Neutral Citation Number: [2018] EWHC 281 (Admin)

Case No: QB/2017/0261

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/02/2018

Before :

MRS JUSTICE LAMBERT

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Between :

ICE ARCHITECTS LTD	**Claimant**
- and -	
EMPOWERING PEOPLE INSPIRING COMMUNITIES	**Defendant**

- -
- -

Alexander Wright (instructed by **Berryman's Lace Mawer LLP**) for the **Claimant**
Matthew Finn (instructed by **DWF LLP**) for the **Defendant**

Hearing date: 24th January 2018

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Approved Judgment

Mrs Justice Lambert :

1. This is an appeal from the judgment of HHJ Parfitt of 13th October 2017 in which he found, on a trial of a preliminary issue, that the Claimant's action for payment of the balance of an invoice dated 23rd April 2009 was statute barred under section 5 of the Limitation Act 1980. The appeal raises a single issue: whether HHJ Parfitt was wrong to find that the Claimant's cause of action accrued on the date upon which the work which formed the subject matter of the invoice was completed rather than, as contended by the Claimant, 30 days after receipt of the invoice by agreement between the parties.

The Facts

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 to 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 to the document described above is acceptable. EPIC Ltd will endeavour to make payment within 30 days of receipt (unless otherwise stated)".

4. The terms of the letter of 10th July 2007 were accepted by ICE and although there were subsequent discussions between the parties which related to the scope of the works to be undertaken by ICE and the annual limit on works to be undertaken, it was common ground between the parties that there was no amendment to, or amplification of, the terms as to payment in that letter.

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.

The Preliminary Issue Hearing before HHJ Parfitt

6. The hearing took place on 14th September 2017 and HHJ Parfitt handed down his judgment on 13th October 2017.

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.

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 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 C*oburn* 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.

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.

Legal Framework

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 in *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 Esher 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.

14. Both parties also drew my attention to the three other cases which had been considered in the judgment of HHJ Parfitt.

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 *Legal 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.

Arguments on Appeal

18. There were five grounds of appeal before me. The first ground, that HHJ Parfitt had erred in failing to have regard to the fact that the date on which the cause of action accrued was the date on which the breach occurred was not pursued as a discrete ground by Mr Wright who accepted that so far as relevant the action was a debt action rather than an action for breach of contract. The remaining grounds concerned:

    i) the Judge's failure to conclude that the terms of the contract in *Boot* were materially similar to those set out in the letter of 10th July 2007;

    ii) the Judge's failure to give any reason for distinguishing *Boot*;

    iii) the Judge's error in distinguishing *Levin*;

    iv) the Judge's error in treating the requirement for an invoice to be issued and for 30 days to elapse as similar to the regulatory provisions requiring a solicitor to issue a bill.

19. Neither the grounds of appeal, nor the Appellant's skeleton argument, addressed specifically the central issue before me; namely the objective interpretation of the relevant terms in the letter of 10th July 2007. Before me, Mr Wright advanced a number of points in support of his submission that the short paragraph entitled "Basis of Payment" in the letter of 10th July 2007 was a "special clause" (as described by Lord Esher in *Coburn*) by which the parties agreed that the cause of action in respect of the monthly invoices did not arise until 30 days after receipt of the invoices. He relied on the header to the relevant paragraph, "Basis of Payment"; that this phrase was repeated within the paragraph itself; that the terms set out in that paragraph mandated that ICE should invoice EPIC on a monthly basis thus avoiding the potential mischief identified in both *Coburn* and *Henthorn* that otherwise a creditor might have control over the limitation period; that the obvious inference to be drawn from EPIC being given 30 days during which to make payment was that the right to payment did not arise until that time period had expired. Further, that given that the procedural bar created by section 69 of the Solicitors' Act 1974 does not preclude other modes of debt enforcement such as the service of a statutory demand for payment within 21 days (see *In re A Debtor* [1993] Ch 286) any construction of the parties' intention other than that entitlement to payment arose only upon the expiry of the 30-day payment window would be absurd.

20. Mr Wright was also critical of a number of elements of HHJ Parfitt's reasoning. He argued that HHJ Parfitt misunderstood (or at least mis-stated) *Coburn* at paragraph 26 of his judgment where he observed that the "*material distinction identified in the case was between facts which are a necessary part of the right to be paid and those matters which might bar that right (such as …failure to comply with the statutory requirements*). Mr Wright argued that the Judge failed to distinguish *Levin* and he was in any event wrong to conclude that *Levin* demonstrated the operation of the *Coburn* principle. Mr Wright also argued that the Judge failed to recognise that the terms as to entitlement to payment were similar to those in *Boot*, save for the inconsequential detail that the payment was against certificates rather than invoices.

