Neutral Citation Number: [2022] EWHC 461 (Comm)

Case No: CL-2019-000818

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/03/2022

Before :

MR JUSTICE JACOBS

- -

Between :

CONSULTING CONCEPTS INTERNATIONAL INC

Claimant

- and -

CONSUMER PROTECTION ASSOCIATION (SAUDI ARABIA)

Defendant

- -
- -

Philip Coppel QC (instructed by **Francis Wilks & Jones**) for the **Claimant**
Gavin Kealey QC and Henry Moore (instructed by **Squire Patton Boggs (UK) LLP**) for the **Defendant**

Hearing date: 22 February 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MR JUSTICE JACOBS

Mr Justice Jacobs:

A: Introduction and factual background

1. This judgment concerns two applications in proceedings started in December 2019 but which have not, for reasons which will become apparent, progressed very far. The Claimant ("CCI") seeks a retrospective extension of time for service of Particulars of Claim by application dated 20 April 2021 ("the extension application"). By an application dated 13 May 2021, the Defendant ("CPA") seeks to strike out the Claim Form (and in so far as relevant the Particulars of Claim) pursuant to CPR 3.4(2)(a) or (c), on the basis that CCI's statement of case discloses no reasonable grounds for bringing the claim; alternatively CPA seeks "reverse" summary judgment under CPR Part 24. Although different rules are relied upon by CPA, the parties referred (and I shall refer) to this application compendiously as "the strike out application".

2. It is common ground that the strike out application proceeds on the express assumption that the facts in the Claim Form and Particulars of Claim are true. CPA has made it clear that it denies the claim and disputes the genuineness of the documentation relied upon. For present purposes, however, CPA takes no issue about the facts or the plausibility of the facts.

3. There are, or at least can be, differences between the court's approach to an application to strike out under CPR 3.4 and reverse summary judgment under CPR Part 24. For example, an application under CPR 3.4 (2) (a) proceeds on the basis that the facts set out in the relevant statement of case are true. In contrast, a summary judgment application can require the court to form a view on the evidence submitted by a party, with a view to deciding whether a claim or defence has a real prospect of success. However, these differences are not material in the light of CPA taking no issue about the pleaded facts or the plausibility of those facts, whether for the purposes of CPR 3.4 (2)(a) or CPR Part 24. It is not therefore necessary to explore any differences between the court's approach to these different rules, and the parties' submissions did not do so. Accordingly, whether CPA's case is advanced as a strike out under CPR 3.4 (2), or summary judgment under CPR Part 24, the application is to be determined on the basis that the facts in the present pleadings are true.

The factual background to the Claimant's claim

4. The facts giving rise to the Claimant's claim are as follows. My description is, unless otherwise stated, taken from the Claim Form and Particulars of Claim, or documents referred to expressly therein.

5. CCI is a company created and registered under the laws of the State of New York. Its owner and CEO is Mr Massimiliano Pincione. CPA is a civil organisation under the law of the Kingdom of Saudi Arabia. It has separate corporate personality. It provides services to consumers of the Kingdom through education about their rights, handling their complaints and helping to protect consumers' interests. Its chairman at all material times was Dr Nasser Al Tweam.

6. A 6-page written agreement, in English, dated 4 June 2013 was signed by both parties on 10 June 2013 ("the June 2013 agreement"). Under the June 2013 agreement, CCI

was to provide certain consultancy services. The opening paragraph of the June 2013 agreement identified its objectives.

> "This agreement entered on June 4th 2013, is an exclusive agreement between Consulting Concepts International (CCI) and Consumer Protection Association (CPA) CCI and CPA will collaborate to develop and implement strategies, programs and public policies to address the root causes of Asthma, its prevalent misdiagnosis, treatment compliance and pediatric continuing-education in the Kingdom of Saudi Arabia, as well as to promote proven therapeutic protocols to enhance and improve the life of Saudi Arabia's youth. Using a comprehensive systems approach to change, Consulting Concepts International and the Consumer Protection Association (CPA), hereby commit to serve the identified youth of the Kingdom of Saudi Arabia. The parties above will submit themselves to the jurisdiction of the laws of the United Kingdom for any and all disputes arising from this agreement."

7. The "Foreword" then described various aspects of the problems facing asthma sufferers, and the reasons why asthma was on the rise. The June 2013 agreement then contained a joint commitment by CCI and CPA as follows:

> *"**Consulting Concepts International and Consumer Protection Association***
> *Using a comprehensive systems approach to change, hereby commit to:*
> - Successfully assume the implementation and management of a progressive pulmonary healthcare reform.
> - Facilitate the expertise of medical professionals and healthcare administrator to participate through the initial phases of establishing an all-encompassing healthcare network throughout the Kingdom.
> - Devise a compelling marketing campaign to bring public awareness of preventive pulmonary healthcare management, proven drug therapies, as well as control and maintenance treatment protocols."

8. A number of "Project Priorities" were then identified, with a principal focus on asthma:

> "Seek government support to regulate a state-wide Asthma/COPD healthcare reform system, by demanding updated medical training and continuing education of pulmonary disorders for all primary care physicians, particularly pediatricians.
>
> Establish a bilateral collaboration between the Health Ministry and Education Ministry to promote better understanding of the causes, symptoms, and therapies available to control and treat asthma among school-age children.
>
> Seek co-op marketing partnerships and sponsorships from public/private sources, intending to provide a continual Asthma/COPD awareness program to the population. A well planned marketing campaign's progression and success will prove to be a lasting mission.

