rather, a statutory condition.
16. The Judge also underlined the lack of clarity in the wording of the Term, as to enable the creditor to displace when the cause of action accrues and the statutory limitation period.
17. The Judge struck out the claim, holding that the cause of action had accrued when the services were provided, being no later than 17 December 2013, and therefore, the claim being issued on 27 December 2019 was out of the six-year limitation time period prescribed by section 5 of the Limitation Act 1980. The Undertaking did not help the claimant because it was merely an agreement to pay for work that had already been done under the June 2013 Agreement, and lacked consideration.

The Decision of the Court of Appeal

18. The Court of Appeal considered the decision in *Henry Boot Ltd v Alstom Ltd* [2005] EWCA Civ 814, [2005] 1 WLR 3850, ("Henry Boot") where Dyson LJ found that the cause of action accrues when work is completed, and is not contingent on a demand for payment. Andrews LJ noted that this principle was derived from case of *Coburn*. The Court emphasised the principle that the delivery of an invoice or bill, is not required for the cause of action to accrue. The judgment at paragraph 33 clearly summarises the principle stating:

"The debt accrues when the work is done; the time at or by which the debt must be discharged is a different matter altogether. Indeed, a provision in a contract which sets a time for payment for services rendered is implicitly premised on the existence of a liability

to pay for those services. The right to sue for the payment may not arise until the time has elapsed, but that does not affect the accrual of the right to payment.”

19. The Court clarified the meaning of a “special term”, referring to the *Henry Boot* decision, distinguishing a condition precedent for payment from terms which specifically relate to a condition for the commencement of legal proceedings.
20. The judgment considered the *Ice* case, endorsing its approach and applicability to this case, finding that there had to be ‘clear words’ if the Court is to construe an agreement between the parties as to displace the usual principle of when the limitation period begins.
21. As to the Undertaking, the Court of Appeal upheld the lower court’s reasoning that the Undertaking did not produce to a new cause of action in respect of the same debts that had fallen due under the June 2013 Agreement.
22. The Court of Appeal accordingly dismissed the appeal.

Practical Implications of the judgment

23. This judgment provides clear-cut and helpful direction to those wishing to bring a claim for breach of contract, particularly in disputes involving services which are more protracted and have vague start and end dates. The starting point is that limitation will start to run at the point that the services are completed such that there arises an obligation to pay. The parties are free to modify that, but must use clear words. A contract is unlikely to be interpreted as giving one party the freedom to postpone limitation indefinitely, by issuing an invoice whenever it chooses (see at [36]).
24. This judgment therefore emphasises the importance of communication and agreement between parties on the date of completion of agreed services. In disputes involving building works, this is regularly done through a process of certification, which will be issued by a third party and will clearly prescribe the date of payment or of completion of the works. Whilst it may seem obvious, if a party considers that there are works outstanding, signing a certificate of completion could waive some of their rights to a remedy for breach of contract.
25. The completion of works is not only relevant in confirming the customer’s acceptance of the completion of the services provided to them, but is material for the Courts in deciding when the limitation period begins.

26. Even if the limitation period has expired by 1 to 2 days, the Courts take a very robust approach to limitation, and it is very often an 'iron-clad' defence to a claim. As in this case, it did not matter that the claims were for a substantial sum of money, the prescribed statutory limitation period was still upheld.
27. If the parties are engaging in settlement talks, or as in this case, pursuing linked litigation in other jurisdictions, it may be wise to issue the claim protectively within the limitation period, and then apply for the claim to be stayed, rather than to hope that the matter resolves without the need to issue the claim, and risk the expiry of the limitation period.
28. This decision also sheds useful light on what a 'special term' is, and what terms could displace the rule that the limitation period in a contractual claim begins when work is completed. Any term which is agreed between the parties should be clearly worded, unambiguous, and specifically relate to when the limitation period commences, and a party is entitled to commence legal proceedings against the other.

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