



# Limitation for payment claims under construction contracts

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**The decision in [Hirst v Dunbar](#) [2022] EWHC 41 (TCC) considers the impact of payment provisions in a construction contract, whether through contract or implied terms, and the commencement of the limitation period for payment claims under the contract.**

**It indicates that the need to specify a due date for payment and the service of a payment notice may not affect the standard six-year limitation for a cause of action for payment upon completion of the work, save for limited circumstances.**

## Background

Originally a farm, the construction site in question had been partially converted to an estate of 26 properties before the original developer folded. It was purchased from liquidators by, in part, the defendants, and the claimant took on the job of completing the development. Work began in October 2011.

The claimant brought an action claiming sums for construction work done. The claim was for nearly half a million pounds.

The primary dispute at trial was whether the claimant had been contracted to complete the works by the defendant or whether they

had taken the job at their own risk with a view to purchasing the site themselves.

The Court decided there was no contract between the parties, so the claim failed. However, the Court did go on to consider whether the claim had also been brought out of time.

## The limitation issue

Even though the Court ruled there was no contract between the parties, it was still accepted that practical completion of the project had been certified on 4 December 2012.

The claimant argued he had agreed to be paid after the work was done.

The first formal claim for payment was made on 6 March 2014, seeking £476,886.29. No response was received and a claim for the reasonable price under a contract was brought on 2 August 2019. The defendant raised limitation as a defence.

The Court had to make a determination about whether the cause of action had occurred before 2 August 2013 (six years prior to the court issue date – six years being the common law statute of limitations period within which to make a claim in



the UK).

It was the claimant's case that as the contract (assuming there was one) did not contain an adequate mechanism for payment, that the Scheme for Construction Contracts (England and Wales) Regulations 1998 (the **Scheme**) implied payment terms, in that:

1. the final payment was due on the later of 30 days following completion of the works or the claimants making a claim;
2. that the defendant was required to serve a payment notice five days after the due date for payment; and
3. in the absence of a payment notice, the sum in the claim would become the notified sum payable by the defendant.

The claimants argued that the first demand for payment on 6 March 2014 represented the making of a claim and that the defendant should have issued a payment notice on 12 March 2014. If correct, the proceedings would have been commenced less than six years after the right to payment occurred and therefore would have been within time.

This was rejected by the Court.

The Court did not agree that issuing a payment notice was a precondition to the right to payment. Once the works were completed, the claimant would not have needed to take any further action to crystallise the right. In that event, the claimant could have assigned the right to payment or sought a declaration that payment would be due.

It followed that any payment made in response to the making of a claim under paragraph 6 of the Scheme meant the discharge of a cause of action that already existed and accrued independently.

The Court also distinguished paragraph 9 of the Scheme from a clause in a contract requiring an employer to pay a contractor a sum certified by an independent certifier. In *Henry Boot Construction v Alstom Combined Cycles Ltd* [2005] EWCA Civ 814, the issuing of an engineer's certificate was held to be a condition precedent to a contractor's right to payment.

## Conclusion

In summary, the Court held that payment terms implied by the Scheme did not displace the common law rule regarding limitation. In the absence of a special term to the contrary, such as that found in *Henry Boot*, the cause of action for payment under a contract for services enures on completion of the work. The work had been completed on 4 December 2012, more than six years before the claim was brought to Court, so the claim was time-barred.

This decision now provides authority as to how the terms implied by the Scheme impact the limitation period. Parties are best warned to err on the side of caution and issue proceedings within the limitation period following the completion of works rather than run the risk that their contract does not provide the protection they thought it would.

## ABOUT THE AUTHOR



Sam Dorne is a member of the NZDRC's Knowledge Management team and provides technical support to the Building Dispute Tribunal. Sam recently returned back to NZ after nearly 19 years of living in the UK where he spent the last several years working as a civil litigation solicitor mainly dealing with the recoverability of legal costs and consumer claim cases. He has experience in advocacy, case management and legal drafting and had several cases go to the Court of Appeal in England.

