



Neutral Citation Number: [2019] EWCA Civ 360

Case No: B2/2015/3378

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM BIRMINGHAM COUNTY COURT**  
**(DISTRICT JUDGE INGRAM)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 07/03/2019

**Before :**

**LORD JUSTICE McCOMBE**  
**LORD JUSTICE MOYLAN**  
**LORD JUSTICE HADDON-CAVE**

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**Between :**

**AVTAR SINGH**

**Applicant**

**- and -**

**ROSHAN DASS**

**Respondent**

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**Mr Avtar Singh as Litigant in Person**  
**Mr Aidan Reay (instructed by dbs Andersons Solicitors) for the Defendant**

Hearing date: 6<sup>th</sup> February 2019  
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**APPROVED JUDGMENT**

## LORD JUSTICE HADDON-CAVE:

### Introduction

1. Mr Singh (“Mr Singh”) appeals against the decision of District Judge Ingram sitting in Birmingham County Court dated 30<sup>th</sup> September 2015 dismissing Mr Singh’s claim against Mr Dass (“Mr Dass”) on a preliminary point that the claim was statute-barred by virtue of the Limitation Act 1980.

### *Background Facts*

2. The claim arose from a building contract whereby, in or about June 2007, Mr Singh undertook to carry out renovations to a care home owned or operated by Mr Dass at 87-89 Stirling Road, Edgbaston (“the Property”). It was agreed that Mr Dass would pay Mr Singh a daily rate for labour of £100 and make payments in respect of materials. The contract was made orally.
3. Mr Singh contended that, in or about May 2008, the parties agreed to vary the contract so that, instead of making stage payments as the project progressed, Mr Dass would instead pay a lump sum of outstanding labour charges plus 10% on completion of the project.
4. Mr Dass contended that, in or about November 2008, Mr Singh made an unwarranted demand for a further £10,000 to be paid as a condition to obtaining a certificate of completion, whereupon on 23<sup>rd</sup> November 2008 Mr Dass, in effect treated Mr Singh’s conduct as a repudiatory breach and terminated the contract, stating that all payments due up to that date had been made.
5. On 21<sup>st</sup> (or 25<sup>th</sup>) January 2009, a Building Regulations completion certificate was issued by Birmingham City Council for the works.
6. Some six years later, on 28<sup>th</sup> November 2014, Mr Singh issued the proceedings herein. Mr Singh claimed that a total of £31,260.41 remained outstanding under the contract, comprising (i) £20,570 in respect of outstanding unpaid wages between May 2008 and January 2009 at £100 per day plus 10% “as per agreement on finishing the works”, and (b) £10,679.41 in respect of materials paid for between May 2008 and January 2009, but not reimbursed.
7. Mr Dass denied the claim contending (a) no sums remained outstanding under the contract and (b), in any event, the contract was terminated on 27<sup>th</sup> November 2008. He contended that the cause of action for the whole of Mr Singh’s claim accrued more than six years before the proceedings were brought; and, accordingly, the action was time-barred by virtue of section 5 of the Limitation Act 1980.

### *Judgment below*

8. A preliminary issue was heard before DJ Ingram on 25<sup>th</sup> September 2015 on the question of the time-bar. The issue which DJ Ingram had to determine was when the cause of action accrued. Mr Singh contended that the cause of action did not accrue until 10<sup>th</sup> January 2009 when the certificate of completion was issued and, accordingly, the claim was issued in time, *i.e.* within six years. Mr Dass contended that the cause of action accrued earlier when he terminated the contract on 27<sup>th</sup> November 2008 and, accordingly, the claim was time-barred.