> Establish and anchor our commercial talents and business capabilities by enhancing our corporate presence in the society through education, marketing and public relations, as well as through strategic pro bono investments within the community."

9. A number of "Future Goals" were then set out; for example, the development of a compelling and comprehensive anti-smoking marketing campaign throughout the Arabian Peninsula. There followed "Corporate Objectives" identified in 9 bullet points.

10. The June 2013 agreement did not record any rate of remuneration. However, it was envisaged that CCI would charge for its work and submit invoices. Under the heading "Responsibilities of Consumer Protection Association", there was the following provision:

> "All invoices submitted by CCI will be paid within 90 days if funds of Stakeholders are available, by submission of said Invoice by Consumer Protection Association to a Bank account designated by CCI."

11. There was then a curious provision which entitled CPA (which would be paying the invoices) to receive "20% of total contract value relating to the project outlined above".

12. CCI alleged that there was then an "extension" to the June 2013 agreement, made shortly after 10 June 2013, when the parties (by Mr Pincione and Dr Al Tweam) entered into an oral agreement, which CCI described as the "Second Agreement". Under this agreement, the parties agreed that CCI would provide consultancy, labour and related services, being other non-asthma health, sociologic, epidemiologic and economic studies, to CPA at CPA's request. It was an express term of the Second Agreement that CPA would pay US$ 12 million to CCI for these services. This Second Agreement was pleaded in the Particulars of Claim, but was not specifically referred to in the Claim Form. However, the Claim Form did plead generally that during 2013 CCI "provided services" to CPA at the latter's request, including under the earlier June 2013 agreement.

13. Between June and December 2013, CCI provided services under the June 2013 agreement and the Second Agreement. CCI rendered the following invoices to CPA.

14. In relation to asthma related services, CCI alleged that it had submitted an invoice dated 17 December 2013 for "Asthma Reform Research & Analysis". This was in the sum of US$ 3 million. This invoice is apparently unavailable, and neither party was able to produce it for the purposes of the hearing. It was common ground, however, that this is the last invoice that was actually or allegedly sent by CCI to CPA.

15. In relation to non-asthma related services, CCI submitted two "summary invoices" in the total amount of US$ 12,129,800.

16. The first summary invoice, totalling US$ 9,955,500 was for "Economic and Health Reform Studies", and encompassed a number of invoices covering work between 15 June and 25 November 2013. Both the summary invoice, and the individual invoices included in the summary, contained the following text: "Due Immediately Upon Invoice as per Agreement with CPA dated June 4, 2013". The individual invoices were

dated either September (2 invoices), October (2 invoices) or November 2013 (3 invoices). Based on the dates when the invoiced work was carried out, the September invoices must have been issued at some point or points after 14 September 2013, and the November invoices at some point or points after 2 November 2013.

17. The second summary invoice was for US$ 2,174,300, again for Economic and Health Reform Studies, and encompassed a number of invoices covering work between 15 August and 7 November 2013. There were two individual invoices. One was dated August 2013, but related to work carried out between 1 September and 16 October 2013, and therefore appears to have been issued after 16 October 2013. The other was dated November 2013, and related to work carried out between 15 August and 7 November, and therefore appears to have been issued after 7 November 2013.

18. Each of the invoices designated Mr Pincione's numbered account at JP Morgan Chase bank as the account to receive payment.

19. At all material times, CPA, which is generously funded by the Saudi Arabian Chamber of Commerce, had funds of Stakeholders available to pay the invoices.

20. CPA also provided CCI with a document headed "Undertaking and Commitment" ("the Undertaking"). This is a short document in Arabic. It is undated, but was alleged by Mr Pincione to have been provided to him in October 2013. The text of the Undertaking, in translation, was as follows:

> "In accordance with the agreement made between the Consumer Protection Association and Consulting Concepts, an international company based in New York City, in the United States of America, for conducting studies, research and consultations regarding the activities of the association. Whereas the said company has performed consultations and multiple studies in this field, the Association undertakes to pay to Mr. Massimiliano Pincione in the amount of one hundred sixty-one million five hundred five thousand riyals, provided that the amount will be transferred to the account in the name of Massimiliano Pincione by December 31, 2013, and this is an undertaking thereto. Thanks are due to Mr. Max and his colleagues for the professional work and effort exerted for undertaking such studies, research and consultations to prepare the Association for performing its duties in the best way in accordance with the regulations of the Association and on the bases of our rulers' aspirations and consumers' satisfaction.
>
> And God is the source of strength.
>
> Executive Board Chairman
>
> Association Chairman
>
> [Signed]
>
> Dr. Nasser bin Ibrahim Al Twaim"

21. The sum of Saudi Riyals 161,505,000 is the equivalent, in December 2019 (the date of the Claim Form) of US$ 43,055,500.

22. No part of any of the invoices was paid by CPA, despite demands. Nor was payment made pursuant to the Undertaking on 31 December 2013.

