Limitation in Construction Disputes

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The material in these notes is based upon the law of England and Wales. It is only intended to provoke and stimulate. It does not constitute advice. Detailed professional advice should be obtained before taking or refraining from taking action in relation to any such material.
Introduction

1. This paper covers the common issues which arise when dealing with limitation in construction contracts. It starts with a brief re-cap of the basic principles of limitation, before moving on to set out the principles to apply when approaching limitation issues.

Limitation: The basic principles

2. Limitation is a time-limit on when a party can bring a claim. Limitation periods are provided for in the Limitation Act 1980, although parties can agree in a contract that a shorter or longer limitation period will apply. The policy behind limitation is that claims should be litigated while the evidence is still fresh so a fair trial can take place, and after a reasonable time defendants should not have to worry about old claims coming back to haunt them.

3. The Limitation Act 1980 provides that an action shall not be brought:
   a. In the case of an action in tort, six years from the date on which the cause of action accrued (s.2). For our purposes this would most likely be a claim in negligence;
   b. In the case of a simple contract, six years from the date on which the cause of action accrued (s.5);
   c. In the case of a specialty, which includes a contract under seal, twelve years from the date on which the cause of action accrued (s.8);
   d. In the case of an action for negligence, three years from the date of knowledge if the three year period expires more than the six years after accrual of the cause of action (s.14A).

4. The date of accrual in contract cases is the date of breach. In some cases, the obligation is a continuing one and it will be possible to argue that there is therefore a continuing breach giving rise to a later date for limitation.

5. In negligence claims, damage is an essential ingredient and so the claim will only accrue when physical damage occurs.
6. In *Abbott v Will Gammon & Smith Ltd* [2005] BLR 195, the claimant was the owner of a hotel and had engaged consulting engineers to design repair works to a large bay window. The works were carried out in 1997, but it was only in 1999 that the claimant discovered that the lintel over the bay window had moved and cracked the surrounding structure. The claimant brought a claim in 2003. The contract claim was statute barred and the judge tried a preliminary issue as to whether a claim in tort was also statute barred. It was held that, following *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1, the claim in tort accrued when damage to the building first occurred. It had been argued that the claim should accrue when the design is completed, because that is when the economic loss is suffered. The Court of Appeal rejected this argument and held *obiter* that had the claim been for economic loss, it would have accrued when the cracks appeared because this is when the economic loss occurred – either in the form of liability to carry out repairs or diminution in the market value of the property.

7. The Latent Damage Act 1986 amended the Limitation Act and inserted section 14A which provides for a longer limitation period running from the date of knowledge, which is defined in s.14A(6)-(10) and can be summarised as:

   a. The claimant needs to know the material facts about the damage and other facts relevant to the claim;
   b. The “material facts” are such facts as would lead a reasonable person to consider it serious enough to institute proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment;
   c. The “other facts” include that the damage is attributable to the acts and omissions of the defendant and the identity of the defendant;
   d. The claimant does not need to know that the facts amount to negligence;
   e. Knowledge of the facts includes knowledge which the claimant could reasonably have been expected to acquire from facts ascertainable or observable by him, or with the assistance of expert advice where it is reasonable to seek expert advice.

8. The time limits for commencing arbitration proceedings are the same as the time limits for commencing litigation (s.31(1) Arbitration Act 1996).
Limitation: 5 questions

9. This next section of the paper deals with the common issues and questions arising out of construction contracts when a party is faced with a ticking (or expired) limitation clock. We have identified five questions to ask as an aid to identifying the relevant issues and working out where the bear traps may be.

1. What is the defect?

10. The first question is: what is the defect? Cracks in the walls could be due to defective foundations – but is the defect in the design or the construction? Leaking may be caused by a failure to design a piping system properly, a failure of workmanship or a failure to carry out reasonable maintenance.

11. The key question for calculating when limitation expires is the date of accrual of the cause of action. This varies depending on the nature of the type of work a party has been asked to carry out and the nature of their obligations. The principles set out below apply to actions in contract.

