FENWICK ELLIOTT

The construction & energy law specialists

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Issue 253 - July 2021

Dispatch

Time Bars

Arab Lawyers Network Company Ltd v Thomson Reuters (Professional) UK Ltd

[2021] EWHC 1728 (Comm)

TR applied for summary judgment to dismiss ALN's claims stating that the claims were time-barred. The case, whilst turning on its own facts (as they all do), is interesting due to Deputy Judge MacDonald Eggers QC's comments about how to interpret the time bar clause:

"14.2 Limitation of Claims. No claim, regardless of form, which in any way arises out of this Agreement or the parties' performance of this Agreement may be made, nor action based upon such a claim brought, by either party more than one year after the basis for the claim becomes known to the party desiring to assert it."

On 20 June 2014, TR served notice of termination and it was common ground that the contract came to an end on 1 February 2015. On 13 October 2015, ALN sent TR a letter, which TR said was not received until 10 February 2016. In this letter, ALN expressed its intention to bring a claim against TR. On 26 July 2016, TR sent ALN a "without prejudice" letter making an offer (without admission of liability) in full and final settlement of any claims ALN may have. On 8 December 2016, ALN issued an invoice or letter of demand for payment of royalties. A Claim Form was issued on 13 June 2017.

One of the claims made related to royalties. Here, TR said that the trigger for the running of time under clause 14.2 was when the "*basis for the claim*" became known to the potential claimant. That: "*basis for the claim denotes the foundation, the fundamental ingredient, the principal constituent, or the starting point for a claim.*"

This meant that there was a distinction between the substance (or basis) of a claim (here, the failure to pay the Agreed Royalty within the specified contractual deadline), and a procedural precondition that may have to be satisfied in order to entitle the claimant to claim (in ALN's case, the submission of an invoice).

ALN said that a precondition to a claim being brought (or action based on a claim) was that the cause of action had accrued. Knowledge of the "basis" of a claim must (at the very least) include knowledge of the facts which enabled a claim to be brought. The time to bring a claim ran from when ALN had complied with the contractual formalities for requesting payment. This was the sensible commercial approach in that the receiving party (the claimant) should not be required to issue an invoice in circumstances where the assessment of how much is owed was disputed by the paying party (the defendant). This was especially so in the case of a long-term relational contractual relationship, such as that here.

The Judge said that the time bar provision applied to a claim which arose out of the contract or the parties' performance under that contract. Clause 14.2 provided that neither party may bring a claim or start legal proceedings ("action") in respect of that claim "*more than one year after the basis for the claim becomes known to*" the claimant.

The effect of this provision was that, if a claim was made, or an action was commenced, more than one year after the basis for the claim was known to the claimant, the claim or action could not then be brought: it was time barred.

The Judge accepted that, if the provision was ambiguous in its meaning, then the court should generally adopt a construction which is favourable; in this instance, to ALN. However, there was no such ambiguity here. That said, a court should also take into account the fact that a time bar clause does not operate as a complete exemption from liability on the part of the defendant for breach of a contractual obligation. That exemption takes effect only if the claim is not instituted within the time specified.

The contractual limitation period commenced when "the basis for the claim becomes known to the party desiring to assert it" and concluded one year later. Further, the Judge stressed the commercial purposes behind such a provision:

"to ensure that the claim is brought to the attention of the defendant and the defendant is enabled to investigate the claim soon after it is made rather than having the potential disability of inquiring into a claim perhaps years after the circumstances giving rise to the claim arose."

The Judge agreed with ALN that "*the basis for the claim*" must be the facts and circumstances which constitute a right or cause of action at law. The key question was whether the basis for the claim was constituted by (a) the accrual of the Agreed Royalty at the end of the relevant quarter, (b) the expiry of the period for payment of the Agreed Royalty, being 60 days after the end of the relevant quarter, and/or (c) the issue of a valid invoice by ALN to TR.

The Judge held that ALN's entitlement to claim for payment of the Agreed Royalty existed no later than 60 days after the end of the relevant quarter. This was because the contract expressly stipulated that the "*royalties payable hereunder shall be accrued*" at the end of the relevant quarter and that the Agreed Royalty "*shall be paid*" by TR within 60 days after the end of each such quarterly period".

The Judge did not accept ALN's submission that the entitlement to claim for the Agreed Royalty accrued only upon the issue of an invoice by ALN. The contract did not say that the Agreed Royalty must be paid only upon the issue of the invoice; it stipulated payment at the end of the 60 day period after the end of the relevant quarter. Further, the contract did not say that the obligation to pay the Agreed Royalty accrued upon the issue of an invoice by ALN. Payment could be made without the invoice. TR knew how much the Agreed Royalty was because it had information which allowed the relevant amount to be calculated.

