Neutral Citation Number: [2017] EWHC 1555 (TCC)

Case No: HT-2016-000329

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 29 June 2017

Before:

THE HON MR JUSTICE COULSON

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Between:

(1) Mr Stuart Howard Russell	**Claimants/Respondents**
(2) Mrs Naomi Patricia Russell	
- and -	
(1) Peter Stone	
(trading as PSP Consultants)	**Defendants/Applicants**
(2) PSP Consultants Limited	
(3) PSP Consultants (a firm)	

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Ms Lynne McCafferty (instructed by **Beale & Co**) for the **Defendants/Applicants**
Ms Jennifer Jones (instructed by **Elborne Mitchell LLP**) for the **Claimants/Respondents**

Hearing Date: 23 June 2017

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Judgment Approved

The Hon. Mr Justice Coulson:

1. INTRODUCTION

1. In these proceedings, which were commenced on 1 December 2016, the claimants seek almost £2.2 million in damages against the defendants arising out of the defendants' quantity surveying and project management services in respect of extensive building works carried out at the claimants' property at 36 Millfield Lane, Highgate, in North London. It is the defendants' case that the relevant defendant is the first defendant, and the claimants' primary case is to the same effect. Save where relevant, I shall refer to them generically as 'the defendants'.

2. The project, which involved the demolition of the existing house and the construction of a modern house in its stead, was dogged with difficulties. Merely by way of outline, it appears that:

   (i) In 2008 the claimants engaged the defendants to act as project managers and quantity surveyors in respect of the proposed project.

(ii) Ibex Limited were engaged as contractors, pursuant to a letter of intent dated 22 June 2010. Work started the following month.

(iii) Ibex suspended work in late 2011. They went into liquidation in June 2012.

(iv) The defendants' appointment terminated in May 2012.

(v) A second contractor was appointed in December 2012. They went into administration in February 2014.

(vi) A third contractor was appointed in March 2014. The claimants' relationship with the third contractor broke down in May 2015 and the works were finished using a series of direct contractors.

(vii) Throughout this lengthy period there were also problems with other members of the claimants' professional team.

3. The allegations against the defendants include the following claims:

(i) The preparation of inadequate tender documentation;

(ii) The deficient analysis of the Ibex tender;

(iii) The preparation of a deficient letter of intent;

(iv) The failure to obtain a performance bond from Ibex;

(v) The failure properly to value Ibex's works;

(vi) The failure properly to check the claims for payment by other members of the professional team;

(vii) Negligent advice to the claimants to place orders directly with suppliers;

(viii) The failure properly to monitor the quality of Ibex's works.

4. On 11 May 2017, the defendants issued an application seeking to strike out claims (i), (ii) and (iii) noted in paragraph 3 above ("the three claims") on the grounds that they were statute-barred. It is the defendants' case that the causes of action in respect of the three claims had accrued on 9 November 2009, the end of March 2010, and 22 June 2010 respectively, and are therefore statute-barred (having accrued more than six years before the issue of the claim form). I deal in more detail with the arguments as to the accrual of the relevant causes of action in **Section 3** below. It is accepted that the claims noted at paragraph 3 above from (iv) onwards, in respect of Ibex's actual performance of the works on site, are not statute-barred.

5. In addition to the arguments as to when the relevant causes of action actually accrued, there are a number of other significant issues between the parties on this application. Many of them concern the proper construction of three 'Standstill Agreements' entered into between the parties on 5 November 2015, 18 February 2016 and 28 April 2016 respectively. On the face of it, the claimants need to rely on those agreements having the effect for which they contend, because otherwise the causes of action in contract and in tort underlying the three claims would appear, *prima facie,* to be statute-barred.

2. GENERAL OBSERVATIONS

6. It can often be tempting for a defendant to seek to strike out some or all the claims made, because it considers that they are statute-barred. That temptation is not lessened over-much when, as here, even though it is accepted that many of the claims are not statute-barred, those which are said to be out of time have a considerable value. Thanks to the clarity with which the claimants' loss and damage claim has been pleaded, it appears that the three claims are worth about £1 million, leaving further claims of about £1.2 million which are unaffected by this application.

7. But it is never straightforward to make applications to strike out based on a limitation defence, unless the claims are plainly and obviously statute-barred (see ***Schweppe v Closier and another*** [2017] EWHC 1485 (TCC) for a very recent example of this). A strike-out application requires the court to decide when particular causes of action accrued on an interlocutory basis, which can be unsatisfactory and may encourage a necessarily cautious approach. In addition, in cases of professional negligence, there will often be an argument that the defendant owed obligations both in contract and in tort, because the date of the accrual of the cause of action in tort will often be different, and if so, will inevitably be later in time than the accrual of the cause of action for damages for breach of contract.

