Statute-barred

When does the limitation period commence for the purposes of a construction contract? Ian Pease assesses the impact of a recent Court of Appeal decision

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It was a day for celebrations on 4 July, and not just in the United States. The Court of Appeal overturned a limitation decision that, had it stood, would have been a bombshell for the construction industry. It would have changed the way that the vast majority of building and engineering contracts are implemented.

In essence

The limitation case of *Henry Boot Construction v ALSTOM* [2005] involved a dispute over payment for the construction of a Powergen power station. Most building and engineering contracts involve monthly valuation of the work done. The engineer or architect then gives the contractor a certificate that the employer pays. The valuation of the work is essentially fluid; it can go up or down right up to the final certificate. It is quite common for any contractor to wait until the final certificate before disputing the valuation in arbitration or in court.

However, you have to start your case promptly. If you don't, the law will extinguish your remedy. Your case will be 'statute-barred'. The law requires you to commence your action within six or 12 years of when your 'cause of action' arose – six years for normal contracts, 12 years where it's a contract under seal.

What comprises your 'cause of action' is not defined in any statute as there are many different rights that litigants may possess, depending on what has happened to them. Where they have a contract, their rights depend on the correct interpretation of that contract.

In the arbitration that led up to the dispute in *Henry Boot*, a distinguished judge-arbitrator said that, under the Institute of Civil Engineers (ICE) contract, the 'cause of action' for payment did not arise upon the issuing of the final certificate itself, but rather when the work was actually done, and because that was more than six years ago, all the contractor's rights were statute-barred.

This was quite contrary to the perception in the building and engineering industry, and would have caused many problems. Contractors would have to keep a close eye, day by day, on when they did their work, and would have to start court cases or arbitrations within six years of doing particular elements of work. Potentially, there would have to be many more arbitrations.

The judge-arbitrator's award has now been overturned by the Court of Appeal. Dyson LJ, giving the leading judgment, said that the case is of considerable significance to the construction industry. The Court confirmed that the right to payment arose when the final certificate was issued, and not when the work was actually done.

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In detail

The contract was the ICE sixth edition, one of the 'standard forms' of contract. It is a 'remeasurement' contract, by which one starts with a tender total and it is only after the work is complete that the contract price is finally ascertained, after the quantities and materials actually used to construct the works have been recalculated and the appropriate rules for pricing those final quantities have been decided upon.

Therefore, what happens each month is that the engineer not only measures and values the work done in the current month but also reassesses their valuation

of works done previously. This process proceeds month by month until one gets to the contractor's final account and the final certificate produced by the engineer.

At any point in that process an arbitration notice can be issued by either party. In the first instance the dispute is adjudcated upon by the engineer making an engineer's decision. That decision becomes binding upon the parties unless it is arbitrated within a given period.

Month by month, therefore, the contractor submits a monthly account that is valued, and a certificate is issued by the engineer as to the then present cumulative value of the works done. Much the same arrangements apply to the Joint Contracts Tribunal (JCT) contracts.

The work in *Henry Boot* was commenced in 1994, and substantial completion was achieved in the middle of 1996. There was then an extended defects correction period within which any problems were to be corrected, and a defects corrections certificate was issued in the latter part of 2000. The issue of the defects correction certificate under this form of contract effectively kicks off the final account process, whereby the contractor submits its final account and the engineer values it and issues their final certificate. That final certificate was somewhat delayed and was not issued until the end of 2002. Arbitration proceedings were then commenced in May 2003.

As happens with many construction contracts, there wasn't complete agreement at the start of contract as to all the contract documents, and this resulted in what was due to be a contract under seal being signed as a simple contract. On the face of it, therefore, a six-year limitation period applied.

When did the causes of action arise?

Henry Boot Construction, as the contractor, was wanting payment for its works under the contract, and it claimed the engineer had certified insufficiently in that respect. The arbitrator and the Court of Appeal, therefore, had to construe the contractual causes of action for payment.

The arguments revolved around whether or not a certificate from the engineer was a necessary part of the cause of action. The payment clause is clause 60 of the ICE sixth edition, which indicates that after delivery of the contractor's estimate of contract value, the engineer 'shall certify', and the employer will pay to the contractor the amount that, in the opinion of the engineer and on the basis of the contractor's monthly statement, is due to it. However, the engineer and contractor can deduct off previous payments on account.