The Judge stressed that:

"Importantly, as far as clause 14.2 is concerned, it is not only when the entitlement to claim the Agreed Royalty arises which matters, but also when ALN became aware of the basis of that entitlement to claim."

TR said that the entitlement to claim the Agreed Royalty was known to ALN no later than 60 days after the end of the relevant quarter. ALN contended that the entitlement to claim the Agreed Royalty was only known to ALN when it issued the invoice on 8 December 2016. In the view of the Judge, much (or all) of ALN's claim for the Agreed Royalty was time barred insofar as the said Agreed Royalty for the relevant quarter was payable before 13 June 2016, being one year before the date of the commencement of this action.

There was another claim, based upon the allegation that TR continued to provide access to the Supplier Publications to third parties, and received payment for this, after the termination. Here, the submissions centred on what "*becomes known*" meant for the purposes of clause 14.2.

The Judge said that knowledge should be given its ordinary, natural meaning and should be answered by asking whether ALN knew, or was aware, of the basis for the claim. Knowledge did not mean that ALN:

"*must have an unwavering conviction in the belief in the truth of the basis for the claim, but there must be a sufficient measure of confidence in the belief which is justified by evidence, experience or reasoning. A mere suspicion, even if supported by some indeterminate evidence, is not sufficient to constitute knowledge for this purpose.*"

The key question was whether, and when, ALN knew that TR was continuing to use the information after termination. Here, there was conflicting witness evidence, which required a full enquiry, and it appeared to the Judge that ALN had a real prospect of succeeding in its claim and defeating the time bar defence on the basis that it did not become aware of the basis of the continued use until after 13 June 2016 (i.e. one year before the date of commencement of the claim). This part of the application was dismissed.

Contract formation

Dana UK AXLE Ltd v Freudenberg FST GmbH

[2021] EWHC 1751 (TCC)

In issue 252, we discussed this case and, in particular, the Judge's views on the approach to expert evidence, one of the other issues related to the formation of the Contract. It was common ground that, in deciding whether the parties had reached an agreement, the Judge should apply an objective test. In particular, they should look at the communications passing between the parties to see whether, to all outward appearances, there had been agreement in the same terms as to the same subject matter.

Had an offer been made with the apparent intention that it should be binding (notwithstanding that the offer may have been described as something else) and whether there had been a final and unqualified expression of assent to the terms of the offer, including by conduct. However, where there was acceptance by conduct, it must be objectively clear that the act of acceptance was done with the intention of accepting the offer.

Terms and conditions in standard form contracts must be brought to the attention of the party being bound before, or at the point, the contract is made. Here, there was a "battle of the forms" with each party alleging that the other contracted on its standard terms and conditions.

Clause 1 of the FST Terms provided that:

"These General Terms and Conditions apply to all our offers, contracts, deliveries and other services ... including all future business relations, even if not explicitly and separately stipulated. The Terms and Conditions shall be considered as accepted at order placement or receipt of goods at the latest. Conditions to the contrary set by our Customer shall not be accepted. These may only be applicable with our express written consent."

This is the type of clause which can displace the usual battle of forms analysis. However, the FST Terms were not attached to the relevant FST Quotation and there was no indication as to where they could be found and no evidence that Dana had ever asked for them or seen them.

Taking an objective view, the Judge said that a contract was formed between the parties on the 2003 Dana Terms. The application of the last shot doctrine resulted in Dana's terms being incorporated. The relevant purchase order represented a formal offer to purchase (in the first instance) 288,482 seals at a unit price of Euros 1.4335 on the 2003 Dana Terms, which was accepted by FST's conduct when it delivered the seals requested in the order.

Further, it was accompanied by a hard copy of the 2003 Dana Terms printed on the reverse of each page. There was sufficient information to amount to an offer to contract. The total order value for each part was identified as well as a unit price, from which the initial order volumes agreed between the parties could be calculated. In addition, it identified the mechanism by which volumes and delivery dates would be communicated at a later stage.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

Dispatch is a newsletter and does not provide legal advice.

Edited by **Jeremy Glover, Partner**
jglover@fenwickelliott.com
Tel: + 44 (0)20 7421 1986
Fenwick Elliott LLP
Aldwych House
71 - 91 Aldwych
London WC2B 4HN