23. As well as being out of pocket through non-payment, CCI incurred in excess of US$ 500,000 for travel and other costs in seeking to recover the outstanding payments.

Procedural history

24. CCI brought an unsuccessful claim, in respect of the subject-matter of these proceedings, in Saudi Arabia. The evidence before me did not include any materials relating to these proceedings, and I therefore do not know the basis on which the case was actually advanced. The claim was, according to Mr Pincione, submitted to the wrong court. His evidence was that after almost 5 years of trying to negotiate with CPA, he gave up and decided to file proceedings in New York instead.

25. On 24 December 2019, both CCI and Mr Pincione sued both CPA and the Kingdom of Saudi Arabia in New York ("the New York Proceedings"). The claim was brought in Federal Court before the United States District Court of the Southern District of New York and was for (i) US$ 45,055,500 for "asthma-related services" and (ii) US$ 12,000,000 for "non-asthma-related services". An Amended Complaint was filed on 27 December 2019.

26. Also on 27 December 2019, CCI issued the present proceedings against CPA in England. The present proceedings ("the English Proceedings") are in many respects identical to the New York Proceedings, and the Particulars of Claim are clearly based on what has been said in the New York Amended Complaint. They differ to the extent that in New York Mr Pincione was also a plaintiff and the Kingdom of Saudi Arabia ("KSA") was also a defendant, and there was a claim for an "Account Stated".

27. On 15 June 2020, CCI and CPA agreed a stay of the English Proceedings to enable the parties to discuss the appropriate forum. CCI's first set of solicitors, DLA Piper ("DLA"), and CPA's solicitors, Squire Patton Boggs ("SPB"), agreed the following: (i) CPA would accept service of the English Proceedings; (ii) a 90-day stay would be granted; and (iii) CPA would retain its ability to challenge jurisdiction.

28. On 16 June 2020, DLA served the Claim Form on SPB. These proceedings were then duly stayed. A similar stay was put in place in the New York Proceedings, with a view to the parties trying to settle their difference. Those attempts were unsuccessful.

29. On 29 September 2020, in New York, CPA and KSA brought a motion to dismiss the New York Proceedings on sovereign immunity and *forum non conveniens* grounds. CPA's contention was that the June 2013 agreement contained an agreement for English jurisdiction.

30. On 1 October 2020, Foxton J granted a further 90-day stay of the English Proceedings in the same terms as previously ("the Foxton J Order"). The reason for the stay was to allow the motion to dismiss the New York Proceedings to be progressed.

31. On 28 December 2020, the stay of proceedings under the Foxton J Order expired.

32. On 29 December 2020, in New York, following three extensions of time, CCI and Mr Pincione filed a response opposing CPA's and KSA's motion to dismiss in New York.

33. On 30 December 2020, CPA filed an acknowledgment of service in the English Proceedings stating that they would be defended. Particulars of Claim were, accordingly, due within 28 days.

34. On 6 January 2021, DLA requested a three-month extension to the period for service of the Particulars of Claim (a third extension). SPB considered this to be excessive and the parties agreed 56 days instead. SPB said that it would not expect to be asked for further extensions.

35. On 19 January 2021, DLA on behalf of CCI wrote to the court in the following terms:

> "We write to advise the Court that the parties have, pursuant to PD51ZA, agreed a 56 day extension of time for the filing of Particulars of Claim. Accordingly, the Claimant will file its Particulars of Claim by no later than **24 March 2021**." (bold in original).

36. By this time, Mr Pincione's health had become severely compromised. He was diagnosed with Covid-19 on 2 January 2021. Dr Mitchell Kurk, who had been his doctor for over 20 years, provided a letter dated 9 April 2021 in the following terms:

> "The past 5 weeks or so have been challenging for Mr. Pincione. He has had a setback in his recovery and has been experiencing fevers, chills, nausea, and chronic fatigue. Mr Pincione has been home during this period and for the most part bedridden. I have recommended to Mr. Pincione to convalesce at home for the next month hoping that he will feel better..."

37. On 25 March 2021, the 56-day extension expired. No Particulars of Claim were filed or served.

38. On 1 April 2021, the New York Proceedings were dismissed. Federal Judge Alvin K. Hellerstein upheld both the sovereign immunity and *forum non conveniens* grounds advanced by CPA (the latter with the benefit of expert evidence on English law): *Consulting Concepts Int'l Inc. v Kingdom of Saudi Arabia* Case 1:19-cv-11787-AKH.

39. On 7 April 2021, CCI changed its solicitors of record in the present proceedings. Giambrone & Partners ("Giambrone") replaced DLA. On the same day, Giambrone asked CPA for a retrospective extension of time until 4 pm on 9 April 2021 to file and serve the Particulars of Claim, referring to the facts that (i) Mr Pincione had been diagnosed with Covid-19 in January 2021 and had since not been sufficiently fit to attend to work, and (ii) there had then been "a misunderstanding in the formal change of solicitors".

40. On 9 April 2021, SPB declined Giambrone's extension request, noting among other things that Mr Pincione had been capable of giving instructions in the New York Proceedings and that CCI had already had 15 months in which to settle Particulars of Claim.

41. On 14 April 2021, at 9.31pm, Giambrone sent the Particulars of Claim to SPB. SPB were requested to agree a retrospective extension of time. This was declined by SPB.