8. In the present case, there is a yet further difficulty, arising out of the three Standstill Agreements (and the side letters that were also agreed). Standstill agreements have become much more common than they ever used to be, for reasons which remain obscure. Since their underlying purpose is to allow claims and defences to be researched properly before the commencement of proceedings, and thereby to encourage settlement, they might be regarded as a positive development. But this dispute has left me with an overwhelming feeling that they are potentially just another self-inflicted complication. If limitation is an issue, and the claim needs further work, or the Pre-Action Protocol process has not been activated or completed, the TCC Guide is very clear: paragraph 2.3.2 states that the claimant can commence proceedings and then seek a stay of, say, 6 months, in order to follow and complete the Protocol process. I cannot help thinking that that would have been a safer option than the muddle that has occurred here.

9. Further, although the Standstill Agreements in this case were drafted by well-known firms of solicitors, the disputes which now arise indicate that there may have been a fundamental difference between them as to what the Standstill Agreements were supposed to provide. The problem has been compounded rather than lessened by the fact that the solicitors used a template prepared by the Practical Law legal resource website, without perhaps fully understanding why they were doing so, and serially departing from the template in any event. Despite all of that, this application requires the court to reach final and binding decisions as to the proper meaning and effect of the Standstill Agreements.

10. I have approached the issues in this way. In **Section 3**, I address the arguments as to the accrual of the relevant causes of action, and I then identify when, in my view, those causes of action accrued. In **Section 4**, I address the applicable principles of law under three sub-headings: (i) the test for a striking out application; (ii) the rules regarding contract construction; and (iii) any particular principles applicable to standstill agreements. In **Section 5**, I set out the relevant parts of the Standstill Agreements in this case.

11. Thereafter, I address the three grounds for the application to strike out. In **Section 6** I deal with Ground 1: On the true construction of the Third Standstill Agreement, should the claim form have been issued on/no later than 30 November 2016, such that

service on 1 December was out of time? In **Section 7**, I deal with Ground 2: Did the claimants lose the protection of the earlier Standstill Agreements when the Third Standstill Agreement was entered into? In **Section 8**, I deal with Ground 3 which is a separate point concerned with the second defendant company. There is a short summary of my conclusions in **Section 9** below. I am very grateful to both counsel for their considerable assistance in dealing with this application.

3. THE ACCRUAL OF THE CAUSES OF ACTION

12. Claim (i) concerns the allegations concerning the adequacy or otherwise of the tender documents. They are set out at paragraphs 27.1-27.3 of the Particulars of Claim. The tender documents were prepared by the defendants and then sent out to the prospective tenderers on 9 November 2009. It is the defendants' case that, accordingly, the causes of action in contract and tort in respect of claim (i) accrued on that date, and became statute-barred on 10 November 2015.

13. The claimants agree that the cause of action for damages for breach of contract in respect of claim (i) accrued on 9 November 2009. However, the claimants say that the concurrent cause of action in tort did not accrue until 22 June 2010, which was the date that the letter of intent was sent out to Ibex. That submission is put on the basis that the cause of action in tort accrued when damage occurred, and damage could not have occurred as a result of the inadequate tender documents until a contract had been agreed with Ibex based on those documents.

14. In my view, the claimants' analysis is correct. Whilst Ms McCafferty is right to say that the focus of the pleadings in respect of claim (i) is the alleged inadequacies of the tender documents, I consider that Ms Jones is correct that, pursuant to paragraph 27.14 of the Particulars of Claim, the loss flowing from those inadequacies only crystallised when a contract was agreed with Ibex. The inadequacies allegedly meant that Ibex could not return an accurate price for the works, but no loss would have been suffered as a result of that until the claimants were committed to Ibex's inaccurate price, which would have been when they sent out the letter of intent. On that basis, I find that it is more likely than not that the cause of action in tort in respect of claim (i) accrued on 22 June 2010. Further and in any event, on the basis that this is an interlocutory application, it would be unwise and unsafe to reach any conclusion based on an earlier accrual date.

15. Claim (ii), in respect of the inadequacies in the defendants' analysis of the Ibex tender, is set out at paragraphs 27.4-27.13 of the Particulars of Claim. It is the defendants' case that the relevant causes of action in contract and tort accrued no later than the end of March 2010, because that was when the claimants decided to contract with Ibex. I agree that the documents indicate that the claimants had reached that decision by the end of March.

16. The claimants say that both the cause of action in contract and the cause of action in tort arising out of claim (ii) did not accrue when the decision was made to contract with Ibex, but when the contract with Ibex was actually made. That, they say, was the date of the letter of intent of 22 June 2010. On the claimants' case, that therefore is the relevant date for limitation purposes in respect of claim (ii).

17. Again, I accept the claimants' submissions. In respect of the cause of action in tort, the analysis is the same as that set out in paragraph 14 above. As for the cause of action in contract, I agree with Ms Jones that, in the ordinary case, a cause of action arising out of a breach of contract, where that contract is ongoing, accrues on the last

opportunity that the contract-breaker had to correct the relevant breach. Thus, although the decision had been taken to contract with Ibex by the end of March 2010, until that decision was implemented, the defendants still had the opportunity to reconsider and prevent that from happening. Thus I find that the accrual date for the cause of action for damages for breach of contract in respect of claim (ii) was 22 June 2010, when the letter of intent was sent out.