12. Where the claim is against a designer, the cause of action accrues when the design is first prepared or information is first issued to the contract. However, where the design has been subject to revisions, and there is good reason for those revisions, the cause of action will accrue on the date the revisions to the design are made. There may also be a further duty to review the design in light of defects manifesting themselves before practical completion.

13. In construction contracts, a claim for defective workmanship usually accrues at practical completion because it is only at this point that the contractor’s obligation to carry out and complete works has not been complied with (Oxford Architects Partnership v Cheltenham Ladies College [2006] EWHC 3156). Where there has been sectional completion, time may run from the date of earlier completion of each section.
14. Issues can arise, however, in construction contracts – particular ones that completed some time ago – as to establishing if there was a formal practical completion and if so, when. Large scale construction projects usually comes in phases – whether that be houses on a particular street or blocks in a large complex. The practical completion for each can be different. Finally, often located the relevant paperwork to establish completion can also be difficult.

15. Construction contracts often provide for an additional time after practical completion where a contractor is obliged to remedy any defects which arise (known as a defects liability period). The cause of action will accrue on breach of the obligation to remedy defects, which may be within a specific time set out in the clause, or after a reasonable time following notification of the defects (see Bellway (South East) v Holley (1984) 28 BLR 139).

16. Further, some contracts will contain continuing obligations in relation to the structure of the building – an obligation, for example, to return to site and to rectify. If so, it may be possible to construct a later breach and therefore a different and possibly more favourable limitation period.

17. In facilities management contracts, the claim will accrue on breach. Identifying the breach may be simple, for example a one-off failure to carry out an essential maintenance task, or there may be a continuing duty to keep the building in a good state of repair.

2. Is the claim in contract or tort?
18. The limitation period may be different for claims in contract and tort. For example, physical damage may not occur until some time after the breach of a contractual obligation, and time only starts to run in tort from that later date, or in some cases the date of knowledge.

19. It is now settled law that professionals, such as architects, owe a concurrent duty of care to their client in contract and tort (Robinson v PE Jones Contractors Ltd [2011] EWCA
Civ 9). Therefore if there is a claim against the designer of the building, the later limitation period for tort claims may be of genuine practical assistance.

20. Where the claim is against the building contractor, the Court of Appeal has held that it is unlikely that the existence of a duty to exercise reasonable care and skill in a construction contract is sufficient to establish a concurrent duty of care (Robinson v PE Jones Contractors Ltd [2011] EWCA Civ 9). A claim against a builder for defects in his work is a claim for pure economic loss and the general principle is that a person is only liable for the pure economic loss of another if they have voluntarily assumed responsibility. In Robinson, the builder had agreed to sell a house once it had finished construction. Many years later it was discovered that the flues had not been constructed in accordance with good practice and Mr Robinson brought a claim in tort. The Court of Appeal held that a clause in the contract excluding liability for negligence was valid and not an unfair term, but then went on to examine previous authorities on liability for economic loss. Jackson LJ held that where there is a “normal” construction contract, this will not be sufficient to establish a concurrent duty of care.

21. It remains unclear what factors would persuade the court that there was an assumption of responsibility, or what happens to builders who agree to carry out design work as part of a design and build contract.

3. Are there continuing indemnities obligations in the contract?

22. An indemnity clause may provide for the opportunity to bring a claim at a later date. Where there is an obligation to indemnify against loss, the cause of action on the indemnity does not arise until the loss has been established (County & District Properties v C. Jenner & Son Ltd [1976] 2 Lloyd’s Rep 728.) You may also have a fresh breach where you request a contractor to comply with its obligation under an indemnity, and the contractor refuses.

23. There may also be warranties, for example that the structure is free of defects. It will be a matter of construction of the contract as to whether the warranty is a continuing warranty, meaning that the structure has to be free of defects on every day of the period that the
warranty applies, or whether it means that at practical completion the structure must be free of defects. In *VAI Industries (UK) Ltd v Bostock & Bramley and Others* [2003] EWCA Civ 1069 the majority of the Court of Appeal held that where goods are delivered subject to a warranty that they will be free of defects, which was said to last for 24 months, the claim accrued on the date of delivery and it was not a continuing obligation to ensure that the goods were free of defects. Lord Carnwath held that to establish a continuing obligation, there must be clear words to that effect.

