Neutral Citation: [2018] EWHC 729 (TCC)

Case No: HT-2017-000261

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Before :
MR EDWARD PEPPERALL QC
SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

R.G. CARTER BUILDING LIMITED
Claimant

- and -

KIER BUSINESS SERVICES LIMITED
(formerly Mouchel Business Services Limited) **Defendant**

- -

Mr Steven Walker QC (instructed by **Mills & Reeve LLP**) for the **Claimant**
Miss Lynne McCafferty (instructed by **Beale & Company Solicitors LLP**) for **the Defendant**

Hearing date: 25 January 2018
Judgment handed down: 5 April 2018

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Approved Judgment

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

MR EDWARD PEPPERALL QC:

1. This judgment concerns the trial of a preliminary issue as to whether these contribution proceedings are statute barred pursuant to section 10 of the

Limitation Act 1980. It raises a short point as to the proper construction of the section.

2. In 2001/2, the Claimant, R.G. Carter Building Limited, built a new science block at Boston Grammar School. Unfortunately, the science block, which was designed by the Defendant, Kier Building Services Limited, suffered problems with the ingress of water into the building. Consequently, the client, Lincolnshire County Council, brought arbitration proceedings against Carter. The arbitration was settled in 2015 upon terms that Carter would carry out remedial works at its own cost.

3. On 20 September 2017, Carter issued these proceedings against Kier seeking an indemnity or a contribution of £205,908.60 in respect of the cost of the settlement. Kier has not filed a Defence but plainly intends to plead that the claim is statute barred. In those circumstances, the court approved a consent order on 31 October 2017 setting down the trial of the preliminary issue of limitation. While it is unusual to conduct the preliminary issue of an unpleaded defence, the parties have jointly invited the court to take this course.

4. The parties entered into a standstill agreement on 28 April 2017. Of course, such agreement does not prevent Kier from arguing that this claim was already statute barred, but it does not seek to argue that the claim is out of time if the court finds that the limitation period had not expired at the date of the standstill agreement. Thus, the issue before the court is whether the contribution claim was statute barred on 28 April 2017.

5. The parties' respective positions can be briefly summarised:

   5.1 Mr Steven Walker QC, counsel for Carter, contends that there was no agreement as to the remedial works until the parties to the arbitral proceedings signed a settlement agreement on 29 June 2015. Alternatively, the date of agreement was in any event later than 28 April 2015 since the parties were still negotiating the terms of their settlement throughout April. Accordingly, he submits, the two-year limitation period did not expire until after the standstill agreement and this claim is in time.

   5.2 Miss Lynne McCafferty, counsel for Kier, argues that the remedial works were agreed by 16 April 2015, or at the latest by 27 April 2015. All that remained to be agreed thereafter were ancillary matters that did not prevent time from running. Therefore, she argues, the claim was already statute barred at the date of the standstill agreement.

THE EVIDENCE

6. Carter called two witnesses; its company secretary, Robert Alflatt, and its solicitor, Alison Garrett of Mills & Reeve LLP. Both had first-hand dealings with the 2015 settlement of the arbitration. They explained the negotiations that were conducted between Carter and the Council between December 2014 and June 2015. Specifically, they explained that an agreement in principle

was reached during April 2015 but that all negotiations were expressly conducted on a subject to contract basis until the parties signed the settlement agreement on 29 June 2015.

7. Kier served a witness statement from its solicitor, Nathan Modell, of Beale & Company Solicitors LLP. Mr Modell described the negotiation of the standstill agreement in April 2017. Otherwise, he had no direct knowledge of the 2015 settlement and his statement essentially gave a preview of counsel's submissions. He was rightly not called to give oral evidence.

8. Carter and the Council attended a without prejudice meeting on 27 March 2015. Mr Alflatt attended on behalf of Carter together with David Drake (Carter's Director and General Manager) and Peter Smith (the then regional director responsible for Carter). A handwritten note of their discussions was produced in evidence. It recorded agreement that Carter would carry out external remedial works at its own cost as soon as reasonably practicable. The parties also agreed that Carter would carry out internal works at the joint cost of the parties, but the scope of such works remained to be agreed. In addition, John Radice was to provide a warranty in respect of his remedial design, the wording of which was to be agreed. The emerging agreement was expressly subject to the school's agreement.