18. Claim (iii) is in respect of the alleged inadequacies in the letter of intent. Those allegations are set out in paragraph 28 of the Particulars of Claim, in the third, fourth and fifth sentences. It is the defendants' case that the relevant cause of action, whether in contract or in tort, accrued on 22 June 2010. The claimants agree with that.

19. Thus, I address the application to strike out on the basis that (with the exception of the cause of action for breach of contract in respect of claim (i), where the cause of action accrued on 9 November 2009), the relevant date for the accrual of the causes of action in contract and tort in respect of the three claims was 22 June 2010. As I have already noted, these proceedings commenced on 1 December 2016. That was more than six years after the accrual of the relevant causes of action. In those circumstances, the claimants need the Standstill Agreements in order to demonstrate that these claims are not, in fact, statute-barred.

4. THE STANDSTILL AGREEMENTS

20. The claimants' then-solicitors, Taylor Wessing, wrote to the defendants on 13 October 2014, setting out, over sixteen pages, a detailed claim for just under £3 million. For reasons which have not been explained, when the defendants' solicitors asked whether the letter was a letter of claim in accordance with the TCC Pre-Action Protocol, they were told that it was not. The actual letter of claim, which was seventeen pages long and repeated much of what had been said in the previous letter, was sent on 30 September 2015.

21. At paragraph 6.2 of that letter, Taylor Wessing said:

> "Unless your client enters into a Standstill Agreement within 14 days of the date of this letter, in order to avoid limitation concerns, our client will take steps to issue a claim form. Our client has no concerns in taking this step and we are instructed to do so if necessary. However, we suggest that it would be in all parties' interests to take part in the pre-action protocol process in advance of any proceedings and in the hope that the need for proceedings could be avoided."

The letter enclosed a draft Standstill Agreement. Beale & Co, the defendants' solicitors, returned an amended version on 13 October 2015.

22. Following these exchanges, the first Standstill Agreement was dated 5 November 2015. The following parts of the Agreement were referred to in argument:

> "RECITALS
>
> …
>
> (B) The Parties have agreed to enter into this Standstill Agreement to extend the period in which proceedings can

be issued and thereby extending the limitation period so that no party needs to issue protective proceedings against another in respect of the Dispute, and so that no party is prevented from raising any existing limitation or similar defence in respect of the Dispute from the date of this agreement until the expiry of the Period…

2. AGREEMENT TO SUSPEND TIME

2.1 The parties hereby agree that:

(a) For all purposes of any defence or argument based on limitation, time bar, laches, delay or related issue in connection with the Dispute (a **Limitation Defence**) time will be suspended from the date of this agreement until the earlier of any of the dates or events referred to in paragraph 2.3 (the **Period**).

(b) No party shall raise any Limitation Defence that relies on time running during the Period.

(c) The Parties reserve their right to raise any limitation or similar defence arguments that they may have up to the date of this agreement whether known or unknown.

2.2 No party will object to another joining any additional party to the proceedings by using any Limitation Defence that relies on time running during the Period.

2.3 The suspension of time under this agreement shall continue in force until the earlier of:

(a) 30 days after the service by any party of a notice stating that the running of time is to recommence; or

(b) 28 February 2016.

2.4 The Parties confirm that they will not issue or serve proceedings in relation to the Dispute during the Period."

Clause 6 provided that this was an entire agreement and superseded any previous agreements.

23. On 10 February 2016, Taylor Wessing wrote to Beale & Co to suggest "that a further extension of the Standstill Agreement…would be sensible." Thereafter, on 18 February 2016 (in other words, within the period referred to at clause 2.3 of the first Standstill Agreement), the parties entered into a second Standstill Agreement. Recital B was in similar form to before, but expressly referred to the first Standstill Agreement. The amendment was clumsily done because it now read "the Parties have agreed to entered into a standstill agreement dated 5 November 2015…" The rest of Recital B was in the same terms as before, except that there was an additional final sentence which read: "The parties have agreed to further extend the period in which proceedings can be issued as set out in this agreement."

24. Clauses 2.1, 2.2, 2.3 and 2.4 were in the same terms as before, except that now the date had been extended to 29 April 2016.

25. In April, Taylor Wessing sought a further extension. Beale & Co stated in their letter of 20 April: "We note your request to extend the current Standstill Agreement in place which suspends time from 18 February to 29 April…"

26. The third and final Standstill Agreement was dated 28 April 2016 (in other words, within the period covered by the second Standstill Agreement). Recital B was in these terms:

> "The Parties have entered into a Standstill Agreement dated 5 November 2015 to extend the period in which proceedings can be issued and thereby extending the limitation period so that no party needs to issue protective proceedings against another in respect of the Dispute, and so that no party is prevented from raising any existing limitation or similar defence in respect of the Dispute from the date of this agreement until the expiry of the Period. The parties agreed to extend the period in which the proceedings can be issued as set out in an agreement dated 18 February 2016. The parties have agreed to further extend the period in which proceedings can be issued as set out in this agreement."

