



Neutral Citation Number: [2018] EWHC 2192 (TCC)

Case No: HT-2017-000262

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/08/2018

Before:

MRS JUSTICE O'FARRELL

Between:

**SWANSEA STADIUM MANAGEMENT
COMPANY LIMITED**

Claimant

- and -

**(1) CITY & COUNTY OF SWANSEA
(2) INTERSERVE CONSTRUCTION LIMITED**

Defendants

Justin Mort QC & Tom Owen (instructed by **DJM Solicitors**) for the **Claimant**
Paul Darling QC (instructed by **Reynolds Porter Chamberlain LLP**) for the **Second Defendant**

Hearing dates: 7th June 2018

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE O'FARRELL

Mrs Justice O'Farrell:

1. The matter before the court is the Second Defendant's application for summary judgment against the Claimant in respect of part of the claim, alternatively for that part of the claim to be struck out, on the ground that the limitation period had expired when proceedings were commenced.

Background

2. The proceedings concern the Liberty Stadium in Swansea. The First Defendant is the freehold owner of the stadium. The Claimant is the leasehold owner and operator of the stadium for the benefit of the Swansea City Association Football Club Ltd.
3. By a contract dated 17 June 2004, executed as a deed, the First Defendant engaged the Second Defendant as contractor to carry out the design and construction of the stadium ("the Building Contract").
4. The works were commenced in about September 2003.
5. On 1 April 2005 Gardiner & Theobald ("G&T"), the Employer's Agent under the Building Contract, sent the following letter to the Second Defendant (then known as Interserve Project Services Limited):

"Re: New Stadium

For and on behalf of the Employer, the City and County of Swansea, we are writing in accordance with Clause 16.1 of the Conditions of Contract, to inform you that the Works have reached Practical Completion as at 31 March 2005.

As you are aware there are still some works to complete and defects to be made good and we will be issuing a schedule next week."

6. On 22 April 2005 the First Defendant granted a lease of the stadium to the Claimant for a term of 50 years. The lease contains a tenant's repairing covenant.
7. In about April 2005 the Claimant (as "the Beneficiary"), the First Defendant (as "the Employer") and the Second Defendant (as "the Contractor") entered into an undated collateral warranty, executed as a deed ("the Collateral Warranty"). Although the document on its face identifies Interserve plc as "the Guarantor", it transpires that Interserve plc did not in fact execute the Collateral Warranty.
8. On 30 May 2008 the final account for the works was agreed.
9. Under cover of a letter dated 26 May 2011, G&T enclosed the Notice of Completion of Making Good Defects, which was stated to be achieved on 14 April 2011.
10. On 14 June 2012 the First Defendant and the Second Defendant entered into a settlement agreement in respect of outstanding sums due under the final account.

The proceedings

11. On 4 April 2017 the Claimant issued the claim form, seeking damages in the sum of £1.3 million approximately against the defendants in respect of alleged defects in the stadium, namely: (i) paint delamination and associated corrosion to the exposed steel structural elements of the stadium; and (ii) inadequate resistance for foot traffic of the surface of the concourse and mezzanine floor, causing visitors to slip and fall.
12. The pleaded case against the Second Defendant is that:
 - i) the design and construction of the concourse flooring, and the supply, construction and painting of the steelwork were defective ("the Original Construction Claims"); and
 - ii) the Second Defendant failed to identify and rectify the flooring and/or paintwork defects pursuant to its obligations under clauses 16.2 and 16.3 of the Building Contract ("the Clause 16 Claims").
13. The Claimant pleads that the defects were caused by breaches of the Building Contract on the part of the Second Defendant and that such breaches constituted breaches of the Collateral Warranty on the part of the Second Defendant.
14. In its Defence dated 13 November 2017 the Second Defendant pleads that the claims are time barred because the claim was commenced more than 12 years after 31 March 2005, the date of practical completion.