42. On 15 April 2021, in New York, CCI and Mr Pincione filed a notice indicating their intention to appeal the decision of the Federal Judge to the United States Court of Appeals for the Second Circuit.

43. On 20 April 2021, in England, CCI issued the extension application. CCI served this application on CPA a week later on 27 April 2021. It was supported by the first witness statement from Mr Pincione.

44. On 13 May 2021, CPA served evidence opposing the extension application. It also issued the strike out application.

45. On 28 May 2021, CCI served a second witness statement from Mr Pincione opposing the strike out application. On 25 June 2021, CPA served evidence in reply on the strike out application. On 2 February 2022 (just over two weeks before the hearing fixed for the determination of both applications), CCI changed solicitors to Francis Wilks & Jones ("FWJ"). On 4 February 2022, FWJ formally replaced Giambrone. On 10 February 2022, FWJ served a witness statement from Mr Downie of FWJ.

46. Prior to the hearing, the parties served written skeleton arguments. Oral submissions were made by Mr Kealey QC for CPA and Mr Coppel QC for CCI. The oral submissions were principally directed towards the strike out application. They proceeded on the basis of the Particulars of Claim which had been served, late, in April 2021. The oral submissions on that application were followed by oral submissions on the extension application. In this judgment, I follow the same approach by dealing first with the strike out application. I do so on the basis of the Particulars of Claim as served, since (for the reasons given in Section D) I consider it appropriate to grant the extension which the Claimant seeks.

B: The strike out application: the parties' arguments

CPA's submission

47. On behalf of CPA, Mr Kealey's principal argument was encapsulated in the following propositions:

    i) The June 2013 agreement and the Second Agreement are pleaded as contracts for services at the request of another, on terms that payment is to be made for them.

    ii) The final invoice for the services in the Particulars of Claim is dated 17 December 2013.

    iii) CCI's case is that the services were completed by the time they were invoiced for.

    iv) The invoicing provision in the June 2013 agreement, which was equally applicable to the alleged "Second" Agreement, was not a "special term", to use

the language of Lord Esher in *Coburn v Colledge* [1897] 1 QB 702. Instead, it was a provision concerned with the mechanics of payment: see *Ice Architects Ltd v Empowering People Inspiring Communities* [2018] EWHC 281 (QB) at [22]; *Hirst v Dunbar* [2022] EWHC 41 (TCC) at [112].

v) Accordingly, the cause of action for the services accrued no later than 17 December 2013, which is more than six years before the claim was issued.

48. As far as the Undertaking was concerned:

i) The Undertaking is pleaded under the umbrella of the June 2013 agreement and expressly in accordance with it.

ii) The consideration for the payment of money by CPA under the Undertaking is, and is (only) pleaded to be, services rendered by CCI. It is, and is only pleaded to be, services rendered by CCI in accordance with the parties' agreement. There was no suggestion by or on behalf of CCI that CCI ever performed services other than those invoiced for and pleaded in the Particulars of Claim. There is also no suggestion by or on behalf of CCI that CPA ever requested CCI to perform any other such services. There is no suggestion that CPA ever prevented CCI from performing any other such services.

iii) A claim for payment in respect of those services is time-barred unless there is a "special term" displacing the fundamental position that time ran from completion of the services.

iv) The provision that "the amount will be transferred to the account in the name of Massimiliano Pincione by December 31, 2013" was nothing like a special term. It was "an arrangement as to the mechanics of payment". Its significance was that it created a procedural bar to an action in the period before 31 December 2013.

v) Accordingly, the relevant cause of action for sums in return for the pleaded services accrued no later than 17 December 2013 (not 31 December 2013). This is more than six years before the claim was issued.

49. CPA submitted that its point could also be stated more shortly as follows: if a claim for services rendered pursuant to an agreement is time-barred in circumstances where the same services also constitute the consideration for payment under another services agreement, the time bar applies as much to the second agreement (unless of course it contains a special term) as to the first. The 31 December 2013 deadline for payment is not a special term. It is unsurprising that the Undertaking, given in accordance with and for services rendered under the parties' prior agreement, adds nothing to the limitation analysis.

50. Mr Kealey also advanced a number of subsidiary arguments which arose in the event that his primary case was rejected. He also advanced a number of other arguments in reply to points taken by Mr Coppel. Where relevant, these are reflected in my discussion below.

CCI's submission

51. On behalf of CCI, Mr Coppel submitted that CCI's cause of action could only arise when there was a breach by CPA of the relevant contract. Here, the contract imposed an obligation on CPA to pay within 90 days of the invoice. The cause of action did not arise as soon as the work was done. There was no breach by the recipient of the invoice at that point. There would be no breach of the obligation to pay until the 90 days had passed. The relevant contractual provision involved a number of pre-conditions to any obligation to pay, and therefore to any cause of action, after the work had been done. These were: the submission of the invoice, the availability of stakeholder funds, and the lapse of 90 days. CCI could not bring an action before 90 days had elapsed. Prior to that time, CPA had not breached its obligation to pay the amount stated in the invoice. Were it otherwise, for example if CPA paid on Day 89, CCI could claim that there had been a breach of contract between Day 1 and Day 89, and claim interest. That was not the way in which the contract would work in a common-sense way. The parties had applied their minds as to when CCI would be paid. They had agreed 90 days, and it was important to give those words meaning and practical effect. A party was entitled to know how much time was permitted for the performance of an obligation, without the contract being breached. Here, that period was 90 days. The breach of the contractual obligation to pay within 90 days initiates the contractual limitation period.