27. Clauses 2.1-2.4 of the third Standstill Agreement were again in the same form as before. On this occasion, clause 2.3(b) extended time to 30 June 2016.

28. Each of the three Standstill Agreements allowed the parties to vary the terms, provided that the variation was in writing. That is then what happened. The date of 30 June 2016 was extended by agreement on three separate occasions, recorded in letters sent by the defendants' solicitors on 22 June, 26 July and 26 September 2016. The third and final side letter of 26 September 2016, which was counter-signed by Taylor Wessing, confirmed:

> "This is a side letter to enable a further variation to be made to the Standstill Agreement to extend the Period as set out in that Standstill Agreement to allow the parties to attend a mediated meeting on 7 November 2016 ("the Amended Further Variation")…
>
> The Parties by signing this letter below agree that the Period within the Standstill Agreement is extended such that clause 2.3 of the Standstill Agreement is amended as follows:
>
> 2.3 The suspension of time under this Agreement shall continue in force until the earlier of:
>
> (a) 30 days after the service by any party of a notice stating that the running of time is to recommence; or
>
> (b) 30 November 2016."

29. Accordingly, in a rather longwinded way, the parties extended the period set out in the third and final Standstill Agreement to 30 November 2016. It is the defendants' case that the claimants had to commence proceedings by that date, and they argue that,

because the proceedings were not issued until the following day (1 December 2016), the claimants cannot avail themselves of the Standstill Agreements and the three claims are statute-barred.

5. THE APPLICABLE PRINCIPLES OF LAW

5.1 The Test for Striking Out

30. Pursuant to CPR Rule 3.4(2)(a), the court may strike out a statement of case where it discloses no reasonable grounds for bringing the claim. In the alternative, pursuant to CPR Rule 24.2(a), the court may give summary judgment against the claimants if it considers that the claimants have no real prospect of succeeding on the claims.

31. The parties are agreed that if the court concludes that the claims are plainly and obviously statute-barred, they should be struck out. Although Ms Jones had an argument to the effect that that may not be applicable here because there were arguments of fact, I have resolved those arguments of fact (which related to the accrual of the causes of action in respect of claims (i) and (ii)) in the claimants' favour in any event (see **Section 3** above).

32. Accordingly, this is a situation in which, depending on the proper construction of the Standstill Agreements, the court can reach a conclusion for the purposes of r.3.4(2)(a) and/or r.24.2(a).

5.2 Contract Construction

33. Because the application turns on the proper construction of the Standstill Agreements, I have been reminded of the passages in, amongst others, ***Rainy Sky SA v Kookmin Bank*** [2011] 1 WLR 2900 and ***Arnold v Britton*** [2015] AC 1619. There was the less-than-novel hint that, whilst the former authority stressed an objective approach, the latter gave much greater emphasis to the language actually used by the parties. I was also shown ***Wood v Capita Insurance Service Limited*** [2017] 2 WLR 1095 in which Lord Hodge said emphatically that ***Arnold v Britton*** did *not* recalibrate the approach in ***Rainy Sky*** and where he reiterated that the task of the court was to "ascertain the objective meaning of the language that the parties have chosen to express their agreement". I have considered and applied the principles set out by Lord Hodge at paragraphs 10-13 of his judgment. They are already well-known and I do not set out them out again here.

34. A particular point arises here as to the proper approach to the construction of Recitals and their interaction with the operative terms of the contract. The classic statement on this topic can be found in the judgment of Lord Esher MR in ***Re Moon*** (1886) 17 QBD 275, Volume XVIL at 286:

> "Now there are three rules applicable to the construction of such an instrument. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction. If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred."

35. This approach is noted at paragraph 13-068 of ***Chitty on Contracts,*** 32nd edition ("clear words in the operative part of an instrument cannot be controlled by recitals"); and in the more detailed analysis at paragraphs 10.10-10.14 of the ***Interpretation of***

Contracts, 6th edition, by Sir Kim Lewison. In the latter work, the author indicated, by reference to ***Franklins PTY Limited v Metcash Trading Limited*** [2009] NSWCA 407 at 380 that modern methods of interpretation, in which background plays a far larger part than used to be the case, may have tempered the traditional approach, such that recitals in a deed can be looked at as part of the surrounding circumstances of the contract "without a need to find ambiguity in the operative provisions of the contract."