9. Further correspondence followed in which the parties clarified what had been agreed on 27 March. Mr Alflatt agreed in cross-examination that the scope of the proposed external works had already been defined by reference to Mr Radice's December 2014 report. The proposed deal was not that Carter would undertake to remedy the defects, but that it would carry out the agreed works. It was therefore seeking to contract for a clean break with any warranty as to the efficacy of the design to be given by Mr Radice. Accordingly, it was important to the Council, and no doubt the school, that the proposed works would be effective.

10. Meanwhile, on 29 March 2015, Mr Drake e-mailed a detailed proposed specification for the internal works to the Council. In cross-examination, Mr Alflatt described the specification as a "draft for discussion."

11. By an e-mail dated 16 April 2015, prominently marked "WITHOUT PREJUDICE SAVE AS TO COSTS" and "SUBJECT TO CONTRACT", Mark Keal, a senior lawyer at the Council, wrote:

> "I confirm that my client is minded to pursue a settlement along the lines of the proposal discussed between our respective clients on 27 March 2015. Accordingly, my client's efforts are now focussed on the matter of the Heads of Terms documentation.
>
> The initial feedback from the School is that they are also amenable to attempting the external works in an effort to solve the problem.
>
> The School have confirmed that your client may undertake investigatory works between 2-4 May …

> Accordingly, it seems sensible to agree a way forward that ensures that our respective clients have a sufficient opportunity to discuss and finalise the Heads of Terms … documentation."

12. By a second e-mail sent on the same day, again prominently marked "WITHOUT PREJUDICE SAVE AS TO COSTS" and "SUBJECT TO CONTRACT", Mr Keal added:

> "I confirm that my client is prepared to agree to a settlement in principle in accordance with the heads of terms agreed between our respective clients at their [without prejudice] meeting on 27 March 2015 and as recorded in the manuscript note attached subject to the detail of the Heads of Terms being agreed and the Council obtaining the full agreement of the School to the Heads of Terms.
>
> You indicated that your client was willing to agree to a suspension of the arbitration until the end of May having regard to the above. My client agrees that is a sensible way forward to ensure efforts can be concentrated upon agreeing the Heads of Terms."

13. By a letter dated 20 April 2015, Mr Keal proposed additional internal works. Such letter was sent under cover of an e-mail in which Mr Keal made clear that the Council considered it sensible to agree the scope of the internal works before finalising the heads of terms. This point was repeated in a further letter from Mr Keal on 21 April in which the Council sought a revised schedule of internal works.

14. The investigatory surveys were undertaken over the May Day bank holiday weekend. Mr Alflatt explained that the surveys were necessary in order to finalise the scope of the remedial works. Carter responded on 7 May 2015 on a number of issues, including points of detail about the scope of the internal works. A technical meeting was held on 8 May 2015 in the absence of the lawyers in order to discuss and agree the design and scope of the remedial works and the programme for the works to be undertaken over the summer holidays. Rejecting the suggestion that Carter had reached a concluded agreement with the Council by 16, or alternatively 28, April 2015, Mr Alflatt observed that it was not until the technical meeting on 8 May that there was clarity as to the scope of the works to be carried out.

15. Modest preparatory work started on site on 8 June 2015. Specifically, cabins were delivered to site and the risk assessment and method statement were finalised. Mr Alflatt said that he was then confident that agreement would be reached and that accordingly Carter was happy to undertake some preliminary work in setting up the site in view of the limited window in which remedial works could be undertaken before the start of the autumn term. Nevertheless, he maintained that the parties had not at that stage reached agreement as to the final scope of the works. Indeed, Mr Alflatt told me that the scope of the external works was adjusted right up until 25 June 2015 following sample work undertaken on 23 June upon opening up a section of the external wall.

THE LAW

16. Section 1 of Civil Liability (Contribution) Act 1978 provides that any person liable in respect of any damage can recover contribution from any other person liable in respect of the same damage. Section 1(4) of the Act provides:

> "A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage … shall be entitled to recover contribution in accordance with this section …"

17. Section 10(1) of the Limitation Act 1980 provides that no action to recover a contribution pursuant to the 1978 Act shall be brought after the expiry of a period of two years from the date on which such right accrued. The right to a contribution is treated for the purpose of limitation as accruing on the date of any judgment or award against the party seeking the contribution (s.10(3) of the 1980 Act) or upon agreement to pay compensation in the case of a settlement (s.10(4)).