52. Mr Coppel sought to distinguish the authorities relied upon by CCI. Each contract had to be evaluated on its own terms. One could not transpose a conclusion that the court had reached on one contract, for certain services, into a different contract relating to different services.

53. Mr Coppel described the June 2013 agreement as a framework agreement. Under the framework, CCI could ask for a report on an issue of its choosing. That is what CCI did on 10 occasions during 2013, and the same was to happen in the years ahead. The Undertaking was not to be regarded as a separate agreement to the June 2013 agreement. It reflected the fact that further work was to be carried out, both in the same year and the following years. The sum to be paid, which was much more than the amounts invoiced in 2013, reflected that fact. The sum covered by the Undertaking covered both the amounts invoiced and the work that was to be carried out going forward.

54. Mr Coppel also submitted that if he was wrong on the primary arguments outlined above, so that there was a time-bar in relation to the work carried out in 2013, that did not apply to CCI's claim for repudiatory breach. On any analysis, this had been brought within 6 years. Mr Pincione's evidence was that CCI had prepared a programme that had been approved by CPA's executive board chairman. It was this work that CPA undertook to pay for in advance. By not making payment, CPA had repudiated the agreement. That repudiation had been accepted by CCI bringing proceedings in Saudi Arabia.

55. Mr Kealey had submitted, both orally and in writing, that the pleaded claim for a quantum meruit did not result in a different limitation period from that applicable to the contractual claim. Mr Coppel in his submissions did not suggest otherwise.

C: Discussion

The claim in respect of the invoices rendered

56. Both the Claim Form and the Particulars of Claim advance claims for payment under a number of invoices. In relation to asthma related services, CCI claims payment of US$ 3 million in respect of the invoice dated 17 December 2013 (albeit that no copy of that invoice appears to be available). In respect of non-asthma related services, CCI claims a total of US$ 12,129,800 under two summary invoices and underlying invoices covering work performed between 15 June and 25 November 2013. It is therefore the case that all of the work covered by the invoices was carried out more than 6 years prior to the issue of the Claim Form on 27 December 2019. Indeed, each of the invoices was issued more than 6 years prior to that date.

57. The essential question which arises is whether CCI's cause of action was complete (i) at the time when the work covered by each invoice was performed, as CPA contends; or (ii) once an invoice had been issued and 90 days thereafter had elapsed, as CCI contends. On that issue, I was referred to the following authorities by the parties: *Coburn v Colledge* [1897] 1 QB 702 (CA); *Sevcon Ltd v Lucas CAV Ltd* [1986] 1 WLR 462 (HL); *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 814; *Legal Services Commission v Henthorn* [2011] EWCA Civ 1415; *JJ Metcalfe v Dennison* (6 December 2013, [2013] 12 WLUK 224, HHJ Raynor QC in the Manchester County Court); *ICE Architects Ltd v Empowering People Inspiring Communities* [2018] EWHC 281 (QB) (Lambert J) ("*Ice*"); *Hirst and others v Dunbar and others* [2022] EWHC 41 (TCC) (Eyre J) ("*Hirst*"). I have also considered the judgment of HHJ Coulson QC in *Birse Construction Ltd v McCormick (UK) Ltd* [2004] EWHC 3053 (TCC), which is referred to in some of these cases.

58. The judgments of Lambert J in *Ice* and Eyre J in *Hirst* contain a detailed review of the authorities in this area, and it is not necessary for me to carry out a similar exercise. The significant points which emerge from those judgments, and the preceding case-law, can be summarised as follows.

    i) There is an established principle that, in the absence of any contractual provision to the contrary, a cause of action for payment for work performed or services provided will accrue when that work or those services have been performed or provided. In such circumstances, the right to payment does not depend upon the making of a claim for payment by the party that provided the work or services.

    ii) It is a question of construction whether the terms of the contract produce a different result. The date of the accrual of a cause of action for sums due under a contract for work or services will therefore ultimately depend upon the terms of the contract.

    iii) Contracts will frequently contain terms which require something to be done before a creditor is contractually entitled to payment or to enforce his right to payment. The cases consider in that context, for example, provisions which relate to: obtaining certification from a third party; making a demand; submitting an invoice; and the lapse of a period of time after making the demand or submission of the invoice.

iv) When considering such provisions, it is necessary to distinguish between (i) terms which are conditions precedent to the right to payment arising, and (ii) terms which impose conditions for the bringing of proceedings and which are concerned with limiting the right to bring an action to enforce an entitlement to payment: see *Hirst* para [102]. The latter are regarded as procedural conditions which affect the right to bring proceedings for a period of time in respect of a complete cause of action which already exists. Thus, as Lord Mackay of Clashfern said in *Sevcon* (at 467G): "bars to enforcement of accrued causes of action which are merely procedural do not prevent the running of time unless they are covered by one of the exceptions provided in the Limitation Act itself".

v) In deciding whether a particular term falls within one or other category, the cases have attached importance to the need for certainty in the context of limitation, and inclining against a result whereby the running of time is wholly within the control of the creditor. Thus, in *Henthorn*, Lord Neuberger MR said:

> "save where it is the essence of the arrangement between the parties that a sum is not payable until demanded (e.g. a loan expressly or impliedly repayable on demand), it appears to me that clear words would normally be required before a contract should be held to give a potential or actual creditor complete control over when time starts running against him, as it is such an unlikely arrangement for an actual or potential debtor to have agreed".

vi) A related issue is the undesirability of the court becoming embroiled in collateral issues, such as the questions of the reasonableness or otherwise of any delay in rendering an invoice.