The application

15. The Second Defendant seeks the following orders:
 - i) summary judgment in favour of the Second Defendant on the claims made in paragraphs 89(1) to (5) inclusive and 93(1) to (4) inclusive of the Particulars of Claim and striking out of those paragraphs from the Particulars of Claim; and
 - ii) the Claimant's claims in paragraphs 103-105 of the Particulars of Claim be confined to the breaches alleged in paragraphs 89(6) and 93(5) of the Particulars of Claim.
16. The claims made in paragraphs 89(1) to (5) are the Original Construction Claims in respect of the flooring. The claims made in paragraphs 93(1) to (4) are the Original Construction Claims in respect of the painting.
17. The claims made in paragraphs 103-105 are the allegations of breach of the Collateral Warranty. The claim made in paragraphs 89(6) is the Clause 16 Claim in respect of the flooring and the claim made in paragraph 93(5) is the Clause 16 Claim in respect of the painting. It is common ground that for the purpose of this application there is no limitation defence to the Clause 16 Claims.
18. The issue before the court is whether the Second Defendant can establish that the Claimant has no real prospect of succeeding on the Original Construction Claims because they are barred by limitation.

The Building Contract

19. The Building Contract was the JCT Standard Form of Building Contract with Contractor's Design 1998 edition (incorporating amendments 1 to 4), subject to bespoke amendments made by the parties.
20. Clause 2 obliged the Second Defendant to complete the design and carry out the works.
21. Clause 16.1 (as amended) states as follows:

“When in the reasonable opinion of the Employer the Works have reached Practical Completion and the Contractor has complied with clause 6A.5.1 or has complied sufficiently with clause 6A.5.2, whichever clause is applicable, the Employer shall give the Contractor a written statement to that effect, which statement shall not be unreasonably delayed or withheld, and Practical Completion of the Works shall be deemed for all the purposes of this Contract to have taken place on the day named in such statement.”
22. Clause 6A.5.2 is the relevant provision and concerns the Second Defendant's obligation to provide a health and safety file:

“... within the time reasonably required in writing by the Planning Supervisor to the Contractor the Contractor shall provide, and shall ensure that any subcontractor, through the Contractor, provides, such information to the Planning Supervisor ... as the Planning Supervisor reasonably requires for the preparation, pursuant to regulations 14(d), 14(e) and 14(f) of the CDM Regulations, of the health and safety file required by the CDM Regulations.”
23. Clause 16.2 (as amended) states:

“Any defects, shrinkages or other faults which shall appear within the Defects Liability Period and which are due to failure of the Contractor to comply with his obligations under this Contract or to frost occurring before Practical Completion of the Works, shall be specified by the Contractor in a Draft Schedule of Defects which he shall deliver to the Employer not later than 14 days after the expiration of the said Defects Liability Period, and the Employer may within 21 days of receipt of such Draft Schedule notify the Contractor of his comments and any further such defects, shrinkages or other faults which are to be included in the Schedule. 28 days after delivery of the Draft Schedule to the Employer the Contractor shall deliver to the Employer a Schedule of Defects which shall be based upon the Draft Schedule and shall take account of the comments and further items notified by the Employer (if any) and within a reasonable time after delivery of such Schedule the defects, shrinkages and other faults therein specified shall be made good.”

24. Clause 16.3 states:

“Notwithstanding clause 16.2 the Employer may whenever he considers it necessary so to do, issue instructions requiring any defect, shrinkage or other fault which shall appear within the Defects Liability Period and which is due to failure of the Contractor to comply with his obligations under this Contract ... to be made good and the Contractor shall within a reasonable time after receipt of such instructions comply with the same at no cost to the Employer unless the Employer shall otherwise instruct;... Provided that no such instructions shall be issued after delivery of a Schedule of Defects or after 14 days from the expiration of the Defects Liability Period.”

25. Clause 17.1 states:

“If at any time or times before Practical Completion of the Works the Employer wishes to take possession of any part or parts of the Works and the consent of the Contractor (which consent shall not be unreasonably delayed or withheld) has been obtained, then, notwithstanding anything expressed or implied elsewhere in this Contract, the Employer may take possession thereof. The Contractor shall thereupon issue to the Employer a written statement identifying the part or parts of the Works taken into possession and giving the date when the Employer took possession (in clauses 17, 20.3 and 22C.1 referred to as ‘the relevant part’ and ‘the relevant date’ respectively).”

26. Clause 17.1.1 states:

“For the purposes of clauses 16.2, 16.3 and 30.4.1.2 Practical Completion of the relevant part shall be deemed to have occurred and the Defects Liability Period in respect of the relevant part shall be deemed to have commenced on the relevant date.”

27. Article 10 (as amended) states:

“The Contractor shall within 14 days of a written request by the Employer to do so execute and deliver to the Employer deeds of collateral warranty in favour of:

...

- (c) any first tenant of the whole or any part of the property at which the Works are to be undertaken in the form of Appendix [] hereto; and

...