24. In *Larkfleet Ltd v Allison Homes Eastern Ltd* [2016] EWHC 195 (TCC), the Claimant was a developer who had contracted with a builder to construct a housing development. The contract had passed from the original builder to the defendant, who accepted responsibility for any claims in contract but not breach of duty or negligence. The contract was a standard JCT with an amendment that the builder warranted that it would accept responsibility under the NHBC warranty scheme for a period of 10 years. Claims were brought against the claimant for defective foundations within the 10 year period. When the developer claimed against the builder, the builder argued that practical completion had occurred more than six years ago and the claim was time barred. The court held that the claims were not time barred. The cause of action for breach of the clause accrued when the builder was asked to comply (by either carrying out remedial works or reimbursing the NHBC for expenses) and refused to do so.

4. *Has the defect been concealed?*

25. Section 32 of the Limitation Act provides that:

(1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant; or

(b) any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant; or

(c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.
References in this subsection to the defendant include references to the defendant’s agent and to any person through whom the defendant claims and his agent.

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

26. In the context of construction cases, the Court of Appeal has held that where a builder does his work so badly so that it is likely to give rise to defects in the future, and then covers up his bad work so that it cannot be discovered until years later, the builder will not be able to rely on limitation (Applegate v Moss [1971] 1 QB 406 at 413). Deliberate wrongdoing is required (Trilogy Management Ltd v Harcus Sinclair (a Firm) [2016] EWHC 170). Merely shoddy or incompetent work which is covered up in the normal course of a building project will not suffice; it needs to have been unconscionable for the defendant to have left the work without putting it right.

27. AIC Ltd v ITS Testing Services (UK) Ltd (The Kriti Palm) [2006] EWCA Civ 1601 concerns the potential for concealment by a failure to disclose new information. ITS was a testing services company and their employee, T, had tested a cargo of gasoline using the wrong method. When AIC sold the cargo on to a third party, it was tested again by T and revealed to be off specification. In a telephone conversation, T told AIC that he stood by the original certificate. AIC sued ITS for deceit and was successful at first instance on the main cause of action and a preliminary issue that the claim was not statute-barred pursuant to s.32(1)(b) Limitation Act 1980. On appeal, the Court of Appeal overturned the judge’s decision on deceit but found that it was open to the judge to conclude on the evidence that the claim was not statute-barred. Concealment, in order to be deliberate, does not have to be dishonest. T was under a duty to disclose the fact of the retests and the results. The finding of concealment had therefore been correct.

5. What do you do to stop time running?

28. In litigation proceedings are started when the court issues the claim form (see CPR r7.2(1)). However, proceedings are “brought” for the purposes of the Limitation Act
when the claim form is received by the court (see PD7A paragraph 5.1 and *St Helens MBC v Barnes* [2006] EWCA Civ 1372).

29. If the court office is closed on the day that limitation expires, a party cannot simply wait until the next day when the court is open (see *Gelmini v Moriggia* [1913] 2 KB 549).

30. If further time is needed to investigate a claim once protective proceedings have been issued, the parties can agree a stay or an extension of time for particulars of claim to be filed.

31. In arbitration, the parties are free to agree what constitutes “commencement” of arbitration proceedings for the purposes of limitation. In the absence of agreement, s.14 Arbitration Act 1996 provides that:

   (3) Where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties a notice in writing requiring him or them to submit that matter to the person so named or designated.

   (4) Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.

   (5) Where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.

32. *Bulk & Metal Transport (UK) LLP v Voc Bulk Ultra Handymax Pool LLC (The Voc Gallant)* “The Voc Gallant” [2009] EWHC 288 (Comm) is a shipping case where arbitration proceedings had to be commenced within one year of discharge. The claimant had sent a message to the defendant stating that if they did not pay a sum of money which
was due, or agree to the appointment of a sole arbitrator, the claimant would proceed to appoint their own arbitrator. The defendant argued that this message was not commencement of arbitration proceedings and was only a threat and the tribunal ruled that the arbitration was out of time. The court disagreed and held that a flexible approach to s.14(4) of the Arbitration Act needed to be adopted, the message made it clear that the arbitration agreement was being invoked and required the defendant to take steps and that was sufficient to commence arbitration proceedings for the purposes of limitation.