59. In the light of these principles, the short question raised by the limitation issue in respect of the invoices rendered is how to construe the relevant provision of the June 2013 agreement, namely:

> "All invoices submitted by CCI will be paid within 90 days if funds of Stakeholders are available, by submission of said invoice by Consumer Protection Association to a Bank account designated by CCI".

60. It was common ground that this was ungrammatical, and that the language would be improved by a comma after "said invoice". The effect of the provision was, however, clearly to require CCI to submit an invoice to CPA, and to oblige CPA to make payment within a period of 90 days to a designated account. This was subject to "funds of Stakeholders" being available, but this aspect of the provision played no material part in the parties' arguments. CCI's pleaded case was that such funds were available, and the present application proceeds on the basis that this allegation is true.

61. I do not consider that the present issue is resolved by the decision of the Court of Appeal in *Coburn*. In that case, the relevant bar to the solicitor being entitled to immediate payment was not a contractual provision concerning the delivery of an invoice, and the giving of a period of credit, but rather a statutory condition which precluded a solicitor

from bringing an action for a period of one month after delivery of his bill. Lord Esher referred in that case (at 705) to the right of payment arising as soon as the work is done "unless there is some special term of the agreement to the contrary". Lord Esher commented in the course of argument (see 704) that the case before him was not analogous to the case where goods had been sold on the basis of a bill of exchange which allowed for a period of credit:

> "In that case it would be a term of the contract between the parties that credit should be given, and of course the price of the goods would not be due until the credit had expired".

62. This brief comment suggests that Lord Esher may have considered that a "special term of the agreement to the contrary" might include the case where the buyer had been given, by the terms of the contract, time to pay. If so, that might assist CCI's argument in the present case, because the contractual provision referring to payment "within 90 days" is in substance a period of credit.

63. Had *Coburn* been the only authority relied upon in the present context, I would have been inclined to accept CCI's argument that there was no cause of action until the expiry of 90 days. However, matters have developed in the years since *Coburn*.

64. First, paragraph [31] of the judgment of Lord Neuberger MR in *Henthorn* indicates that "clear words" are required before a contract should be held to give a potential or actual creditor complete control over when time starts running against him. The Court of Appeal were there giving practical effect to the concerns expressed by Lopes LJ in *Coburn* as to the "anomalous and inconvenient" result which the solicitor's argument in that case would produce.

65. Mr Kealey QC described the relevant words in the present contract as "anodyne". I agree that they are not sufficiently clear to displace the established principle that the cause of action arises when the work is performed. Indeed, as Mr Kealey pointed out, the clause in the present case does not require a payment on the 90th day after submission of the relevant invoice. It refers to payment "within 90 days". Since payment earlier than the 90th day is contemplated, this suggests that CCI's right to payment arose earlier than that day. Some further marginal support for this conclusion is the reference to "if funds of Stakeholders are available". As I have said, the parties' arguments did not make anything of this aspect of the clause. However, it does seem to me that this part of the clause did not focus on the position simply on the 90th day. If funds were available at any time following completion of the work, including on Day 1 when the work was completed, then CCI would have a right to payment, and it would be no answer for CPA to contend that it had exhausted its available funds by the time that the 90th day arrived.

66. Secondly, I did not consider that the decision of Lambert J in *Ice* can be satisfactorily distinguished. This is a case which applies *Coburn* in the context of a clause which required the submission of an invoice, and provided in substance for a period of credit. Apart from the decision of HHJ Raynor QC in *Metcalfe*, the decision in *Ice* appears to be the first case where *Coburn* has been applied in that context. Notwithstanding that it is carefully and well reasoned, the decision of HHJ Raynor QC is not itself a particularly powerful authority in that regard. In reaching his decision, HHJ Raynor placed

considerable weight on what he described as "bespoke" payment provisions set out in paragraph [6] of his judgment. The CCI contract contains no equivalent provisions.

67. However, Lambert J's decision in *Ice* is a powerful authority in the present context. The contract in that case related to architects' services, and the relevant provision concerned the provision of an invoice and an obligation of the employer to endeavour to make payment within 30 days. The relevant letter of appointment set out the following under the heading "Basis of Payment":

> ""You will invoice EPIC on a monthly basis for work completed to date. The basis of payment proposed in the appendix to the document described above is acceptable. EPIC Ltd will endeavour to make payment within 30 days of receipt (unless otherwise stated)"."