The warranty will be in the form(s) contained in the appendices referred to above unless amendments are agreed by the Employer in writing beforehand.”

The Collateral Warranty

28. The Collateral Warranty is undated. The Claimant pleads that it was executed by the Claimant as a deed in about 2012 and, so far as the Claimant is aware, the Second Defendant executed the Collateral Warranty as a deed in about 2007. In its Defence, the Second Defendant pleads that the Collateral Warranty was sealed and delivered to the Claimant in April 2005.

29. The recitals to the Collateral Warranty state:

“A. The Contractor has entered into a contract dated 17 June 2004, (“the Contract”) with the Employer for the design, carrying out and completion of the construction of ... a new 20,000 seat stadium for football, rugby and concert events at Llandore, Swansea (“the Works”) as more particularly described in the Contract.

B. The Beneficiary has an interest in the Works as a tenant of the Stadium and has relied and will continue to rely upon the skill and judgement of the Contractor.

C. Pursuant to Article 10 of the Contract the Contractor has agreed to execute a deed in the form of this Agreement in favour of the Beneficiary (and its successors and assigns).

...”

30. Clause 1 of the Collateral Warranty states:

“The Contractor warrants, acknowledges and undertakes that:-

.1 it owes a duty of care to the Beneficiary in the carrying out of its duties and responsibilities in respect of the Works;

.2 in the design of the Works or any part of the Works, insofar as such design has been or will be carried out by or on behalf of the Contractor, it has exercised and will continue to exercise all the skill care and diligence to be expected of an appropriately qualified and competent Architect or other appropriate professional designer who is experienced in carrying out such work for projects of a similar scope, complexity, nature and size to the Works;

- .3 all materials and goods supplied or to be supplied for incorporation into the Works are or shall be of a quality, kind and standard which complies with the express and implied terms of the Contract;
- .4 all materials and goods recommended or selected or used by or on behalf of the Contractor shall be in accordance with good building practice and the relevant provisions of British Standard documents;
- .5 all workmanship, manufacture and fabrication shall be in accordance with the Contract;
- ...
- .7 it has complied and will continue to comply with the terms of and regularly and diligently carry out its obligations under the Contract.

Provided that the Contractor shall have no greater liability under this Agreement than it would have had if the Beneficiary had been named as joint employer with the Employer under the Contract.”

31. Clause 3 states:

“Nothing in the Contractor’s tender, the [Contract] or in any specification, drawing, programme or other document put forward by or on behalf of the Contractor and no approval, consent or other communication at any time given by or on behalf of the Employer or the Beneficiary shall operate to exclude or limit the Contractor’s liability for any breach of its obligations hereunder.”

32. Clause 4 states:

“The provisions of this Agreement shall be without prejudice to any rights or remedies which the Beneficiary may have against the Contractor, whether in tort or otherwise, and shall not be deemed or construed so as to limit or exclude any such rights or remedies.”

33. Clause 6 states:

“The Contractor hereby covenants with the Beneficiary that it will maintain with reputable insurers carrying on business in the United Kingdom from the date hereof, for a period expiring no earlier than 12 years after the date of Practical Completion of the Works, professional indemnity insurance...”

34. Clause 7 states:

“The Guarantor hereby:-

- .1 guarantees to the Beneficiary the due and proper performance by the Contractor of each and every obligation of the Contractor arising under this Agreement;
- .2 agrees that if the Contractor shall in any respect fail to perform any of its obligations arising under this Agreement or shall commit any breach of or fail to fulfil any warranty or indemnity set out in this Agreement, then the Guarantor will forthwith perform and fulfil in place of the Contractor each and every obligation, warranty or indemnity in respect of which the Contractor has defaulted or as may be unfulfilled by the Contractor, and the Guarantor will be liable to the Beneficiary for any and all losses, damages, expenses, liabilities, claims, costs or proceedings which the Beneficiary incurs by reason of the said failure or breach and taking into account all sums which become due to the Contractor;
- ...
- .5 the Guarantor's liability hereunder shall be co-extensive with the liability of the Contractor pursuant to the provisions of this Agreement and for such purposes the terms and conditions of the Contract shall be deemed to be incorporated herein;
- .6 the Guarantor's liability hereunder shall become ipso facto null and void upon the expiry of 12 years from the date of issue of the Certificate of Practical Completion.”

Applicable test

35. CPR 3.4(2) provides that:

“The court may strike out a statement of case if it appears to the court:

- (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim ...”