21. For the Respondent, Mr Finn contended that the terms set out in the letter under "Basis to Payment" did not, on an objective interpretation, demonstrate the parties' intention that ICE's entitlement to payment only arose 30 days following the receipt by EPIC of the invoice. He submitted that the terms, viewed in context, were no more than an agreement between the parties concerning the mechanics of payment namely that monthly invoices would be issued and that EPIC would try to make payment within a month. There was nothing, he submitted, within the letter to suggest that the intention of the parties was to delay ICE's entitlement to payment from the completion of the work to a date 30 days after the receipt of the invoice. He argued that such an agreement to shift the accrual of the cause of action would require clear words to do so as, otherwise, the creditor would have control over time running. He submitted that, as in *Coburn*, had the Appellant commenced proceedings against the Respondent before the issue of an invoice, and the Respondent pleaded the lack of an invoice, this may have at most affected the Appellant's right to bring an action immediately following completion of the work or services in question. The terms in the letter would have operated as a procedural bar to an action, but no more.

Discussion and Conclusions

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.

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.

25. Mr Wright also submitted that, if ICE's entitlement to be paid arose on completion of the works then, on the authority of *In Re A Debtor*, ICE could still have served a statutory demand and obtained payment from EPIC within 21 days notwithstanding the contractual agreement as to a payment "window". He argued that, in these circumstances, any objective interpretation of the timing of the entitlement to be paid other than that for which he contended, would be wrong. I do not agree with him. This argument was not advanced before HHJ Parfitt, nor did it feature in the Grounds or the Appellant's skeleton argument (neither of which were written by Mr Wright). However, the decision *In Re A Debtor* itself leads to an incongruous result. S. 69 of the Solicitors' Act 1974 prevents a solicitor from commencing an action for his fees for a period of one month but does not prevent a solicitor from taking earlier, alternative, modes of enforcement which were considered by the Court *In Re A Debtor* to be distinct and separate from pursuing an action which was hedged with statutory procedural hurdles. As Mr Finn has submitted, a similar incongruity or disjuncture between the Appellant's right to serve a statutory demand and the agreement as to a payment window of 30 day may also arise. It does not however affect the timing of the accrual of the cause of action.

26. I do not accept Mr Wright's submission that HHJ Parfitt's analysis of the legal principles was wrong. Although in paragraph 26(c), the judge refers to the distinction between facts "*which are a necessary part of the right to be paid and those matters which might bar that right*", as Mr Wright accepted in his submissions to me, had HHJ Parfitt added "*to bring an action*" then no complaint could be made. Although the words do not appear, it is clear that HHJ Parfitt was drawing the *Coburn* distinction between facts necessary to complete the cause of action and procedural bars to the action. He goes on to describe in parenthesis the sorts of matters which "*might bar the right*". All of them are procedural bars: "*limitation itself but also facts*

such as the failure to comply with the statutory requirements e.g statutes about solicitor's bills in Coburn".

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.

28. Finally, I do not accept that, as submitted by the Appellant, the Judge was wrong to describe *Levin* as an application of the *Coburn* principle. *Coburn* is authority for the proposition that, absent a special term of the agreement, the cause of action accrues at the time of completion of works in a services agreement. *Levin* did not concern an action for works or services but an action on a number of guarantees. However, in *Levin* the Court undertook a similar exercise of determining the intention of the parties on an objective construction with a view to ascertaining the question which, correctly, HHJ Parfitt considered to be at the heart of identifying the time at which the cause of action accrues, namely, what has to happen for an entitlement to be paid to arise. To that extent, HHJ Parfitt was correct in saying that the case is an application of the *Coburn* principle. Even if HHJ Parfitt was wrong to consider that *Levin* reflected an application of *Coburn*, *Levin* is distinguishable as a claim under a guarantee against a party whose liability was secondary rather than a claim under an agreement for works and services. In the latter, clear words are required before the Court will infer that the parties intended the creditor's cause of action to accrue after the date upon which the works were completed.

29. I therefore dismiss this appeal for the reasons stated. It follows that I make no ruling on the need for a Respondent's Notice nor, if needed, on the application for permission to serve the Notice late. My judgment is sufficient to dispose of the appeal without the need for me to consider those arguments.

30. I invite the parties to draw up the appropriate Order.