5.3 Standstill Agreements

36. The only authority which the parties were able to identify which dealt expressly with Standstill Agreements is a decision of the Deputy High Court Judge in ***Exsus Travel Limited v Baker Tilly*** [2016] EWHC 2818 (Ch). The subject matter of the dispute in that case was when the period covered by the Standstill Agreement came to an end, which is not a point that arises here. Furthermore, I note that the wording of the Standstill Agreement was different to the one here, and the relevant Recital referred to "suspension" rather than "extension". That said, some passages in the judgment of the Deputy Judge are of general assistance on the question of the interaction between Recitals and the operative clauses:

> "31. It makes no difference to the construction of this definition or of the Standstill Agreement as a whole that this definition is made in a recital rather than in an operative provision of the Standstill Agreement. It is clear that recitals can and should be taken into account when interpreting an agreement in accordance with the principle that a contract should be interpreted as a whole: see, for example, ***Chitty on Contracts*** (32nd edn, 2015), para 13-068. The same provision of ***Chitty on Contracts*** notes that recitals cannot control an operative provision, but that question only arises if there is an inconsistency between a recital and an operative provision. In this case, there is none.
>
> …
>
> 35. For the claimants Mr Patten remarked that Recital (B) is not felicitously drafted…He said that assistance for the true meaning of Recital (B), read together with clause 3, could be obtained from the factual matrix. The relevant factual background is that there were putative claims against Baker Tilly, the Claimants (as defined in the Standstill Agreement) could not sensibly bring the claims until the litigation against Turner was completed and the litigation against Mr Turner was likely to take place in June 2012 with a judgment likely to be later, perhaps much later. Against this background, a provision enabling Baker Tilly to terminate the Standstill Period within 12 months would defeat the whole purpose of the Standstill Agreement. It must have been the parties' intention that the 12 month period was a minimum, subject to termination on 28 days' notice thereafter.
>
> 36. For the defendants Mr Plewman, beyond pointing to the use of "or" between the two parts of the definition of

> "Standstill Period" in Recital (B), which makes it clear that they are alternatives, noted that there is nothing in clause 3 of the Standstill Agreement that limits the ability of a party to terminate the Standstill Period by written notice. To the contrary, clause 3 expressly says that either of the parties may terminate the Standstill Period "at any time".
>
> 37. I accept Mr Plewman's submissions on the construction of Recital (B) and clause 3. It is clear that the two parts of the definition of "Standstill Period" in Recital (B) are alternatives, with the consequence that the Standstill Period, which apples separately in relation to each relevant set of claims, runs for a period of 12 months only, unless terminated earlier by notice under clause 3."

37. Paragraph 39 of the judgment in ***Exsus*** made plain that the standstill agreement in that case was considered to be suspensory in effect. That is similar to the finding of Akenhead J in ***How Engineering v Southern Insulation (Medway) Ltd*** [2010] EWHC 1878 (TCC) that the agreement in that case had the effect of "freezing limitation". But Ms McCafferty is quite right to say that those findings merely reflect the wording of the particular agreement in those cases, and do not set out any wider principle.

6. GROUND 1: SHOULD THE CLAIM FORM HAVE BEEN ISSUED ON 30 NOVEMBER 2016?

6.1 The Clause 2.4 Argument

38. The principal argument between the parties was whether, on the true construction of the Standstill Agreements, they operated to *suspend* time for the purposes of limitation, or to *extend* time for those purposes. In other words, on the claimants' case, if they had a period of, say, one month remaining out of the six years when they entered into the Standstill Agreements, they still had a period of one month when the third Standstill Agreement came to an end. On the defendants' case, because they say that the Standstill Agreements operated to extend time rather than to suspend it, they submit that the time for commencing proceedings finished when the third Standstill Agreement came to an end, on 30 November 2016. Thus they argue that the claim form was one day late.

39. I deal with that argument in **Section 6.2** below. But if Ms Jones will forgive me, I consider that the short, sharp answer to the defendants' case on Ground 1 can be found in the last of the four arguments that she outlined in paragraph 47 of her skeleton argument. There she pointed out that clause 2.4 (paragraph 22 above), which was the same in each of the three Standstill Agreements, provided that the parties would not issue or serve proceedings during the period of the particular Standstill Agreement in question. In other words, on the defendants' case, the claimants would have had to have breached the term at clause 2.4 of the Standstill Agreement and issued proceedings on 30 November 2016, in order to preserve the three claims. In my view, that cannot possibly be right.

40. The Standstill Agreements make plain on their face that neither party would issue proceedings during the currency of each Standstill Agreement. Thus, to comply with their obligations, the claimants could not legitimately commence proceedings until the

third Standstill Agreement came to an end on 30 November 2016. They commenced proceedings the day after, on 1 December 2016. In my view, that was in accordance with clause 2.4. It is an untenable construction of any agreement if it requires one party to breach its terms in order to make the agreement work in the way contended for.