36. CPR 24.2 provides that:

“The court may give summary judgment against a claimant ... on the whole of the claim or on a particular issue if:

- (a) it considers that

(i) the claimant has no real prospect of succeeding on the claim or issue ... and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

37. In *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37 Hamblen LJ summarised the applicable test on applications concerning strike out and summary judgment at paragraph [27]:

“(1) The court must consider whether the case of the respondents to the application has a realistic as opposed to fanciful prospect of success – in this context, a realistic claim is one that carries some degree of conviction and is more than merely arguable.

(2) The court must not conduct a mini trial and should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by the trial process.

(3) If the application gives rise to a short point of law or construction then, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.

See *Easy Air Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15]; *Arcadia Group Brands Ltd & Ors v Visa Inc* [2014] EWHC 3561 at [19]; *Tesco Stores Ltd v Mastercard Incorporated* [2015] EWHC 1145 (Ch) at [9]-[10].”

38. In order to grant the relief sought by the Second Defendant, the court must be satisfied on the balance of probabilities that: (a) any cause of action under the Collateral Warranty in respect of the Original Construction Claims accrued as at practical completion; (b) practical completion occurred on 31 March 2005; and (c) there is no other compelling reason why those matters should go to trial.

The parties' submissions

39. Mr Darling QC, on behalf of the Second Defendant, submits as follows:

- i) On a proper construction of the document, the Collateral Warranty was retrospective relating back to the date of practical completion.
- ii) The cause of action in respect of the Original Construction Claims accrued against both defendants on the date of practical completion.
- iii) Practical completion occurred on 31 March 2005.
- iv) The proceedings were not issued until 4 April 2017 and the claim is therefore statute barred.

- v) Alternatively, the proviso to clause 1 of the Collateral Warranty achieves the same effect.

40. Mr Mort QC, on behalf of the Claimant, submits:

- i) The Second Defendant did not achieve practical completion as at 31 March 2005 because its works were incomplete and defective at that date and the Second Defendant has not pleaded nor evidenced compliance with clause 6A.5.2.
- ii) Alternatively, if the Second Defendant did achieve practical completion as at 31 March 2005, it was on the basis that it would then remedy the patent defects in the works and therefore it had an ongoing obligation to perform the Building Contract and comply with its terms.
- iii) The Second Defendant is unable to establish that the Claimant has no real prospect of succeeding in its argument that Practical Completion was not in fact achieved as at 31 March 2005.
- iv) On a true construction of the Collateral Warranty it does not have retrospective effect.
- v) These issues are not suitable for summary judgment. The court cannot be satisfied that the claim is bound to fail.

Effect of the Collateral Warranty

- 41. A contract or a deed can take effect retrospectively: *Trollope & Colls Ltd and Holland & Hannen and Cubitts Ltd (t/a Nuclear Civil Constructors (a firm)) v Atomic Power Constructions Ltd* [1963] 1 WLR 333 per Megaw J pp.339; *Tameside Metropolitan Borough Council v Barlow Securities Group Services Ltd* [2001] EWCA Civ 1 per Henry LJ at paragraph [42].
- 42. Whether or not a clause in a contract is capable of having a retrospective effect depends on the express or implied intention of the parties: *Trollope & Colls* (above) per Megaw J pp.340-341; *Northern & Shell plc v John Laing Construction Ltd* [2003] EWCA Civ 1035 per Nelson J at paragraph [51].
- 43. Where it is clear that the parties intended a deed to have retrospective effect, full effect should be given to that common intention even if it has not been expressed in words: *Westminster City Council v Clifford Culpin & Partners* (1987) Con LR 117 per Sir John Megaw at p.139; *Northern & Shell* (above) per Nelson J at paragraph [52].
- 44. In the case of *Northern & Shell* (above), the relevant deed of warranty was signed after practical completion but contained a clause stipulating that the deed came into effect on the day following the date of practical completion. The Court of Appeal, affirming the judgment of His Honour Judge Thornton QC, held that the limitation period in respect of the alleged breach of contract ran from the date of practical completion and not from the date on which the deed of warranty was signed. Giving the judgment of the court, Nelson J concluded that the warranty had retrospective

effect, not only because of the wording of the deed, but also because of the factual matrix of the contract:

“[54] When the factual matrix of this contract is considered it is clear that the intention of the parties was to give cl 5 retrospective effect. The deed is not a simple warranty such as that provided by the manufacturer to a purchaser in the sale of a television. The deed specifically refers to the building contract and its past and future performance by the contractor. Far from being an unnecessary complication it is an integral part of the contract between the contractor and the original leaseholder and its successors or assigns.

