

KEEP YOUR EYE ON THE TIME-BAR! ARAB LAWYERS NETWORK COMPANY LTD V THOMSON REUTERS (PROFESSIONAL) UK LTD

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The importance of complying with time-bar provisions cannot be overstated, as the English Commercial Court's recent decision in *Arab Lawyers Network Company Ltd v Thomson Reuters (Professional) UK Ltd*¹ makes clear. The decision, which highlights the importance of considering the effect of time-bar clauses carefully in order to avoid being prevented from bringing claims in the future, will be of interest to all commercial parties, including those contracting under the NEC suite of documents, who must give a notice of dissatisfaction to challenge an adjudicator's decision and notice of a compensation event within very tight timeframes.

BACKGROUND

The claimant, Arab Lawyers Network Company Ltd and the defendant, Thomson Reuters (Professional) UK Ltd, entered into an agreement relating to the publication of legal resources for which the defendant undertook to pay the claimant an agreed royalty. The agreement contained a time-bar clause that read:

"No claim...which in any way arises out of this Agreement or the parties' performance of this Agreement may be made, nor action based upon such a claim brought, by either party more than one year after the basis for the claim becomes known to the party desiring to assert it".

However, a dispute arose between the parties, leading to the termination of the agreement on 1 February 2015. Eventually, on 13 June 2017, the claimant brought proceedings for:

- i. non-payment of the agreed royalty (the "agreed royalty claim"); and
- ii. the defendant's continued use of their publications after termination (the "continued use claim").

However, the defendant sought summary judgment on the basis that the claims had been brought too late and were therefore time-barred.

JUDGMENT

The judge set out several key principles concerning the interpretation of time-bar clauses:

i. Time-bar clauses operate similarly to exclusion clauses, restricting a party's entitlement to exercise a right that would otherwise exist, namely the right to bring a claim within any statutory limitation period. As such, applying the principles applicable to contractual interpretation, where a clause is ambiguous the courts generally take the view that it is unlikely that a party would surrender such rights without using clear wording to that effect. In the event that a time-bar clause is ambiguous, the courts will therefore usually adopt an interpretation that is favourable to the claimant. However, this principle is only relevant where the clause is genuinely ambiguous when due regard is given to the language, purpose, contextual background and place of the relevant provision within the contract as a whole, not just if the language used is simply capable of two or more meanings.

"In the event that a time-bar clause is ambiguous, the courts will therefore usually adopt an interpretation that is favourable to the claimant."

ii. However, the courts will also take into account the fact that time-bar clauses do not operate as total exclusions of a party's rights and only take effect if a claim is not brought within the specified time period.

iii. The courts will consider the commercial reasons why time-bar clauses are used, including the fact that they ensure a claim is brought to the defendant's attention and can be investigated by them quickly, rather than having to wait several years after the events in question have taken place.

The agreed royalty claim

Applying this approach, the key issue for the agreed royalty claim was whether the claimant had a real prospect of establishing that it was not time-barred because they only became aware of the "*basis of the claim*" after 13 June 2016 (i.e. within one year of the proceedings being issued).

The judge held that "*the basis of the claim*" was equivalent to facts and circumstances which would constitute a right or cause of action at law. In this case, the contract provided that royalties would accrue at the end of quarterly periods and were to be paid by the defendant within 60 days after the end of such a period, subject to receipt of a valid invoice. In the judge's view the claimant's contractual entitlement to claim the agreed royalty therefore arose no later than 60 days after the end of the relevant quarter, and not upon the issue of a valid invoice by the claimant (which in fact only occurred on 8 December 2016). The invoice set out funds already due and owing to the claimant, it did not trigger their contractual entitlement to payment of the agreed royalty. Furthermore, the judge commented that it would be odd if the claimant could indefinitely postpone their entitlement to claim the agreed royalty simply by refusing to issue an invoice.

As a result, the judge held that much of the agreed royalty claim was time-barred, although any claim for royalties which became payable after 13 June 2016 was not.

The continued use claim

In respect of the continued use claim, the key issue was the meaning of the words "*becomes known*" in the time-bar clause.

The defendant submitted that the concept of knowledge is inherently subjective, by analogy with the meaning of “*knowledge*” in sections 14 and 14A of the Limitation Act 1980, and that the claim had “*become known*” to the claimant by 22 February 2015 as by then they knew that the agreement had been terminated, that the 21-day period during which the defendant could pay a “*one-time*” fee to keep the publications had expired and that the claimant could see that the defendant was continuing to use the publications.

However, the judge rejected this submission, holding that nothing in the agreement indicated that “*knowledge*” was to be defined in accordance with the statutory meaning. Instead “*knowledge*” was given its natural and ordinary meaning, so while the claimant did not need to have an unwavering conviction in their belief in the truth of the basis for the claim, they did need a sufficient measure of confidence in the belief which was justified by evidence, experience or reasoning. Mere suspicion was not sufficient to constitute “*knowledge*” for this purpose.

Applying this test, the judge held that the claimant had a real prospect of succeeding in their claim and defeating the time-bar defence on the basis that they did not become aware of the basis for the continued use claim until after 13 June 2016. The question required a full inquiry on the basis of evidence and could not be summarily determined. This part of the defendant’s application was therefore dismissed.

CONCLUSION

The decision in *Arab Lawyers Network Company Ltd v Thomson Reuters (Professional) UK Ltd* provides useful guidance on the interpretation of contractual time-bar clauses and demonstrates the importance of adopting a cautious approach to limitation. In this case the judge’s decision on the application of the time-bar, and the meaning of “*the basis of the claim*”, meant that the claimant lost the opportunity to claim royalties they contended they were otherwise entitled to.

Such time-bar provisions are frequently found in both bespoke agreements and standard form contracts. For example, parties contracting under NEC contracts are obliged to serve a notice of dissatisfaction within four weeks of “*being informed*” of an adjudicator’s decision in order to refer the dispute to arbitration or litigation for final determination. A failure to serve such a notice will lead to the adjudicator’s decision becoming final and binding, even in circumstances where it appears clear that another tribunal would reach a different decision. Parties contracting under NEC contracts are also required to give notice of a compensation event within eight weeks of “*becoming aware that the event has happened*” in order to be entitled to a change in “*the prices, the completion date or a key date*”. The consequences of a contractor’s failure to comply with this deadline are therefore very serious.

"Parties contracting under NEC contracts are obliged to serve a notice of dissatisfaction within four weeks of 'being informed' of an adjudicator's decision in order to refer the dispute to arbitration or litigation for final determination."

For parties dealing with bespoke time-bar provisions, meanwhile, the case emphasises the importance of careful drafting so as to avoid any uncertainty as to when the clause takes effect.

[1] [2021] EWHC 1728 (Comm)

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