41. With her customary tenacity, Ms McCafferty countered this argument by alleging that the word "until" in clause 2.3 should be given an exclusive, rather than an inclusive meaning, so that the third Standstill Agreement should be construed as meaning that the 30 November date was not only excluded from the currency of the Agreement itself, but was in fact the agreed date for the issue of proceedings.

42. I cannot accept either element of that submission. Because the parties had agreed that no proceedings would be issued or served "during the Period", which was to end on "the earlier of any of the dates referred to in clause 2.3", the only proper construction that can be given to the clause as a whole is that the claimants could not commence any proceedings until the Period had come to an end (i.e. after 30 November 2016). That gives 'until' an inclusive meaning; it would be contrary to the whole thrust of clause 2 if the long-stop date was excluded (i.e. outside the Period as defined).

43. Ms McCafferty made much of the fact that, because there was an agreed long stop date of 30 November 2016, this made for certainty on both sides. It is of course true that the inclusion of a particular date is always better than a stated period from or after an event, and much better than a nebulous expression like "reasonable time". But in my view, she was wrong to suggest that the combined effect of the sub-clauses within clause 2 was to provide for an agreement whereby the claim form had to be issued on a certain and nominated date (on her case, 30 November 2016). In my view, that interpretation is contrary to the express words of clause 2.4 and the definition of the 'Period'. These made plain that no claim form could be issued until after that date. There was nothing in the wording of the third Standstill Agreement which suggested that the long-stop date in clause 2.3 was an agreed date for the issue of proceedings.

44. Clause 2.4 also highlights an important issue concerned with the genesis of the Standstill Agreements in this case. The evidence was that Taylor Wessing took the template from the Practical Law resource website, a matter which was explained in the evidence in some detail. But the Practical Law template does not include the bar on issuing proceedings at clause 2.4; on the contrary, the template suggests that proceedings can be issued during the standstill period. In such circumstances, I consider that, generally, both sides' arguments based on the template must be treated with considerable care and that, on the clause 2.4 issue specifically, it is another point against the defendants' submissions.

45. Accordingly, I consider that the short answer to Ground 1 is that the defendants' construction cannot be right, because it would require the claimants to breach clause 2.4 of the Standstill Agreement in order to bring proceedings within time. Although that therefore disposes of Ground 1, I go on to deal with the broader arguments that were raised as to *suspension* versus *extension*.

6.2 The Wider Construction Arguments: Suspending Time or Extending Time?

46. In my view, these arguments can only be resolved in favour of the claimants. Everything points to the Standstill Agreements operating to suspend time (i.e. preserving both sides' positions so that, at the end of the agreement, they are both in

the same position in relation to limitation as they were when they entered into the agreement).

47. That this was an agreement to suspend time and not to extend it can be seen from:

(i) The heading of clause 2, which refers to an "Agreement to suspend time".

(ii) Clause 2.1(a), which states that "time will be suspended".

(iii) Clause 2.3, which states that "the suspension of time under this agreement shall continue in force until…"

(iv) Clause 2.4, which is only consistent with a suspension of time, for the reasons set out in **Section 6.1** above.

48. By contrast, there is no reference anywhere in the operative provisions of the Standstill Agreements to time being extended, rather than suspended. The words "extend" or "extending" do not appear at all.

49. It is of course correct that the words "extend" and "extending" do appear in Recital B (paragraph 26 above). Unsurprisingly, perhaps, Ms McCafferty relied heavily on that wording. However, in my view, the answer to that argument is as follows:

(a) As a general description of what the parties were intending to do, I do not consider that Recital B is inconsistent with clause 2. The claimants wanted longer to issue their proceedings. They therefore wanted to extend the time in which they could do that. I agree with Ms Jones that the general language expressing that aim in Recital B is not inconsistent with the mechanism of achieving that aim, which was to suspend time in accordance with clause 2. On that approach, the result is the same as in ***Exsus***.

(b) If I am wrong about that, however, then there is an irreconcilable inconsistency between Recital B and clause 2: the former talks about extending time, the latter about suspending time. In those circumstances, the authorities noted in paragraphs 34-35 above make clear that such an inconsistency must be decided in favour of clause 2. Clause 2 contains the operative provisions of the agreement and must always take precedence over the Recital.

50. Accordingly, I consider that, in the so-called modern way, the words of Recital B can be taken into account as part of the factual background, without altering the views expressed in paragraphs 46-48 above. But if I am wrong about that, then I am bound as a matter of law to conclude that the operative provisions of clause 2 override the Recital.

51. As I have already noted, both sides have sought to make much of the similarities and/or differences between the eventual version of the Standstill Agreement that was concluded, and the template provided by Practical Law on which it had originally been based. I was even taken to some of the Practical Law drafting notes. I have not derived particular assistance from this exercise, mainly because the agreement reached was so different from the original Practical Law template.