9. The District Judge found that the contract was, in fact, terminated on 23<sup>rd</sup> November 2008 and concluded that Mr Singh's claim was, indeed, statute-barred. She held that the claim should have been issued on a working day within six years of that date, *i.e.* no later than 24<sup>th</sup> November 2014 (23<sup>rd</sup> November 2014 being a Sunday) but Mr Singh did not issue proceedings until 28<sup>th</sup> November 2014 (see above).
10. In reaching her decision, the District Judge found Mr Singh's evidence to be "contradictory and evasive" and in parts "incredible"; whereas she found Mr Dass's evidence "to the point, emphatic and credible". The District Judge rejected Mr Singh's case that the contract had been varied in May 2009 as he claimed to convert payment for wages into a lump sum. She held that Mr Dass had, indeed, terminated the contract on 23<sup>rd</sup> November 2009 following Mr Singh's unwarranted demand for £10,000 as a condition for obtaining a certificate of completion and concluded that it was, therefore, on that date that the contract came to an end and the cause of action accrued for the purposes of the Limitation Act 1980 (see above).

#### *Permission to appeal*

11. Lewison LJ granted permission to appeal after an oral hearing at which Mr Singh was represented *pro bono* by Ms Charlotte Thomas. Ms Thomas (who did not appear below) raised *inter alia* a new point not taken below, namely, that the District Judge found some payments had been made by Mr Dass under the contract after 23<sup>rd</sup> November 2008; and accordingly, it was arguable that Mr Singh's claim was not, in fact, statute-barred because there may have been a fresh accrual of the cause of action pursuant to s.29(5) of the Limitation Act 1980.
12. Lewison LJ granted leave on that single ground, namely, whether the claim was not statute-barred because there may have been a fresh accrual of the cause of action pursuant to s.29(5) of the Limitation Act 1980. In granting permission, Lewison LJ expressly left it open to Mr Dass to argue that, as this argument had not been raised before the lower court, it was not open to Mr Singh to rely upon the point on appeal.

#### *Submissions*

13. Mr Singh appeared before us in person, assisted by a gentleman called Mr Akther who acted as translator and to whom we are grateful. Mr Singh submitted in summary that (i) he continued working for Mr Dass on the project after 23<sup>rd</sup> November 2008; (ii) Mr Dass continued to make payments to Mr Singh for the works after 23<sup>rd</sup> November 2008; (iii) those payments were in part payment or part discharge of the accrued debt; and (iv) accordingly, as Ms Thomas submitted at the leave application, there was a fresh accrual of the cause of action pursuant to s.29(5) of the Limitation Act 1980 and Mr Singh's claim was not statute-barred.
14. Mr Aidan Reay (who also did not appear below) appeared for Mr Dass and argued that the Court should refuse to allow the new point under s.29(5) of the Limitation Act 1980 to be raised now on appeal for the first time because (i) it would necessitate new evidence and (ii), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence. Mr Reay also submitted that, on the findings of the District Judge and the evidence currently available, the case that s.29(5) was triggered could not be made out in any event.

## **Legal Framework**

### *The legal principles*

15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.
16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49]).
18. Third, even where the point might be considered a ‘pure point of law’, the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24; [2017] R.T.R. 22 at [29]).

### *The Limitation Act 1980*

19. Section 29 of the Limitation Act 1980 provides:

*“(5) Subject to subsection (6) below, where any right of action has accrued to recover—*

*(a) any debt or other liquidated pecuniary claim; or*

*(b) any claim to the personal estate of a deceased person or to any share or interest in any such estate;*

*and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it the right shall be treated as having accrued on and not before the date of the acknowledgment or payment.”*

20. Section 29(5) of the Limitation Act 1980 is not materially different to its predecessor in s.23(4) of the Limitation Act 1939. The concept of what amounts to “*other liquidated pecuniary sum*” has been considered in a number of cases, with the leading authority being *Phillips & Co (a firm) v Bath Housing Co-operative Ltd* [2013] EWCA Civ 1591; [2013] 1 W.L.R. 1479 at [20] to [37].
21. Section 29(5)(a) covers specific debts provided for in and ascertainable from contracts. It also covers claims for a reasonable sum under a contract and a solicitor’s claim for his unassessed fees. It is important to note that section 29(5)(a) does not cover a claim for unliquidated damages.