68. The county court judge had decided that the cause of action accrued when the work which formed the subject matter of the invoice was completed, rather than 30 days after receipt of the invoice. Lambert J upheld that decision. She said, at paragraph [22]:

> "I do not accept Mr Wright's submission that, on an objective interpretation of the relevant paragraph of the letter of 10th July 2007, the parties were agreeing that ICE's entitlement to payment did not arise until 30 days after receipt of the invoice. A reasonable person in the position of the parties would have understood the words in the letter to be an agreement concerning only the process of billing and payment, namely the monthly provision of an invoice with payment within 30 days thereafter. This construction arises from a plain reading of the section of the letter under scrutiny. Further, in the context of the letter, it is common sense that both parties would have wished to reach some agreement concerning the billing and payment arrangements; the design work was not a single piece of work, but a rolling design project which was to be ongoing over a period of many months. In these circumstances, some agreement concerning billing and payment would have been important and on an objective construction of the intention of the parties the payment terms of the letter reflect just such an agreement. The letter elsewhere refers to the budgeting constraints which affected EPIC and the agreement to the costings proposed by ICE only on the condition that Council funding was available. Monthly invoicing would therefore have been important, certainly for EPIC, as a means of keeping a running check on the financial outlay on design services."

69. She went on to say [23] that nothing in the language of the relevant paragraph, viewed in isolation or in the context of the letter as a whole, suggested that the parties were intending that the architect's entitlement to payment did not arise when the work was done. In reaching her conclusion, she applied the approach of Lord Neuberger. She said at [24]:

> "Further, I accept Mr Finn's submission that the obiter statement of Lord Neuberger in *Henshaw*, that clear words are needed if the timing of the accrual of the cause of action in an action for work or services is to be displaced, is relevant. Mr Wright relies upon the requirement in the letter that invoices should be provided by ICE each month as an answer to the potential mischief that otherwise the creditor would have control of the time at which the limitation period starts running. However, this is not a satisfactory answer to the point. Chitty LJ in Coburn was clear that the central purpose of the statutory limitation regime is to provide the creditor with a degree of protection by the certainty (my emphasis) of a fixed period during which a claim can be brought and to avoid the Courts becoming embroiled in collateral issues such as, in the context of Coburn, whether there was unreasonable delay in submitting a bill of costs or, in the context of the appeal, whether the invoice had, in fact, been delivered within a month of completion of the relevant work; if not, whether there was a reasonable explanation or excuse; whether the Respondent had paid within 30 days or "endeavoured" to do so, or otherwise stated (which is the relevant term in the letter of 10th July 2007). In these circumstances, it seems to me that clear words are needed if the Court is to construe an agreement between the parties in such a way as to give the creditor control over the start of the limitation period and/or to avoid the Courts becoming engaged in determining satellite issues which deprive the limitation provisions of their central purpose: certainty and the avoidance of stale claims. Such clear words do not appear in the letter."

70. Mr Coppel was correct in submitting that the decision in *Ice* was ultimately based on the terms of the contract in that case. The terms of the present contract are, clearly, different, as is the nature of the parties' agreement. However, I was not persuaded that, for the purpose of analysing the issue which I need to resolve, they are materially different. In *Ice*, Lambert J described the relevant provision as one which concerned "only the process of billing and payment". The relevant provisions in the present contract seem to me to be no different. In any event, it would not be easy to articulate why the decision in *Ice* should go one way, but the decision in the present case should go the other. Mr Coppel referred to the fact that the clause in *Ice* was headed "Basis of Payment", but I do not see why this makes a material difference.

71. Furthermore, the general considerations described by Lambert J in paragraph [24] of her judgment are equally applicable in the present case. CCI's approach, if accepted, would lead to CCI being able indefinitely to postpone the running of time, by not submitting an invoice. Mr Coppel sought to avoid this difficulty by submitting that a term could be implied which required the delivery of invoices within a reasonable time. However, such a term would lead to the uncertainty, and the potential need for the court to determine "satellite issues", described in paragraph [24] of *Ice*.

72. Accordingly, I accept CPA's submission that the cause of action in respect of the work, which was the subject of each invoice, accrued when that work was completed. Since

it was completed by the time when it was invoiced, and since each invoice was issued more than 6 years before the issue of the Claim Form (the final invoice being dated 17 December 2013), CCI's claim in respect of the invoices is time-barred and should – subject to the possible effect of the Undertaking - be struck out.

73. In reaching this conclusion, I attach no importance to the fact that each invoice stated that it was "due immediately". The question of when the cause of action arose in respect of each invoice must be determined by reference to general principles of English law in the light of the terms of the June 2013 agreement. The wording on the invoice could not change the terms of the June 2013 agreement or the true construction of those terms.

The claim under the Undertaking: background

74. The question which then arises is whether this conclusion is affected by the claim made pursuant to the Undertaking. A question also arises as to whether there is an additional claim, that can be made pursuant to the Undertaking, which is not time-barred.

75. I note, by way of background, that the materials before the court do not give a consistent explanation as to the nature of the case advanced in relation to the Undertaking.

76. The Amended Complaint filed in the New York Proceedings on 27 December 2019 advances a claim for Riyals 161,505,000 (around US$ 43 million in US dollars) as monies due and owing for asthma related consulting. The claim for this sum was put forward on the basis that the work, pursuant to the June 2013 agreement and the Undertaking, had been performed. The Amended Complaint included claims for breach of contract, account stated, quantum meruit, and unjust enrichment, all of which were made on the basis of work which had actually been carried out. For example, the quantum meruit claim was advanced on the basis that at the request of CPA, CCI had performed its obligations and provided services; that CPA had accepted those services but failed to provide compensation; that the services were valuable; and that by reason thereof, CPA was liable to the plaintiffs for around US$ 43 million.