[55] Clause 45.1 of the building contract requires the contractor to enter into warranties under seal in the form reasonably required by any entitled party such as the original leaseholder its successors or assigns. It is expressly stated in cl 45.1 that the contractor will not in any such warranty be required to give any greater undertaking than that contained in the contract. This clause in the building contract therefore explains why the deed of warranty was drafted as it was, and also makes clear the intentions of the contractor and the developer when the building contract was signed. There is no reason why this intention should be altered by the date of the signing of the deed of warranty. Nor is there any reason why the leaseholder should have an intention different to that of the contractor. As already pointed out in this judgment the original leaseholder, its successors and assigns is provided with greater clarity if the deed of warranty has the same period of limitation as the underlying obligation. An independent observer would regard this interpretation as giving business efficacy to the contract.

[56] The fact that a fresh promise is provided in the deed of warranty by virtue of the contractor covenanting and undertaking as set out in cl 2 is not inconsistent with cl 5 having retrospective effect. It is inherent in the drafting of such a deed of warranty.

...

[58] I conclude that clause 5 was clear and unambiguous. It was the express intention of the parties to make the deed come into effect on an ascertainable and certain day, namely the day following the date of the issue of the certificate of practical completion. Even if the words of cl 5 did not express an intention that it should have retrospective effect, the factual matrix of the deed, and in particular cl 45.1.3 of the building contract make it clear that it was the parties common intention that cl 5 should operate retrospectively. As Sir John McGaw said in *Westminster City Council v Clifford Culpin & Partners*, the parties plainly so intended.”

45. The Collateral Warranty does not contain an express commencement or expiry date. It does not contain an express term as to the date on which any cause of action for breach is deemed to have occurred. It does not identify an express limitation period in respect of claims made by the Claimant against the Second Defendant.
46. Clause 6 contains a promise by the Claimant to maintain professional indemnity insurance for a period of at least 12 years from the date of practical completion. This is consistent with the Second Defendant's case but it is accepted, properly, by Mr Darling that the provision is not determinative of the issue before the court.
47. Clause 7.6 contains an express limitation provision in respect of the Guarantor's liability by reference to the expiry of 12 years from practical completion. Mr Mort could rely on the fact that the parties did not insert a similar provision into the Collateral Warranty in respect of the Second Defendant's liability. Mr Darling could argue that it is indicative of a 12-year limitation period running from practical completion. The parties agree that the provision is not determinative of the issue before the court.
48. In my judgment, the words used in the Collateral Warranty and the factual matrix indicate that the parties intended the warranty to have retrospective effect.
49. Firstly, the purpose of the Collateral Warranty was to provide a direct right of action by the Claimant against the Second Defendant in respect of its obligations under the Building Contract to which the Claimant was not a party. Such purpose was served by a warranty that gave the Claimant the same rights against the Second Defendant that it would have had if there had been privity of contract but did not require any extension of those rights.
50. Secondly, the recitals to the Collateral Warranty explain the interest of the Claimant, as tenant, in the works carried out by the Second Defendant. Such interest was to ensure that the Second Defendant performed its contractual obligations as required by the underlying Building Contract.
51. Thirdly, clause 1, which contains the direct warranties given by the Second Defendant to the Claimant, specifically refers to the past and future performance by the Second Defendant of its obligations under the Building Contract. When read together with Article 10 of the Building Contract, which does not contain any time limitation on a written request which would trigger the Second Defendant's obligation to execute a collateral warranty in favour of a first tenant, this indicates that the Collateral Warranty was intended to cover the full scope of the contractual works regardless of when it was executed.
52. Fourthly, the proviso to clause 1 expressly limits the liability of the Second Defendant to the liability it would have had if the Claimant had been named as joint employer under the Building Contract. This is the clearest indication that the parties intended the Claimant to be in the same position vis-à-vis the Second Defendant as the employer was under the Building Contract. The commercial purpose served by this provision is that it gives the parties clarity and certainty as to the extent of any liability in respect of the works, including the period of limitation.