18. Section 10(4) provides:

> "If, in any case not within subsection (3) above, the person in question makes or agrees to make any payment to one or more persons in compensation for that damage (whether he admits any liability in respect of the damage or not), the relevant date shall be the earliest date on which the amount to be paid by him is agreed between him (or his representative) and the person (or each of the persons, as the case may be) to whom the payment is to be made."

19. The issue in this case is whether time runs under section 10(4) only once the parties have entered into a binding agreement for the payment of compensation, as Mr Walker QC submits, or whether something short of a binding agreement is sufficient to start time running, as Miss McCafferty submits.

20. Before turning to this question, it is necessary first to consider the structure and general operation of section 10. In brief:

    20.1 As noted above, time for the bringing of a contribution claim runs from the date of the judgment or award where the matter is litigated or arbitrated: s.10(3).

    20.2 Cases in which the underlying dispute is settled fall under section 10(4) and not section 10(3). That remains the case notwithstanding that the parties' settlement is subsequently recorded in a court order: Knight v Rochdale Healthcare NHS Trust [2003] EWHC 1831, [2004] 1 W.L.R. 371 (Crane J); approved in Aer Lingus plc v Gildacroft Ltd [2006] EWCA Civ 4, [2006] 1 W.L.R. 1173, at [37]-[38] (Rix LJ) and Chief Constable of Hampshire Constabulary v Southampton City Council [2014] EWCA Civ 1541, at [31] (Jackson LJ). Accordingly, the court should seek to identify the "earliest date" of the underlying agreement and not the subsequent date when the consent order was sealed by the court or made by the arbitrator.

20.3 In cases falling under section 10(3), time runs from the judgment or award which ascertains quantum and not merely an earlier judgment or award establishing liability for damages to be assessed: Aer Lingus, at [43].

20.4 So too, under section 10(4) there must be agreement as to the amount of the payment and not merely as to liability: Aer Lingus, at [35]-[36] and [41]. Equally, time does not run from earlier agreement to pay an interim payment towards a potential liability, but from the date of agreement of the final sum to be paid: Spire Healthcare Limited v Brooke [2016] EWHC 2828 (QB), at [57]-[66] (Morris J).

20.5 The agreement that must be identified is an agreement for payment for the actual damage caused. The running of time is not further delayed pending agreement of any ancillary liability for costs: Chief Constable of Hampshire Constabulary, at [42]-[44].

20.6 While section 10(4) talks about payment, such term includes both monetary payment and payments in kind: per Judge Havery QC in Baker & Davies plc v Leslie Wilks Associates [2005] EWHC 1179 (TCC), at [16]. Accordingly, the agreement of remedial works is, for the purposes of subsection (4), an agreement for the payment of compensation.

21. It was rightly common ground before me that sections 10(3) and (4) are mutually exclusive. Rix LJ considered this point in Aer Lingus, at [36]:

> "What happens where there is agreement on a settlement sum followed by a consent judgment for payment of that sum, as must often occur? Or a judgment for damages to be assessed followed by agreement on a settlement sum? Are such cases governed by subsection (3) or (4)? They cannot be governed by both: there can in logic be only one 'relevant date', and this is emphasised by the words which introduce subsection (4) – 'If in any case not within subsection (3) above …'
>
> If subsection (3) requires only a judgment for damages to be assessed, then it must follow that, given such a judgment, subsection (4) never comes into play, for the case will already fall within subsection (3). If, however, subsection (3) requires a judgment for damages, then an agreement within subsection (4) could both follow a mere judgment for damages to be assessed and anticipate a consent judgment for the payment of the agreed sum: but it would be the agreement which comes first at a time when there is no judgment within subsection (3), and it would seem that the relevant date is fixed by subsection (4)."

22. Miss McCafferty argued that section 10(4) does not require the parties to have entered into a binding agreement, and that an agreement in principle with the final details still to be worked through is sufficient to make time start running under the section. She developed the argument as follows:

22.1 She submitted that the language of section 10(4) does not suggest that a binding agreement is required. Parliament could, she argued, have chosen to state in terms that time ran from the date of any binding agreement or settlement agreement.

22.2 In this respect, the language of section 10(4) was to be contrasted with section 1(4) of the 1978 Act, which Miss McCafferty accepted requires a binding settlement or compromise.