33. Adjudication proceedings do not stop time from running for the purposes of limitation. However, in the very recent Supreme Court decision in Aspect Contracts (Asbestos) Limited v Higgins Construction Plc [2015] UKSC 38 it was held that a fresh cause of action for overpayment arises when payment is made pursuant to an adjudication award, allowing a party to claim money back after limitation on the underlying dispute has expired.

34. The facts of Aspect were that the developer had brought adjudication proceedings for damages in the sum of £822,482 against a firm of surveyors for a negligent asbestos survey which had been completed in 2004. The developer won the adjudication, and the surveyors were ordered to pay £658,017 in 2009. In February 2012, the surveyors brought a claim to overturn the adjudicator’s decision and sought repayment of the £658,017. The developer then counterclaimed for the difference between the adjudicator’s award and its original claim.

35. At first instance, the High Court found that there was no implied term and that the claimant should have brought a claim for a declaration of non-liability during the 6 year period following the survey. The Court of Appeal disagreed and held that there was an implied term and that the Scheme implied overpayment could be recovered. The Supreme Court, in a judgment given by Lord Mance JSC, agreed with the Court of Appeal. It held that there was an implied term that a party could bring a claim for repayment and that limitation on that claim started to run from the date of payment, in effect allowing another 6 years to bring a claim to dispute the adjudicator’s award. However, the counterclaim was time barred because it had been more than 6 years since the original breach of
contract. The court is entitled to look at the whole dispute, in determining whether the adjudication sum awarded is properly due (see paragraph 32).

Buying More Time

36. In some cases, there may be difficulty in formulating a claim because investigations are still ongoing. If this problem arises, it may be possible to agree a standstill with the potential defendant(s). The court cannot extend time in non-personal injury cases, but it will not take a limitation point of its own motion if the defendant does not plead it. In court litigation, limitation is a defence which must be pleaded (CPR PD15 paragraph 13.1). If the defendant does not plead limitation, there is no requirement for the Claimant to prove that its claim has been brought in time (Mac Hotels Limited v Rider Levett Bucknall UK Limited [2010] EWHC 767(TCC) at [42]).

37. It is important to remember that any standstill agreement should be clearly drafted and that there be consideration. It is likely to be very difficult to claim that a defendant is estopped from running a limitation defence where it has represented that it will not rely on limitation. Such a promise would need to be clear, unequivocal and unambiguous (Fortisbank SA v Trenwick International Ltd) [2015] EWHC 399 (Comm).

38. Where there is a need to issue protective proceedings, it is important to be aware of any mandatory dispute resolution procedures in a contract. If participating in ADR is a condition precedent to bringing a claim, the court or arbitrator will not have jurisdiction unless these procedures have been followed.

39. The English courts have taken a strict approach to the interpretation of multi-tiered dispute resolution clauses. In Wah v Grant Thornton [2012] EWHC 3198 (Ch) it was held that the following dispute resolution clause was not a condition precedent to commencing arbitration:

“(a) Any dispute or difference as described in Section 14.2 shall in the first instance be referred to the Chief Executive in an attempt to settle such dispute or difference by amicable conciliation or an informal nature. The conciliation provided for in this
Section 14.3 shall be applicable notwithstanding that GTIL may be a party to the dispute or difference in question.

(b) The Chief Executive shall attempt to resolve the dispute or difference in an amicable fashion. Any party may submit a request for such conciliation regarding any such dispute or difference, and the Chief Executive shall have up to one (1) month after receipt of such request to attempt to resolve it.

(c) If the dispute or difference shall not have been resolved within one (1) month following submissions to the Chief Executive, it shall be referred to a Panel of three (3) members of the Board to be selected by the Board, none of whom shall be associated with or in any other way related to the Member Firm or Member Firms who are parties to the dispute or difference. The Panel shall have up to one (1) month to attempt to resolve the dispute or difference.

(d) Until the earlier of (i) such date as the Panel shall determine that it cannot resolve the dispute or difference, or (ii) the date one (1) month after the request for conciliation of the dispute or difference has been referred to it, no party may commence any arbitration procedures in accordance with this Agreement.”