22. Section 30(2) of the Limitation Act 1980:

*“(2) For the purposes of section 29, any acknowledgment or payment—*

*(a) may be made by the agent of the person by whom it is required to be made under that section; and*

*(b) shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.”*

23. Under section 30(2)(b) of the Limitation Act 1980, the payment must be made either to the person in respect of whose claim the payment is being made or that person’s agent. A payment, when made to the creditor or his agent, will only result in the cause of action as having been accrued from that date if the payment is made in respect of the “*debt or other liquidated pecuniary claim*” in issue.

24. Where multiple debts are owed, an appropriation by the creditor of a payment to a statute-barred debt will not trigger s.29(5) of the Limitation Act 1980 (*In Re Footman Bower & Co. Ltd.* [1961] Ch 443, 449). However, where the parties’ course of dealing shows that they are treating the debts owed not as individual debts but as a single running account, then a payment by the debtor towards the general balance will trigger s.29(5) (*In re Footman Bower & Co. Ltd.* at 451).

25. If a claimant is alleging a debt is due and the defendant has disputed part of that debt, but made a payment in respect of the part which is undisputed, that payment will not be a part payment in respect the disputed part of the debt so as to trigger s.29(5) of the Limitation Act 1980 (*Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 1 W.L.R. 565. 576).

26. Once a defence of limitation is raised, it is for the claimant to prove that he has brought his claim in time. The burden was, therefore, on Mr Singh to prove that his cause of action had accrued later than 24<sup>th</sup> November 2014 and that would include raising the issue of a deemed fresh accrual under s.29(5) of the Limitation act 1980.

**Analysis**

27. The essential question which we have to determine is whether the proposed point which Mr Singh now seeks to raise under section 29(5) of a fresh accrual of the cause of action by post-termination payments would (a) necessitate new evidential issues on appeal or (b), if the point had been raised below, it would have resulted in the hearing before the District Judge being conducted differently below with regard to the evidence (*c.f. Mullarkey v Broad (supra)*).

28. In my view, the clear answer to both (a) and (b) is ‘yes’ for the following reasons.

29. First, at the hearing below, the District Judge was focussed on the sole legal issue before her, namely whether the contract was terminated on 23<sup>rd</sup> (or 27<sup>th</sup>) November 2008 such that the cause of action accrued on that date for limitation purposes. If and in so far as she considered the evidence regarding payments, this was in the context of determining credibility and resolving the factual dispute as to whether the contract was varied in May 2008 so as to require a lump sum as opposed to weekly payments. She was not concerned, nor was she asked specifically to consider in any depth, the evidence

regarding the post-termination payments, in particular, what each of the payments was in respect of, when and to whom each was made. She was not asked to consider and determine on the evidence (because the point was not raised below), the key point which is now sought to be raised, namely, whether such payments could be said to comprise part payments of the larger debt which Mr Singh says was outstanding such as to trigger section 29(5) of the Limitation Act 1980. Nor were these points the focus of counsel.

30. Second, in so far as the District Judge did touch upon the post-termination payments, her findings largely undermine the argument which Mr Singh now seeks to raise under section 29(5). Indeed, in the light of these findings, it might be said that the section 29(5) point was no longer open to Mr Singh because to run it would require re-visiting the Judge's findings of fact, which is not something which it would be appropriate for this Court to do at this juncture. The District Judge said this (at paragraph 21-22):

“21. Some payments, however, were made by the defendant after 23<sup>rd</sup> November 2008 and the claimant submits that it would be improbable that the defendant would make such payments after the termination of the contract. However, in my judgment, I find that the defendant provided an adequate explanation in that he was paying for materials in stages and that some of those payments made after that date and that on another occasion the claimant was upset because he said his father was ill and he needed some money and a further £500 was paid in order to help him out. It was at this stage again, as I said, that the defendant's evidence had a ring of truth about it. He was clearly very upset because he had done what he thought was a favour to the claimant in helping him out even after the contract had ended and yet he feels so badly treated by the defendant who he alleges is making up the claim against him.