52. However, out of deference to both counsel, who referred to the template and the drafting notes in their submissions, I would add this. The template itself is based on the principle of suspending time, rather than extending it, and the worked examples in

the drafting notes make clear that the agreement is intended to suspend time for a particular period only. Whilst Ms McCafferty is quite right to point out that some of the drafting notes indicate that a standstill agreement can operate on the principle of extending time, rather than suspending time, it is noteworthy that the authors do not deal in any detail with that alternative. Instead, the focus of the Practical Law template, and the drafting notes, is on suspension.

53. Again, therefore, for what it is worth, I consider that that is another point in the claimants' favour. It seems a fair inference from the material that I have been shown that, if the solicitors had wanted to extend time rather than suspending it, they would not have used the Practical Law template at all, because that was expressly based on a suspension mechanism. The differences between the template and the actual agreement reached (which Ms McCafferty illuminated in detail during her submissions) were nowhere near enough to effect such an important change of approach.

54. I would make one final point on the issue of construction. On my analysis (**Section 3** above) with one exception, the relevant causes of action in respect of the three claims accrued on 22 June 2010. The third Standstill Agreement was entered into on 28 April 2016, just less than a month before the limitation period expired. On this basis, therefore, when the claimants entered into the third Standstill Agreement, they were still within time to bring these three claims. Yet on the defendants' case, as a matter of construction, on the expiry of that third Standstill Agreement, they were out of time.

55. That would mean that, merely by entering into the Standstill Agreement, the claimants were running the risk of losing the right to bring the three claims which they otherwise had at the date of the agreement. There is nothing on the face of the third Standstill Agreement which would allow for such an interpretation. On the contrary, the purpose of the third Standstill Agreement was all about the preservation of rights, not the risk of their loss.

56. For all those reasons, therefore, I conclude that the Standstill Agreements operated to suspend time and not to extend time. As a result of that, when the third Standstill Agreement came to an end, in respect of the three claims where I have found that the cause of action accrued on 22 June 2010, the claimants had (by reference to that agreement alone) a period of over three weeks remaining to them in which to commence these proceedings. They did so. Those three claims are not therefore statute-barred.

7. GROUND 2: LOSS OF PROTECTION OF EARLIER AGREEMENTS

7.1 The Submissions

57. The defendants say that, by reference to clause 2.1(c) of the third Standstill Agreement, they were entitled to rely on any limitation defences which had accrued to them by the date of that agreement (28 April 2016), even if that accrual had occurred during the periods covered by the two earlier Standstill Agreements. In other words, it is the defendants' case that, by entering into the third Standstill Agreement, the claimants effectively "lost" the protection provided by the two previous Standstill Agreements.

58. The defendants rely on clause 2.1(c) and clause 6 of the third Standstill Agreement. They point to the fact that, pursuant to clause 2.1(c), the parties had reserved their

right to rely on any limitation defence "that they may have up to the date of this agreement". The defendants therefore say that this must mean that they can rely on any limitation defence that they had up to 28 April 2016. Similarly they rely on clause 6 to show that the third Standstill Agreement superseded the previous two agreements, so they could not have any relevance.

59. The claimants dispute that. They argue that the three Standstill Agreements have to be taken together so that, as a matter of law, as at 28 April 2016, the time for limitation purposes was still 'frozen' as at 5 November 2015, which was a time when, on any view, no limitation defence had accrued to the defendants. As Ms Jones said, at no point from 5 November 2015 onwards was time not suspended.

60. Ms Jones also said that, at least in one sense, her argument followed on from what I have found to be the correct construction of the Standstill Agreements in relation to Ground 1. The Standstill Agreements were suspensive and therefore operated from 5 November 2015 onwards.

7.2 The Limited Effect of Ground 2

61. Before dealing with this argument in greater detail, I should make plain that, in my judgment, it has a very limited effect. I have pointed out that the causes of action in tort in respect of claim (i), and the causes of action in tort and for breach of contract in respect of claims (ii) and (iii) above, all accrued on 22 June 2010. In those circumstances, Ground 2 could not apply to them and the defendants could have only struck out those claims if they had succeeded on Ground 1. Because they have lost on Ground 1, the defendants have no fall-back position in respect of those claims.

62. Thus, on the analysis set out in **Section 3** above, the only cause of action to which Ground 2 has any potential relevance is the claim for damages for breach of contract in respect of claim (i) (inadequate tender documents). That accrued on 9 November 2009. That was within the period covered by the first Standstill Agreement, but was obviously a date more than six years after the start of the third Standstill Agreement. Is that element of the claimants' claim statute-barred because the claimants lost the protection of the first two agreements?

7.3 Analysis

63. In my view, that cause of action is not statute-barred. It would be wrong to construe the third Standstill Agreement in isolation, without regard to the first and second Standstill Agreements. The period covered by the first two Standstill Agreements was continuous, running from 5 November 2015 to 29 April 2016, and the court should construe the third Standstill Agreement as coming into effect on 28 April 2016, when time was still suspended. Any other conclusion would fail to treat the three Standstill Agreements together.