40. The Court held that the clause was too uncertain to amount to a condition precedent because it was not sufficiently certain so as to be enforceable. Hildyard J set out the following guidelines for determining when a multi-tiered dispute resolution clause will be considered mandatory:

“61...[T]he test is whether the provision provides, without the need for further agreement, (1) a sufficiently certain and unequivocal commitment to commence a process (b) from which may be discerned what steps each party is required to take to put the process in place and which is (c) sufficiently clearly defined to enable the Court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach.”

62. In the context of a negative stipulation or injunction preventing a reference or proceedings until a given event, the question is whether the event is sufficiently defined and its happening objectively ascertainable to enable the court to determine whether and when the event has occurred.”

41. In Peterborough City Council v Enterprise Managed Services Ltd [2014] EWHC 3193 (TCC), the court considered the FIDIC Conditions of Contract for Design and Build
Turnkey (the orange book). The parties had entered into a contract for the defendant to provide a solar energy plant. When the plant failed to achieve the required output, the local authority sent a letter of claim alleging that it was entitled to a price reduction which it could recover as a debt. The defendant argued that the contract required the local authority to refer the dispute to a dispute adjudication board rather than issuing proceedings.

42. The relevant clause of the contract was clause 20 of the orange book, which stipulated that: “disputes shall be adjudicated by a DAB in accordance with sub-clause 20.4” (20.2.1). In this version of the FIDIC suite of contracts, the DAB was a sole adjudicator appointed after one of the parties gave notice of its intention to refer the dispute to the DAB. Sub-clause 20.8 provided that where there was no DAB in place, by reason of the expiry of its appointment or otherwise, the parties could refer the dispute directly to the courts of England and Wales.

43. Popplewell J cited Wah v Grant Thornton with approval but held that the clause was not unenforceable for uncertainty. He found that any uncertainty, such as how unpaid fees of an adjudicator would be enforced, could be dealt with by the court.

44. The judge’s reasoning focused on his conclusion that clause 20.8 did not give a party a unilateral right to opt-out of the adjudication procedure and go straight to court (see paragraph 35). He considered that clause 20.8 provided for the situation where there was a standing DAB that had ceased to be in place. It did not apply to the ad-hoc appointment of a DAB after a dispute had arisen. The judge ordered a stay of proceedings so that the dispute could be referred to adjudication under the contract.

45. This case is an example of an enforceable, multi-tiered dispute resolution clause in action. Even though the approach in Grant Thornton seemed to suggest that the court will be slow to find that a dispute resolution clause is mandatory, it should not be assumed that clauses purporting to be a condition precedent to legal proceedings are likely to be optional. Each case will turn on the particular terms of the contract.

46. Some important questions to ask therefore are:
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a. Is there a time limit on each stage of the process?
b. Are the steps required to discharge each stage set out sufficiently clearly? For example, in *Grant Thornton*, the judge did not know what steps were required for “amicable conciliation”.
c. Can you clearly identify when the dispute resolution procedure has been exhausted?
d. Does the clause clearly state that you cannot commence litigation or arbitration until every stage of the dispute resolution procedure has been exhausted?

**Conclusion**

47. Getting limitation wrong can have serious consequences. It is therefore important to remember some simple ‘must dos’ in order to avoid falling foul of the rules:

1. Calculate limitation as soon as the file lands on your desk – is it a simple contract or a contract under seal?
2. Check the contract to see if limitation has been shortened or extended by the parties.
3. Identify your claim and cause of action. If there is time, work to the earliest date it could have accrued.
4. Think about alternative routes like claiming under an indemnity, warranty or relying on concealment.
5. Check the contract for any mandatory dispute-resolution provisions.
6. Make sure you have included all causes of action and the correct parties in the claim.
7. Do not leave issuing the claim form until the last day.
8. If there is an arbitration clause, follow the steps for commencement of an arbitration. Make sure the letter referring the dispute is clearly drafted and complies with s.14 Arbitration Act if it applies – while the Court has indicated some flexibility, this should be an argument of last resort.
9. Do not rely on a vague promise from the other side that they will not take a limitation point – get it in writing and agreed.