53. Mr Mort submits that the proviso to clause 1 is concerned with the nature and scope of the obligations giving rise to any liability but does not extend to cover the duration of any duty or the timing of any claim. He submits that the plain purpose of the proviso is to ensure that by providing the undertakings in the Collateral Warranty, which may or may not correspond precisely with the terms of the Building Contract, the Second Defendant is not agreeing to some more onerous obligation than it had under the Building Contract, or that it would have owed to the Claimant had the Claimant been an employer under the Building Contract. In my judgment, that interpretation would not be an accurate reflection of the words used. The reference in the proviso to the Claimant's position being as if it "*had been named as joint employer*" is a clear indication that the parties intended the Claimant to stand in the shoes of the employer. The Second Defendant's liability to the Claimant was intended to be coterminous with its liability to the employer under the Building Contract. One must look to the Second Defendant's liability under the Building Contract to determine the limits of its liability under the Collateral Warranty.
54. Mr Mort also submits that limitation is a procedural bar to a remedy; it does not extinguish an underlying right or liability. Any liability on the part of the Second Defendant to the First Defendant under the Building Contract would not be extinguished by expiry of the limitation period. The right continues to exist even though it cannot be enforced by action: *Norwegian Government v Calcutta Marine Engineering Co Ltd* [1960] 2 Ll.Rep. 431 per Diplock J at p.442; *McIntyre v Gentoo Group Ltd* [2010] EWHC 5 per John Howell QC at paragraph [66]. Therefore, the proviso would not affect any cause of action by the Claimant. Mr Mort's analysis as to the effect of expiry of the limitation period is correct but it does not assist the Claimant. The Second Defendant remains liable to the Claimant for any breach of the Collateral Warranty but the liability cannot be enforced because the remedy is statute-barred.
55. Mr Mort sought to distinguish the decision in *Northern & Shell* on the basis that in that case there was an express provision as to when the warranty would take effect. However, the Court of Appeal's judgment was that the intention of the parties was clear, even without that express provision, from the overall construction of the warranty and its factual matrix. Particular weight was placed on clause 45.1.3 of the building contract which limited the undertaking in the warranty to that contained in the building contract. In this case, the position is stronger because the limitation placed on liability by reference to the Building Contract is an express term as set out in the proviso to clause 1.
56. In conclusion on this issue, the clear intention of the parties was that the Collateral Warranty should have retrospective effect. The Second Defendant's liability to the Claimant was deemed to be coterminous with its liability to the First Defendant under the Building Contract. Any breach of contract created by the Collateral Warranty would be regarded as actionable from the original date on which the breach occurred even though the relevant facts occurred prior to the effective date of the Collateral Warranty.

Practical completion

57. It is well-established law that a cause of action for breach of a construction contract accrues when the contractor is in breach of its express or implied obligations under

the contract. Where, as in this case, there is an obligation to carry out and complete the works, the cause of action for a failure to complete the works in accordance with the contract accrues at the date of practical completion: *Tameside Metropolitan BC v Barlow Securities Group Services Ltd* [2001] EWCA Civ 1 per Henry LJ at paragraphs [41]-[45]; *Oxford Architects Partnership v Cheltenham Ladies College* [2006] EWHC 3156 per Ramsey J at paragraphs [22] and [23]:

“[22] In principle a cause of action for breach of contract accrues on the date of breach and the cause of action for negligence accrues when a breach of the duty of care gives rise to relevant damage. The application of those principles to obligations under construction contracts or agreements for the engagement of construction professionals has caused a number of difficulties. In terms of a cause of action for breach of contract it is sometimes said that contractors and Architects owe a continuing contractual duty up to at least Practical Completion. There is, however, in my judgment, a distinction to be drawn between the position of the contractor and the position of a professional such as an architect.”

“[23] The position of a contractor of course depends on the terms of the Contract but generally there is an obligation to "carry out and complete" the works. Thus, there will be a cause of action for a failure properly to complete the work by the date for completion. In those circumstances a cause of action will accrue right up to Practical Completion if the contractor fails to complete the works properly, see Chitty on Contracts (29th edition) paragraph 28-054 and Keating on Construction Contracts (8th edition) paragraph 15-012. There may then, depending on the defects liability provisions in the contract, be a further cause of action after Practical Completion.”