22.3 The policy of the 1980 Act is to prevent the litigation of stale claims. Such consideration points therefore to time running from the earliest date, as indeed section 10(4) says in terms. There is a particular danger of stale contribution claims being brought many years after the original building works.

22.4 Miss McCafferty relied on the following passage in McGee on Limitation, (7th Ed.), at para. 15-024:

> "Section 10(4) states quite clearly that time runs from the date on which the amount of compensation is agreed. In out-of-court settlements there may well be a number of other matters requiring to be agreed, such as date of payment, possibility of instalments and method of payment. However, none of these has any relevance. Agreement on them will not set time running but absence of agreement on them will not prevent it from running – it is only the amount of compensation that must be agreed."

22.5 By way of example, Miss McCafferty points out that time ran in Knight v Rochdale Healthcare NHS Trust [2003] EWHC 1831, [2004] 1 W.L.R. 371 from agreement as to the settlement sum even though there was as yet no agreement as to whether it would be paid as a lump sum or by way of a structured settlement.

22.6 Here, an agreement in principle that Carter would carry out remedial works was sufficient to make time run, even though there might not be a binding agreement until the details had been agreed.

23. Mr Walker QC submits that nothing less than a binding agreement can set time running. He argued:

23.1 The natural meaning of "agreed" in section 10(4) was that there should be a binding agreement in a contractual sense.

23.2 Secondly, His Honour Judge Havery QC held in Baker that time ran not from the agreement of a proposed settlement on a subject to contract basis but upon the execution of the subsequent settlement agreement.

23.3 Thirdly, upon Miss McCafferty's construction, time might begin to run under section 10(4) before the claim for contribution arose under section 1(4) of the 1978 Act.

Discussion

24. Miss McCafferty's argument can be tested by considering the position that might arise if the parties reach an agreement in principle – perhaps, as here, a settlement that is expressly made on a subject to contract basis – and yet such agreement subsequently breaks down. On Miss McCafferty's argument:

24.1 Time would start to run under section 10(4) upon the agreement of non-binding terms of settlement.

24.2 Upon the talks subsequently breaking down, the litigation between the parties might be pursued. Does time keep running even though the

agreement has broken down? Or is the running of time to be suspended? Or is the clock reset?

24.3 Thereafter, the case might be determined at trial. Does time now run afresh under section 10(3)?

24.4 Alternatively, the parties might finally agree binding terms of settlement at the door of the court. Does such agreement for the payment of compensation start the clock running again under section 10(4)?

25. I put this problem to Miss McCafferty. She did not shrink from the difficulty created by her construction and accepted that the consequence of time starting to run under subsection (4) upon the agreement of non-binding terms of settlement might well be that the case subsequently fell to be determined under subsection (3) upon the talks breaking down and the matter proceeding to trial.

26. In my judgment, this is not a sensible construction of the Act. It is important to approach the section on the basis that sections 10(3) and (4) are, upon their true construction, intended to be mutually exclusive. I agree with Rix LJ that there can only be one trigger date to start time running under section 10; namely either:

26.1 the date of the judgment or award requiring a payment in cases where such issue is the subject of a judicial or arbitral determination; or

26.2 the date of the agreement to make the payment in a case where the issue is compromised.

27. Since there can only be one trigger event, it follows that time cannot start to run where the parties reach an unenforceable agreement as to payment. In such a case, the litigation or arbitration remains on foot and time will only start to run under section 10(4) from the date of the subsequent formal agreement or, if the matter cannot be agreed, under section 10(3) from the date of the judgment or award.

28. In my judgment, Mr Walker QC is right therefore to submit that the proper construction of section 10(4) is that time only starts to run from the date of a binding agreement as to the amount of the compensation payment.

29. Further, I consider that such conclusion is obviously right when one considers the interplay between section 1(4) of the 1978 Act and section 10(4) of the 1980 Act. Since the cause of action for a contribution only arises under section 1(4) upon settlement of the underlying dispute, time cannot start to run under the Limitation Act 1980 from the date of some earlier non-binding agreement. In any event, if something less than a binding agreement suffices, it is entirely unclear what lower standard is to be applied.

