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LJR Interiors Ltd v Cooper Construction Ltd [2023] EWHC 3339 (TCC)

LJR sought summary enforcement of an adjudicator's decision whilst Cooper sought a Part 8 declaration that the adjudicator's decision was void on the ground that the sum awarded was barred by limitation. Back in August 2014, the parties entered into a written contract under which LJR agreed to carry out dry lining and other works for Cooper. The Contract contained no provision for the reference of disputes to adjudication, so the adjudication provisions of the Scheme applied.

Cooper said that the works under the Contract were completed on 19 October 2014. On 31 July 2022, almost 8 years after they had finished works under the Contract, LJR submitted Application No. 4 in the sum of £3,256.58. While the sum claimed was small, LJR submitted similar applications in July 2022 to Cooper across a number of other contracts. Cooper did not

respond and LJR gave notice of adjudication saying that the dispute arose "on or about 28 August 2022 when the notified sum due was not paid by the final date for payment." Amongst other adjudication defences, Cooper said that the claim was issued outside the Limitation Period of six years, in accordance with section 5 of the Limitation Act 1980:

"For the avoidance of doubt, the 'cause of action' was either 28 November 2014 when the Respondent failed to pay the sum invoiced for by the Referring Party, or, although denied by the Respondent, on 12 March 2015 when the Respondent issued the email refusing to pay the sum invoiced by the Referring Party and provided its reasons for refusal ..."

The adjudicator addressed the issue of limitation by saying that the general rule in contract was that a cause of action accrued when the breach takes place. The breach alleged here was the failure to make payment of a sum said to be due by the final date for payment, namely 28 August 2022. On that basis, the limitation period had not expired. Section 5 of the Limitation Act 1980 provides that: "An action founded on simple contract shall not be brought after the expiration of 6 years from the date on which the cause of action accrued."

In defence to the enforcement proceedings, Cooper simply relied upon the date of the completion of the works as providing the accrual date for a claim for payment under a contract for those works.

HHJ Russen KC noted that Application No. 4 was not the typical type of application for

payment. Although Cooper had described it as being the basis for a “smash and grab” adjudication, the Judge said that it was: “perhaps better viewed as a return to an otherwise cold contractual scene long after the time when any appropriate investigations into it might be expected to have concluded.”

The Judge referred to the Supreme Court decision in *Aspect v Higgins*, noting that the recognition of a limitation period of six years for the commencement of legal proceedings to enforce an adjudicator’s decision provided reason why the decision itself should recognise any limitation defence that operates to defeat the claim advanced under the referred dispute. Otherwise, a contracting party would, through the grafting on of the discrete limitation period which applies

to any action to enforce the decision, benefit from a much longer limitation period than the 1980 Act contemplated for the bringing of legal proceedings. The Judge also referred to, and agreed with, a statement in *Keating on Construction Contracts* (11th ed), at para.16-047, which supported this approach:

“The Limitation Act 1980 and other enactments apply equally to adjudication in the sense that an adjudicator must treat the law of limitation as a substantive defence just as any other defence.”

Further, the Judge said that:

“The key hallmark of a point which may operate to defeat such enforcement on a responsive Part 8 Claim ... is that it should be one which on a summary

judgment application it would be unconscionable to ignore.”

The adjudicator’s approach in deciding that LJR’s cause of action, accrued on 28 August 2022, paid no regard to the terms of the Contract, as to when the right to payment of the balance sought by Application No. 4 accrued. It further appeared to have assumed that the absence of a pay less notice (taking the limitation defence or any other objection to payment of that sum) meant that it was unnecessary to consider whether the application itself was timely. LJR’s right to payment of all sums identified in Application No. 4 was one which accrued on 28 November 2014. The unpaid balance did not somehow become “due again” for limitation purposes simply by virtue of being demanded again over seven and a half years later.

About the author



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Jeremy Glover is a partner at Fenwick Elliott LLP, the UK’s largest construction law firm and President-elect of the Dispute Resolution Board Foundation (**DRBF**). He is listed as a leader in his field in *Who’s Who Legal: Construction 2020*. An accredited FIDIC DAB adjudicator and member of the CIARB Adjudication Sub-Committee. Jeremy is the co-author of *Understanding the FIDIC Red and Yellow Book: A Clause by Clause Commentary*, the third edition of which was published in 2018, and lead editor of *Building Contract Disputes: Practice and Precedents*. Jeremy is a member of the Board of Examiners on the Construction Law MSc programme at King’s College and teaches on the MSc Building Information Modelling Management Programme at Middlesex University. He is also a member of the FIDIC Net Zero Task Group TG23 and of The Chancery Lane Project Built Environment Advisory Committee.