58. The Second Defendant's case is that practical completion occurred on 31 March 2005. The Claimant has no real prospect of challenging the deeming effect of the G&T letter dated 1 April 2005.
59. The Claimant's case is that practical completion was not achieved by 31 March 2005. As at 31 March 2005, the Second Defendant was still on site working and there were patent defects in the works. Reliance is placed on the witness statement of Mr Edwards, solicitor acting for the Claimant, and the documents exhibited to his statement. The letter dated 1 April 2005 relied on by the Second Defendant contains express reference to outstanding works and defects. The extensive snagging lists issued in March 2005 identify the nature and extent of the patent defects in the works. The disclosed documents in the litigation do not include documents that evidence compliance with clause 6A.5.2 and the Second Defendant's factual witness statements do not address this matter.
60. The G&T letter is strong evidence that practical completion occurred on 31 March 2005. The letter was sent by the Employer's Agent to the Second Defendant and contained a clear statement that the works had reached practical completion in accordance with clause 16.1 of the Building Contract. No evidence has been put

before the court that there was any challenge to that statement or that the parties did not operate the relevant provisions of the Building Contract on the basis that practical completion had been achieved.

61. That alone would not be sufficient to establish conclusively that practical completion was achieved on 31 March 2005, at least for the purpose of a summary judgment application. However, as submitted by Mr Darling, clause 16 of the Building Contract is clear that the effect of the written statement by the employer was that practical completion was deemed to have occurred on 31 March 2005.
62. Clause 16 of the Building Contract, as amended, provides: "*When in the reasonable opinion of the Employer the Works have reached Practical Completion and the Contractor has complied with ... clause 6A.5.2...*" The date of practical completion is not based on an objective ascertainment of the state of the works, or the provision of the health and safety information, but on the reasonable opinion of the employer as to those matters.
63. The clause requires the employer to "*give the Contractor a written statement to that effect ...*" The Building contract does not require a third party to certify completion of the works and does not stipulate any formalities in respect of the written statement.
64. Clause 16 expressly states that, where such statement has been given: "*Practical Completion of the Works shall be deemed for all the purposes of this Contract to have taken place on the day named in such statement.*" The effect of this deeming provision is that the parties agree that the works will be practically complete under the Building Contract, even if there are outstanding or defective works. Practical Completion under the Building Contract entitles the contractor to a release of 50% of the retention monies, precludes the deduction of liquidated damages in respect of any work carried out after that date and triggers the commencement of the defects liability period.
65. The Claimant relies on evidence that there were patent defects and outstanding works as at 31 March 2005. However, the existence of any defects or outstanding works, including information required under clause 6A.5.1, would not prevent the operation of clause 16. Clause 16.1 is clear that where, as in this case, the employer issues a notice that practical completion has been achieved, practical completion is deemed to have been achieved.
66. The Claimant's argument that it had ongoing obligations in respect of the identified defects and outstanding works overlooks the effect of clause 16.1. Regardless of the physical state of the works at 31 March 2005, or any ongoing works carried out by the Second Defendant, they were deemed to be complete on that date. Clause 16.1 expressly provides that practical completion was deemed to have occurred "for all the purposes of this Contract".
67. It follows that any breach of the Collateral Warranty in respect of the Original Construction Claims must have occurred by 31 March 2005. The proceedings were issued on 4 April 2017. Therefore, those claims are statute-barred.
68. For the above reasons, the Claimant has no real prospect of success in respect of the Original Construction Claims.

Other compelling reason for trial

69. The Claimant submits that this application has been made too late. The trial of this matter has been listed for 29 October 2018. Summary disposal of the Original Construction Claims will not dispose of the proceedings. The Clause 16 Claims against the Second Defendant and the claims against the First Defendant will be continued. The Claimant considers that little, if anything, will be saved by way of time or costs if summary judgment is granted. Further, the issue is not straightforward and the court should be wary of granting summary judgment in such circumstances, rather than awaiting the full evidence of a trial.
70. I am satisfied that the Second Defendant has established its entitlement to summary judgment. The Original Construction Claims are discrete claims made by the Claimant against the Second Defendant. The issue is sufficiently clear for the court to be satisfied that it should be determined now, rather than await trial. The Original Construction Claims are bound to fail because they are barred by limitation.
71. For the above reasons, I grant the relief sought by the Second Defendant, namely:
- i) summary judgment in favour of the Second Defendant on the claims made in paragraphs 89(1) to (5) inclusive and 93(1) to (4) inclusive of the Particulars of Claim and striking out of those paragraphs from the Particulars of Claim; and
 - ii) an order that the Claimant's claims in paragraphs 103-105 of the Particulars of Claim be confined to the breaches alleged in paragraphs 89(6) and 93(5) of the Particulars of Claim.