30. I acknowledge that the passage in McGee cited by Miss McCafferty envisages that there might be cases in which time starts to run despite the parties'

failure to agree all the details of their settlement. Knight and Chief Constable of Hampshire Constabulary were just such cases. The passage continues, after reference to Knight:

> "In a case where agreement to pay compensation had been made and then embodied in a consent order it was held that time ran from the making of the agreement and not from the later date when the consent order was made. Thus, there was no overlap between s.10(3) and s.10(4). Although it would have been possible for Parliament to provide that the making of the consent order re-set the clock, it had not in fact done so. However, it is likely that the court will want to see evidence of a finalised agreement rather than merely a preliminary agreement."

31. In my judgment, McGee is right to assert that the critical matter is whether there has been agreement as to the payment; indeed section 10(4) says as much. That must be the focus of the enquiry and not whether the parties have agreed ancillary matters. Further, I consider that McGee is right to say that the court will want to see evidence of a "finalised" rather than a preliminary agreement; although I should prefer to distinguish between a binding agreement and an incomplete agreement or an agreement in principle. I do not consider that there is any tension in those statements. Ordinarily, one might expect the parties not to reach a binding agreement as to payment until they have also agreed the other terms of their settlement. That said, it is beyond doubt that the parties are free to contract on such basis. In Pagnan SpA v Feed Products Ltd [1987] 2 Lloyd's Rep. 601, Lloyd LJ summarised the principles applicable in determining whether there is an immediately binding contract, at p.619:

> "(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole …
>
> (2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case.
>
> (3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed …
>
> (4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled …
>
> (5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.
>
> (6) It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the

> statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the court regards as important as opposed to a term which the court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the judge, 'the masters of their contractual fate.' Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'."

32. Accordingly, it is open to the parties to reach an immediately binding agreement as to the settlement payment, but leave for later agreement details as to payment terms (as in Knight) or any liability for costs (as in Chief Constable of Hampshire Constabulary). In such cases, time will start to run from the date of the agreement as to the amount of the payment. Equally, it is open to the parties to agree that, to use an expression much used in connection with the current Brexit negotiations, nothing is agreed until everything is agreed. If so, time will not start to run until the date of the subsequent binding agreement as to the payment or, should agreement prove impossible, the judgment or award.

33. I am fortified in these conclusions by the decision of Judge Havery QC in Baker. In that case, a settlement offer expressly made on a subject to contract basis was accepted by a letter dated 3 March 2005. The parties then executed a formal settlement agreement. Judge Havery QC held that time ran from the date of the execution of the settlement agreement on 11 March 2005.

THE LIMITATION DEFENCE IN THIS CASE

34. It will be evident from my earlier review of the evidence that the negotiations during April 2015 were expressly conducted on a subject to contract basis. It was common ground between counsel that parties negotiating on such a basis will generally be presumed to intend that they should not be bound unless and until they subsequently enter into a formal written contract: Rossdale v Denny [1921] 1 Ch. 57. Accordingly, Miss McCafferty rightly conceded in her closing submissions, and I find, that there was no binding agreement between Carter and the Council by 28 April 2015. Binding terms as to the payment in kind were only agreed upon the execution of the settlement agreement on 29 June 2015.

35. In view of this finding and my conclusions as to the proper construction of section 10(4), it follows in my judgment that this contribution claim is in time.

36. Having, however, heard the evidence and further argument, I briefly set out my conclusions in the event that I am wrong as to the proper construction of the section. Even if a non-binding agreement is sufficient to make time run, there was not, in my judgment, agreement as to the "payment" to be made until after 28 April 2015:

36.1 In a payment in kind case, the "amount to be paid" means the scope of the remedial works. Accordingly, agreement as to the scope of the works is required. Agreement simply to carry out such remedial works as might subsequently be assessed or agreed is no more an agreement as to the "amount" of the settlement payment than an agreement to pay damages to be assessed or agreed.

36.2 I therefore reject Miss McCafferty's submission that there was firm agreement as to the amount of the payment before the parties had agreed the precise scope of the works. These were not matters of fine detail or mechanics, they were matters that went to the very question at the heart of section 10(4), namely the amount of the payment in kind.

36.3 I accept Mr Alflatt's evidence that the scope of the works had not been and could not be finalised until after the investigatory surveys and the subsequent technical meeting on 8 May 2015, and that in fact there were amendments to the scope of the works right up until 25 June 2015.

36.4 Accordingly, even if I am wrong as to the proper construction of section 10(4), there was not in any event agreement as to the amount of the compensation payment in this case until at least 25 June 2015.

37. The contribution claim was therefore brought in time and the limitation defence fails.