ALSTOM's case

ALSTOM's case revolved around the proposition that the certificates that the engineer issues were not a necessary part of Henry Boot's cause of action. Rather, the certificate was a mere quantification of a right that had already previously arisen.

According to their case, the right rose when the work was done, either brick by brick as the building is built or alternatively to be accumulated at the monthly valuations of that work. But, in any case, the certificate was not a pre-condition to the cause of action arising.

They highlighted a contrast with the case of *Scott v Avery* [1843-60], where the parties had by contract made it explicit that any dispute was to be decided by arbitration, and that such an arbitration award was an explicit condition precedent to any rights or obligations arising.

Further, they cited cases such as *Electricity Board v Halifax Corporation* [1963], where the mere quantification of a loss by an independent individual (in that case the minister of state) was not a necessary part of the cause of action (the obvious analogy is to the engineer's monthly quantification of the rights of the parties).

ALSTOM relied on *Beaufort Developments v Gilbert-Ash* [1999] (the case that finally put the nail in the coffin of *Northern Regional Health Authority v Derek Crouch* [1984]). As part of the argument in *Beaufort*, Lord Hoffmann discusses the issuing of certificates, a process that *Crouch* had labelled an 'internal arbitration'. He says that it is internal in the sense that it does not adjudicate upon the rights and duties of the parties but is part of the 'machinery' for determining what they are. ALSTOM maintained that if what the engineer was doing was merely determining what the rights of the parties are, then those rights must pre-exist that determination.

In much the same way as a scientist discovers a particular phenomenon, so the engineer determines the rights of the parties. Both the right and the phenomenon existed before the 'discovery'.

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Henry Boot's case

Henry Boot's case was that the certificate was a necessary precondition to commencing any action. The cause of action could be one of two matters, either that:

1. the contractor wished to be paid in accordance with a certificate; or

2. the certificate that had been issued was of insufficient value and they wanted it changed by the arbitrator.

The case was that, as part of the cause of action, on either of these counts the contractor would have to refer to the existence of the certificate either because it was questioning it or enforcing it.

Also, it made an analogy to the case of *Coburn v Colledge* [1897], which had held that, specific contract terms apart, the right to payment arose when the work was completed. Hence the work was not complete under the ICE form of contract until the contractor had its defects correction certificate (in this case well within the limitation period).

The case law apparently favoured Henry Boot's view. In *Lubenham Fidelities v South Pembrokeshire DC* [1986] May LJ stated that:

> Whatever be the cause of the under-valuation, the proper remedy available to

the contractor is... to request the architect to make the appropriate adjustment in another certificate, or if he declines to do so, to take the dispute to arbitration under clause 35. In default of arbitration or a new certificate, the conditions themselves give the contractor no right to sue for the higher sum. In other words, we think that under this form of contract the issue of a certificate is always a condition precedent to the right of the contractor to be paid.

Furthermore, in *Scottish Equitable v Miller* [2002], Lord Prosser stated that:

... a challenge when a certificate is issued would relate to the amount which ought to be paid at that stage and could properly be seen as part of the enforcement of a different contractual right. A subsequent challenge in arbitration, even upon the same factual basis, may be very different, relating either to the content of a much later interim certificate, or to a final certificate. The whole structure of the contract appears to us to allow such subsequent challenges, notwithstanding that a challenge on the same basis could have been made much earlier, for more limited or different purposes.

Whereas the ALSTOM view means that the contractor must keep a close eye upon when it did particular works, the Boot view allows it to relax and wait until the final certificate before deciding whether to start any arbitration proceedings.

Comment

The two views are startlingly different in their outcome, for whereas the ALSTOM view means that the contractor must keep a close eye upon when it did particular works, the Boot view allows it to relax and wait until the final certificate before deciding whether to start any arbitration proceedings. In this sense, the Boot view is a kind of layer cake of causes of action. The cause of action in the first month can be litigated within six years of its arising. However, this is a different cause of action from that in the second month, which encompasses work in months one and two. This carries on all the way through to the final certificate.

Not only are the figures different but also the circumstances of each element of the works change, hence the engineer is constantly reviewing previous months' works, giving rise not only to monetary changes in the value of those works but also to a different view of what those works comprise because of changing levels of information available to the engineer.

