Reports from the courts

Our regular round up of court decisions of most interest to construction from **Andrew Croft** and **Ben Spannuth** of **Beale & Company Solicitors LLP** looks at a decision that confirms that the right to commence adjudication proceedings 'at any time' does not conflict with the limitation defence under the *Limitation Act 1980*; and another that shows the bar is set high for parties intending to challenge an arbitrator's award if they have to show that it is 'obviously wrong'.

LJR Interiors Limited v Cooper Construction Limited

[2023] EWHC 3339 (TCC); HHJ Russen KC

On 26 August 2014, Cooper Construction Limited (Cooper), a contractor, engaged LJR Interiors Limited (LJR), a plastering and screeding contractor, to undertake screed works at a property in Oxfordshire (the Works). The contract comprised LJR's letter/revised quote in the sum of £18,675 plus VAT dated 9 July 2014 and Cooper's purchase order dated 26 August 2014 (the Contract).

LJR's letter dated 9 July 2014 provided: "Our rates make allowance for 2.5% mcd, based on payment to be made 28 days from Invoice / Valuation, based on an Invoice being submitted on the last day of each month. We reserve the right to recover any costs incurred as a result of late payment".

The Works were completed on 19 October 2014. On 31 October 2014, LJR submitted Application No. 3. On 31 July 2022, i.e. almost 8 years later, LJR submitted Application No. 4, which sought payment of the same sums as in Application No. 3, in the sum of £3,256.58 excluding VAT. Cooper did not respond to Application No. 4.

On 9 September 2022, LJR gave notice of intention to refer a dispute under Application No. 4 to adjudication. LJR averred that this dispute arose "on or about 28 August 2022 when the notified sum was not paid by the final payment date for payment". Cooper argued that LJR's cause of action accrued 28 days from the date of Application No. 3, i.e. on 28 November 2014, such that the claim was time-barred.

The adjudicator held that LJR's cause of action accrued on 28 August 2022, i.e. when Cooper failed to respond to Application No. 4, such that LJR's claim was commenced in time. LJR were thus held to be entitled to £3,256.58 excluding VAT (the Decision).

LJR sought to enforce the Decision against Cooper. Cooper brought a cross-claim seeking a declaration that the sum awarded was unenforceable as LJR's claim was time-barred on the basis that it had been commenced outside the applicable six-year limitation period, which commenced on 28 November 2014.

Decision

HHJ Russen KC granted the declaratory relief sought by Cooper to the effect that LJR's claim was time-barred such that the Decision was unenforceable against Cooper.

HHJ Russen KC held that the adjudicator had erroneously failed to consider when the right to payment of the balance sought by Application No. 4 had accrued – the adjudicator assumed that the absence of a pay less notice meant that it was unnecessary to consider whether the application itself was timely enough. HHJ Russen QC noted that "a limitation period cannot be 'renewed' simply by making a claim for payment of sums previously demanded and otherwise barred from recovery on limitation grounds". In circumstances where the sums applied for in Application No. 4 matched those in Application No. 3, the right to payment accrued on 28 November 2014 – "[t]he unpaid balance of those sums did not somehow become 'due again' for limitation purposes simply by virtue of being demanded again over 7½ years later".

Comment

This decision confirms that the right to commence adjudication proceedings 'at any time' pursuant to s108 of the *Construction Act 1996* does not conflict with the limitation defence under the *Limitation Act 1980*. Parties should therefore consider whether their claims are time-barred

before commencing adjudication proceedings and incurring the associated costs – this will avoid the risk that a favourable decision cannot be enforced on the basis that the relevant limitation period has expired. It is also a reminder that a limitation period cannot be 'renewed' by re-submitting a payment application which would otherwise be time-barred.

Ravestein B.V. v Trant Engineering Limited

[2023] EWHC 11 (TCC); HHJ Kelly

On 14 September 2010, Netherlands-incorporated shipyard and construction company Ravestein B.V (Ravestein) entered into a sub-contract with Trant Engineering Limited (Trant), an engineering procurement and construction company, pursuant to an amended version of the NEC3 Engineering and Construction Subcontract June 2005 incorporating Option A and Dispute Resolution Option W2 (the Subcontract).

Clause W2.4(2) provided: "If, after the Adjudicator notifies his decision a Party is dissatisfied, that Party may notify the other Party of the matter which he disputes and state that he intends to refer it to the tribunal. The dispute may not be referred to the tribunal unless this notification is given within four weeks of the notification of the Adjudicator's decision".

On 24 February 2021, Trant referred a dispute to adjudication, alleging that Ravestein's works were defective and seeking damages as a result. On 11 April 2021, the adjudicator ordered that Ravestein pay Trant damages of £454,083.09 plus VAT and legal costs (the Decision).

On 12 April 2021, Ravestein emailed the adjudicator, cc'ing Trant, challenging his jurisdiction on the basis that Ravestein had not received the Referral Notice within seven days and requesting that the Decision be withdrawn.

On 27 October 2021, Ravestein referred to arbitration the dispute concerning Ravestein's defective works as determined by the adjudicator. Ravestein relied on its email dated 12 April 2021 as its Notice of Dissatisfaction. The parties agreed that the arbitrator should determine whether the purported Notice of Dissatisfaction complied with clause W2.4(2). It was not in dispute that, if Ravestein had not given a valid Notice of Dissatisfaction, the Decision had become final and binding and could not be the subject of further dispute resolution process.

The arbitrator found that Ravestein had not served a valid Notice of Dissatisfaction such that the Decision was final and binding (the Award). Ravestein sought leave to appeal the Award pursuant to section 69 of the *Arbitration Act 1996* on the grounds that, inter alia, the tribunal had incorrectly held that: (a) to comply with the relevant clauses, the Notice of Dissatisfaction had to both notify the matter in dispute and state the intention to refer it to the tribunal; and (b) Ravestein's email dated 12 April 2021 challenged only the jurisdiction of the adjudicator as opposed to contesting the adjudicator's underlying decision. Trant argued that the Award was neither "obviously wrong" nor open to serious doubt.

Decision

HHJ Kelly refused permission to appeal – the interpretation of the law by the arbitrator and his application of it in relation to the purported Notice of Dissatisfaction could not "be said to be either obviously wrong nor open to any serious doubt".

With reference to the judgment in Transport for ***Greater Manchester v Kier Construction [2021] EWHC 804 (TCC)***, which stated that "a valid notice would have to be clear and unambiguous so as to put the other Party on notice that the decision was disputed", HHJ Kelly agreed with Trant that the wording of the purported Notice of Dissatisfaction "failed to identify the matter with which the party was dissatisfied" – the Notice was required "to identify both the matter disputed and the intention to refer the matter to arbitration". The reference to the *Construction Act 1996* in the purported Notice of Dissatisfaction was held to refer only to a jurisdictional challenge, as opposed to a challenge as to the correctness of the Decision.

Comment

This decision emphasises that a Notice of Dissatisfaction must "be clear and unambiguous so as to put the other party on notice that the decision was disputed" – it should therefore clearly state whether the notifying party intends to challenge the validity of an adjudicator's decision, in addition to, or as opposed to, challenging the substantive merits of the decision.

Parties should also be mindful of the fact that, under s69 of the *Arbitration Act 1996*, the threshold to challenge an arbitrator's award, which will involve demonstrating that it is 'obviously wrong', is a high one. **CL**