

Time-Bars for Claims Founded on Simple Contract

16 March 2023

Introduction

In two recent decisions, *Consulting Concepts International Inc v Consumer Protection Association (Saudi Arabia)* [2022] EWCA Civ 1699 (“CCI”) and *Anron Bunkering DMCC v Glencore Energy UK Ltd* [2023] EWHC 295 (Comm) (“Anron”), the English courts have dealt with issues of limitation in the context of claims founded on simple contract.

In *CCI*, the Court of Appeal confirmed that the cause of action in a claim for payment for work done and services rendered accrues when the work was completed unless there is some “special term” in the agreement to the contrary. In *Anron*, the Commercial Court confirmed that the cause of action in a claim in unjust enrichment arising for payments made pursuant to a contract where there has been a failure of basis for payment accrues when the failure occurs.

Consulting Concepts International Inc v Consumer Protection Association (Saudi Arabia)

The Facts

The appellant, Consulting Concepts International Inc (“CCI”), is a New York corporation. The respondent, Consumer Protection Association (Saudi Arabia) (“CPA”), is a civil organisation incorporated in Saudi Arabia. By an agreement dated 4 June 2013, CCI and CPA agreed to collaborate to develop and implement strategies, programs and policies to address the root causes of asthma in Saudi Arabia (the “Agreement”). The Agreement stipulated that CCI would be remunerated for its work, but it made no provision for the rate of CCI’s remuneration. However, it provided that: “[a]ll invoices submitted by CCI will be paid within 90 days...” (the “Invoicing Provision”).

On 27 December 2019, CCI issued a claim form seeking payment from CPA of:

- US\$15,129,800 pursuant to three invoices for services provided by CCI to CPA prior to 17 December 2013; and

- 161,500,000 Saudi Riyals (c. US\$43,055,500) pursuant to an undertaking given by CPA on 31 December 2013.

It was common ground that all the work done for which CCI sought to be paid, whether the subject of the invoices or the undertaking, was completed by 17 December 2013.

CPA applied to strike out the claim under Civil Procedure Rule 3.4(2)(a) or (c), or for summary judgment, principally on the basis that it was time-barred.

The Judgment

The principal issue with which Andrews LJ (delivering the leading judgment of the Court of Appeal) was concerned was whether CCI's cause of action for payment for work done and services rendered to CPA arose when the work was completed or when 90 days had elapsed from the service of an invoice for that work (i.e., the contractually agreed time to make payment pursuant to the Invoicing Provision). Andrews LJ noted that all of CCI's claims were for payment of sums due under a contract of services and were "founded on simple contract" within the meaning of s. 5 Limitation Act 1980 ("LA 1980"), and the limitation period for such claims was six years.

Relying on *Coburn v Colledge* and *Henry Boot Ltd v Alstom Ltd*,¹ Andrews LJ held that in the absence of a "special term" in the agreement to the contrary, the right of a service provider to payment for its work (i.e., its cause of action) arises as soon as the work is done. Further, the court held that a contractual provision which sets a time for payment for services rendered (i.e., the Invoicing Provision) does not postpone the accrual of the cause of action, although it may afford the creditor a defence to an early claim.

Additionally, Andrews LJ stated that any "special term" to the contrary has to be one which means that the right of the service provider to be paid for the work arises at some later time or is dependent upon the fulfilment of some condition.² Andrews LJ found that the Commercial Court was right to find that the claims for work done by CCI on or before 17 December 2013 were time-barred and to strike out the claims or enter summary judgment in favour of CPA on that basis. Thus, CCI's appeal was dismissed.

Commentary

This judgment follows a long line of existing authorities providing that a service provider's right to payment (i.e., its cause of action) arises as soon as the work is done, and, unless there is some "special term" to the contrary, a provision stipulating that the

¹ *Coburn* [1897] 1 QB 702; *Henry Boot* [2005] EWCA Civ 814, [2005] 1 WLR 3850.

² For example, in *Henry Boot*, the right to payment depended on the certification by a third party of the value of the work done and so the cause of action was not complete until such certification.

debtor is afforded a certain amount of time to pay does not postpone the accrual of the cause of action (i.e., the start of the limitation period).

Parties should carefully review their contracts to ensure that the terms therein are clear as to when any right to payment arises, as this will determine when the limitation period on any future claim for work done or services rendered begins to run. If the terms are unclear, it is likely time will begin to run from when the work was done.