The arbitrator's award

Before the arbitrator, the ALSTOM view won out. The arbitrator held that, following the *Beaufort* case, the certificates do not create any right for the contractor to be paid, but merely recognise a right that already exists.

He therefore had to decide when that right arose, and it was at this stage that certain practical difficulties appeared. He baulked at the brick-by-brick analysis that ALSTOM had put forward, and preferred to establish the contractor's cause of action as arising when a certificate is issued or due to be issued.

Hence he found that once all the ingredients were present that would justify a payment application from the contractor, the cause of action accrued once and for all in relation to that element of the works. Significantly, he did not believe that the rights under these certificates were cumulative.

The Court of Appeal's judgment

What the Court has held in construing this contract is that the certificates are a 'condition precedent' to the contractor's entitlement to be paid both on interim certificates and on the final certificate, and they are not merely evidence of the engineer's opinion.

By condition precedent, the Court means that the right to payment arises when the certificate is issued or ought to be issued, and not earlier.

The definition of condition precedent is interesting, for it encompasses a situation in which a certificate ought to have been issued but in fact has not been. Under these circumstances, the Court of Appeal has held that proceedings can still commence even though there is no extant certificate because the decision to issue or not to issue a certificate is reviewable by a court or arbitrator, which can review the engineer's actions in failing to issue the certificate and enter judgment as if a certificate had been issued.

The Court analysed the position as follows: every month the engineer certifies not what is finally due but what is, in their opinion, due based upon the information supplied by the contractor. If the contractor omits a particular element of work, the engineer is not obliged to value it, and hence the mere doing of the work does not give the right to payment but that entitlement only arises when the engineer issues a certificate. Any other construction, the Court held, was inconsistent with the payment provisions of the contract. Specifically, Dyson LJ held:

> I do not see how it is possible to construe this contract as meaning that the right to interim payments arises brick by brick or day by day or is in any other way unrelated to certificates.

The Court found justification within the contract for this construction. In particular, it cited the arbitration provision that allowed the opening up, reviewing and revising of certificates, and it asked rhetorically that if a certificate was no more than evidence of Henry Boot's existing entitlement, why it would be necessary to give the arbitrator this particular power.

The second issue between the parties was the question of cumulative causes of action. ALSTOM's case was that there is effectively merely a re-presentation of the first month's claim as part of the second month's claim, and that the authority was against there being a new cause of action arising. The Court, however, said that it was important to distinguish between successive claims in respect of the same cause of action and successive claims in relation to different causes of action.

The Court was of the view that there is a distinction to be made between interim certificates and the final certificate. It indicated that interim certificates were no more than a provisional estimate of the sum that Boot was entitled to, and the engineer was not obliged to carry out any detailed or accurate valuation each month. The Court contrasted this with the process of the final account stage, where a very much more detailed analysis must take place.

The Court did, however, contrast the ICE or JCT contracts, where the valuation is reconsidered at the end of the work, with a fixed-price contract paid by defined interim payments (see *Birse v McCormick* [2004]) where the cause of action under each interim payment would arise once each payment became payable.

The Court quoted extensively from the *Scottish Equitable* case. Although indicating that it was not necessarily for the purposes of this particular judgment to reach a view about whether there are successive claims under interim certificates, the Court nevertheless endorsed the approach taken by Lord Prosser in that case.

Conclusion

Losing a limitation issue is always a dire situation for a client. The original award was a bombshell, and a turn-up for the books. It would have meant much more litigation on potential disputes that could otherwise have been negotiated away. This case is of general applicability, and the Court of Appeal's concise judgment will undoubtedly set all contractors' minds at rest on this important point. ■

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Beaufort Developments v Gilbert-Ash
[1999] 1 AC 266;
[1998] 2 WLR 860

Birse v McCormick
[2004] EWHC 3053 (TCC)

Coburn v Colledge
[1897] 1 QB 702

Electricity Board v Halifax Corporation
[1963] AC 785

Henry Boot Construction v ALSTOM
[2005] EWCA Civ 814;
(2005) 102(30) L.S.G. 28

Lubenham Fidelities v South Pembrokeshire DC
(1986) 33 BLR 39

Northern Regional Health Authority v Derek Crouch
[1984] QB 644

Scott v Avery
[1843-60] All ER (Reprint) 1

Scottish Equitable v Miller
[2002] SCLR 10