22. I, therefore, accept on the balance of probabilities the defendant's explanation and the defendant's explanation with regard to the termination and the facts surrounding the termination was supported by Mr Long and, therefore, on the balance of probabilities I accept the defendant's version of events, together with that of Mr Long, for the reason that the contract ended on 23<sup>rd</sup> November 2008. ...”

31. Third, in any event, the evidence concerning the post-termination payments is, at best, unclear and, at worst, seriously disputed. In the course of his submissions before us, Mr Singh said that he had received four payments from Mr Dass after 23<sup>rd</sup> November 2008, namely £500 on 25<sup>th</sup> November 2008, £2,000 on 31<sup>st</sup> December 2008, £61 in respect of council tax and a further £500 on or about 5<sup>th</sup> January 2009 when the contract came to an end. He relied upon a manuscript document exhibited to his witness statement in the court below at “AS/5” which contained these figures on the left hand side of the page beside the word “cash”. He said that the handwriting was that of Mr Dass but he had written in the second figure of £500. He said the payments of £500, £2,000 and £500 were each made by Mr Dass to him at the worksite and were by way of deductions from the total debt owed by Mr Dass to him and the last figure of £500 “came off the top”. He denied that they were payments by Mr Dass in respect of materials supplied by builders' merchants. He said that the manuscript figures on the right hand of the page (totalling £17,715.25) showed when individual disbursement had been paid by Mr Dass. Mr Singh said that Mr Dass has “misled” the District Judge on these matters and

the District Judge had made the wrong findings in paragraph 21 of her judgment (cited above) where she said that Mr Dass was paying for materials in stages and he paid a further £500 to Mr Singh simply “to help him out” because he said his father was ill.

32. Fourth, further, it will be apparent from the above that there remain significant potential unresolved disputes on the evidence as to the post-termination payments, in particular, as to (a) whether the post-termination payments were by way of part payments or reductions of a single unified debt such as to trigger s.29(5) of the Limitation act 1980, (b) whether they were payments in respect of one-off items or materials, (c) whether labour and materials were treated and paid for separately and (d) to whom payments were made. In order to make a case on section 29(5), Mr Singh would have to establish that the post-termination payments were acknowledgments of either (i) the whole sum he was claiming, (ii) an accepted lesser sum that remained outstanding, or (iii) a general balance to be determined. It should be noted that the District Judge found that no single invoice for £29,000 existed (at paragraph 28 of her judgment). Mr Singh would also have to establish that the payments post-termination were made to him and not to third parties, such as builders’ merchants, the Council, credit card companies and the electricity companies, in order to satisfy section 30(2)(b) of the Limitation Act 1980 that they were the creditor or his “agent”.
33. Fifth, none of these matters were explored in evidence before the District Judge as they could, and almost certainly would, have been if the s.29(5) point had been live below. Further, it is clear, not least from the exchanges with Mr Singh at the hearing before us, that the Court of Appeal could not resolve the s.29(5) point without admitting and hearing further evidence from Mr Singh and Mr Dass on these issues.
34. Sixth, I remain of the view that the findings of fact DJ Ingram probably form an insurmountable obstacle to Mr Singh raising section 29(5) at this late stage. However, in any event, in my view, it is clear that (a) if the section 29(5) point had been raised below, the hearing before DJ Ingram would have been conducted differently with regard to the evidence and (b) an attempt now to raise section 29(5) on the basis of a fresh accrual of the cause of action by reason of the post-termination payments would necessitate fresh evidence on appeal. For either or both these reasons, Mr Singh should not be permitted to raise this new point under section 29(5) on appeal when he did not raise it below.

### **Conclusion**

35. In conclusion, for the reasons given above, in my view, this appeal must be dismissed. The costs of this appeal are to follow the event in the normal way. Accordingly, we will order that Mr Singh is to pay Mr Dass’s costs of or occasioned by the appeal.

### **LORD JUSTICE MOYLAN**

36. I agree.

### **LORD JUSTICE McCOMBE**

37. I also agree.