Anron Bunkering DMCC v Glencore Energy UK Ltd

The Facts

Glencore Energy UK Ltd (“Glencore”) and Anron Bunkering DMCC (“Anron”) entered into a written contract dated 15 July 2015 (the “July Contract”) under which Glencore would sell Anron unleaded gasoline, to be delivered to Yemen. By a further written contract dated 27 November 2015 (the “November Contract”), Glencore agreed to sell two further instalments of gasoline.

In performance of the July Contract, gasoline was shipped by Glencore and discharge was completed in November 2015. In April 2016, in part performance of the November Contract, a portion of the contracted quantity of gasoline was discharged in Yemen (the “First Instalment”). However, Glencore subsequently sold the remainder of the First Instalment to a third party in the United Arab Emirates on 4 May 2016. Between July and April 2016, Anron had made advance payments of around US\$52 million.

The remaining gasoline under the November Contract (the “Second Instalment”) was not delivered because in late December 2015, Anron accepted Glencore’s repudiation of the remainder of the November Contract. In light of Glencore’s failure to deliver the whole of the First Instalment, Anron alleged that it had overpaid Glencore by US\$ 1.958 million. On 6 June 2022, Anron brought an unjust enrichment claim for the “*money had and received*” by Glencore to Anron’s use. Glencore sought to have the claim summarily dismissed on the basis that it was time-barred.

The Judgment

Simon Colton KC (sitting as a Deputy High Court Judge) (the “Judge”) affirmed that where claims for unjust enrichment are “*founded on simple contract*” under the meaning of s. 5 LA 1980, the limitation period is six years.

The Judge characterised Anron’s unjust enrichment claim as one for the recovery of sums transferred on a basis that subsequently failed. The Judge considered that Anron’s cause of action had accrued when the failure of basis occurred. Thus, the principal issue

to be determined was exactly *when* the failure of basis occurred, as, if the failure of basis had occurred prior to 6 June 2016, then it would be time-barred by s. 5 LA 1980.

First, however, the Judge considered whether a claim in unjust enrichment on the ground of failure of basis requires the contract in question to have been terminated, determined or discharged. The Judge found that it did not.³ In reliance on the Court of Appeal's decision in *Dargamo Holdings Ltd v Avonwick Holdings Ltd*, the Judge confirmed that the test is whether "*the state of affairs contemplated as the basis or reason for that payment [had] failed to materialise*" and that this test may, in appropriate circumstances, be met without termination of the contract.⁴

The Judge held that any real possibility of delivery of the First Instalment had gone by 4 May 2016, by which time the goods destined for Anron had been sold to a third party in the United Arab Emirates. From such time, Glencore was no longer entitled to hold the advance payments, since the state of affairs contemplated as the basis for such payment (i.e., deliveries under the November Contract) had failed to materialise. On the facts, Anron's cause of action in unjust enrichment had arisen by 4 May 2016, so its claims were time-barred by, at latest, 4 May 2022 (just over a month before Anron issued its claim).

Commentary

In claims for the recovery of sums transferred on a basis that later fails, the limitation period starts once the failure of basis occurred. Thus, it is critical that parties determine, at the earliest opportunity, exactly *when* any failure of basis occurred.

Importantly, in any claim in unjust enrichment on the ground of failure of basis (arising out of a sale of goods contract which has failed), it is not a requirement for parties to prove that the contract in question has been terminated. However, parties must show that the "*state of affairs contemplated as the basis or reason for that payment [had] failed to materialise*". In some circumstances, this test will not be met without termination.⁵

* * *

³ Note that this was an issue that only affected the First Instalment of the November Contract, as the July Contract had been fully performed, and the Second Instalment was terminated in December 2015.

⁴ [2021] EWCA Civ 1149 at [80]. A decision cited with approval in *Barton v Morris* [2023] UKSC 3.

⁵ For example, where defective goods are delivered and the buyer has not decided to reject the goods or in the case of late delivery where delivery still remains a possibility under the contract.

Please do not hesitate to contact us with any questions.

LONDON



Patrick Swain
Partner
pswain@debevoise.com



Christopher Boyne
Partner
cboyne@debevoise.com



Natasha McCarthy
International Counsel
nmccarthy@debevoise.com



Callum Murphy
Trainee Associate
cmurphy@debevoise.com