64. It is clear to me that clause 6 in the template, and clause 2.1(c) and clause 6 in the second and third Standstill Agreements, have been carried forward, without any thought being given to the fact that new agreements were being reached. It was certainly sloppy drafting. But as I have said, the strict interpretation of the words urged on me by Ms McCafferty would plainly ignore the parties' intentions in the second and third Standstill Agreements to extend the period of suspension identified in the first Standstill Agreement.

65. That conclusion is supported by the wording of Recital B (Paragraph 26 above). The only proper construction of Recital B in the third Standstill Agreement is that the

extensions under each of the Standstill Agreements were to be regarded as continuous. The Recital records that the parties had agreed "to further extend the period in which proceedings can be issued as set out in this agreement". That is also entirely consistent with the correspondence between the solicitors (see paragraphs 23 and 25 above).

66. In my view, as a matter of construction of the third Standstill Agreement, neither party was to be treated as being in a worse position because of their previous agreements to suspend time. To conclude the claimants suffered (or risked suffering) a detriment as a result of entering into the third Standstill Agreement would be contrary to the terms and intention of the Agreements themselves (see paragraphs 54-55 above). There is nothing in the drafting which could lead to such a draconian result, and I accept Ms Jones' submission that clear words would be needed to achieve that effect. It would also be a result that, in my view, would be contrary to commercial common sense.

67. Accordingly, although I consider that Ground 2 has a very limited application, I do not consider that it is a point that is open to the defendants in any event. It would not be a proper construction of these Standstill Agreements, taken together, to conclude that the claimants have lost any rights as a result of entering into all or any of them.

8. GROUND 3: THE SECOND DEFENDANT

8.1 The Submissions

68. On behalf of the defendants, Ms McCafferty noted that the second defendant company was not named in the appointment, played no part in any of the works carried on at site, and was not a party to any of the Standstill Agreements. Thus, it is said that the claim against the second defendant should be struck out in its entirety.

69. The claimants accept that their primary case is that the correct defendant is the first/third defendant. However, they remain concerned that disclosure will show that there was a claim against the second defendant company and that it is at least a possibility that the documents will show that it was the second defendant, rather than the first/third defendants which provided certain of the services received by the claimants. Accordingly, the claimants say that it would be premature for the court to reach a view on the fact that there was no claim against the second defendant.

70. I should also point out, for completeness, that this point was not raised on the face of the application and has arisen only in the days leading up to the hearing. That doubtless explains the claimants' caution.

8.2 Analysis

71. It seems to me overwhelmingly likely that the second defendant will play no part in this trial. Although the court cannot reach a final view as to the role played by the second defendant until after disclosure, I would be hopeful that the matter could be resolved between the solicitors long before that. But, given the lateness with which the point was taken, I do not consider that it would be appropriate to strike out all of the claims against the second defendant at this stage.

72. As a matter of strict logic, it did seem to me that the three claims (i), (ii) and (iii) cannot now be made against the second defendant. On the face of it, the second defendant was not a party to the Standstill Agreements. For the reasons explained above, the claimants are only able to bring the three claims against the first/third

defendant because of the operation of the Standstill Agreements. Thus it would seem to follow that, because the second defendant was not a party to those Standstill Agreements, the claimants cannot avail itself of the same benefits.

73. However, whilst Ms Jones accepted that, she pointed out that the entity "PSP Consultants", referred to in the Standstill Agreements might still be a reference to the limited company. That seems to me unlikely. However I am prepared to give the claimants the benefit of the doubt for a little longer in order to bottom out this point. As noted above, I would be confident that in the fairly near future, the second defendants will be deleted from these proceedings.

9. CONCLUSIONS

74. For the reasons set out in **Section 3** above, I consider that the cause of action for breach of contract in respect of claim (i) accrued on 9 November 2015, and that the causes of action for breach of contract in respect of claims (ii) and (iii), and the causes of action in tort in respect of claims (i), (ii) and (iii), all accrued on 22 June 2010.

75. For the reasons set out in **Section 6** above, the claimants were not obliged to act in breach of the third Standstill Agreement and issue proceedings against the defendants on 30 November 2016. Further, the Standstill Agreements operated to suspend time. Since the claimants were not out of time in respect of any causes of action in relation to the three claims before entering into the Standstill Agreements, and they issued the proceedings the day after the end of the third Standstill Agreement, the claims are not statute-barred.

76. For the reasons set out in **Section 7** above, I consider that the claimants never lost the protection of the two earlier Standstill Agreements. In any event, Ground 2 could only relate to the cause of action for breach of contract in respect of claim (i), and not any of the other relevant causes of action.

77. For the reasons set out in **Section 8** above, I am not in a position to decide the factual basis of the claim against the second defendant. I can however say that, on the face of it, all causes of action in respect of the three claims, as against the second defendants only, would appear to be statute-barred.

78. I will deal with all consequential matters following the handing down of this Judgment.