77. The Claim Form in the present proceedings, issued on 27 December 2019, seems to be made on the same basis. Paragraph 1 pleads that

> "During 2013 the Claimant provided services to the Defendant
> at the Defendant's request, including under an agreement dated
> 4 June 2013 and signed on behalf of both parties on 10/6/13"

This indicates that the claim is made for services which had actually been rendered.

78. Consistently with this, paragraph 4 of the Claim Form refers to the Undertaking, in which "the Defendant recognised that the Claimant had undertaken studies, research and consultations regarding the activities of the Defendant", and undertook to pay Saudi Riyals 161 million. This too indicates an obligation to make payment in respect of work that had actually been performed. The breach alleged in paragraph 5 of the Claim Form was non-payment "by the date(s) required or at all".

79. The Particulars of Claim dated 14 April 2021 annexed the Undertaking, and paragraph 10 repeated the substance of the Claim Form in that regard. Paragraph 12 alleged a breach by failing to pay the sum stated in the Undertaking. The prayer to the Particulars

of Claim claimed the value of the unpaid invoices (US$ 15,129,800) "and/or the sum of USD 43,055,500 … in respect of the Undertaking". Paragraph 2 of the prayer was an alternative claim for a quantum meruit or restitution for unjust enrichment. This was, however, in the lower sum (US$ 15,129,800) equivalent to the invoiced amount, thereby suggesting that no further work had been carried out beyond the invoice amounts, or at least no further work which justified a quantum meruit claim.

80. Mr Pincione's first witness statement, dated 20 April 2021, described the origin of the Undertaking in paragraph 8 in the following terms:

> "After the Claimant had completed some of its work, by the fall of 2013 I was becoming concerned that the Defendant had not made any payments so I asked Dr Nasser Al Tweam and other members of the Defendant's Board for written assurance that payment would be made. The result was that the Defendant supplied an "Undertaking and Commitment". The Undertaking was drafted by the Defendant's side and not by me. This Undertaking promised to pay the Saudi Riyal equivalent of USD 43,055,500.00 to my account by 31 December 2013. The Undertaking was provided in anticipation that. A translated copy of the Undertaking, and of its Arabic version is at Annex B to the Particulars of Claim (pages 14-16)"

81. This passage indicated that, at the time of the Undertaking, the Claimant had only completed some of its work. The sentence - "The Undertaking was provided in anticipation that." – was not comprehensible, and was later explained by Mr Pincione as being incomplete. This witness statement was the first document which hinted, albeit obliquely, at the possibility that the sum in the Undertaking was not payable in respect of work actually performed.

82. In his second witness statement, dated 28 May 2021, Mr Pincione provided a fuller explanation in paragraphs 17 – 19:

> "[17] However, I want to say more about the background to the Undertaking and expand on paragraph 8 of my First Witness Statement. Before the Undertaking I had become alarmed because Dr Nasser had told me that I might have to wait a bit longer to get paid. At the time of the Undertaking (it was provided to me on 2 October 2013) the Claimant was already carrying out significant work at the Defendant's request and I wanted a level of assurance that the Claimant would be paid. In paragraph 8 of my First Witness Statement, I had also intended to say that the Undertaking was provided in anticipation that the Claimant would be performing a significant amount of additional work (the Studies) and the continued implementation of the asthma reform in the near future. (In error the second part of this sentence was omitted from paragraph 8, leaving an incomplete sentence. I apologise for this).
>
> [18] In this regard I refer to the Claimant's Prospectus for "Planning & Managing Asthma Healthcare" (Exhibit MP2). I

> provided this Prospectus to Dr Nasser in late June 2013. The Budget Summary of the Prospectus forecast a cost of US$ 42,000,000 over 3 years. Most of the costs (US$ 21,525,000) were to be incurred in the first year. These costs were a forecast of charges to be made by the Claimant for capital expenditures and human resources.
>
> [19] Dr Nasser approved work programme in the Prospectus and the Claimant began mobilizing in finding doctors and subject matter experts both in health and IT and did phase one which was the Asthma report."

83. This was the first time that a case was positively advanced that the sum set out in the Undertaking related, at the time that it was signed, in part to future work.

84. In Mr Coppel's written argument served prior to the hearing, there was a degree of ambiguity about the nature of the Undertaking. In paragraph 40 (3), reference was made to Mr Pincione's second witness statement, and it was said that the payment "included discharging all the existing invoices". Later in that paragraph it seemed to be asserted (consistent with the complaint in the New York Proceedings) that the amounts were payable for work that had been performed. Having set out the text of the Undertaking, the written argument explained:

> "In other words, it is recording the making of the First Agreement as alleged by C, it is recording the doing of the work under that agreement as alleged by C, and it is recording how D is to pay C (ie via the bank account of its Chairman Mr Pincione in riyals) for having done its work. It is simply recording a mode by which D would discharge its liabilities under the First Agreement for the work so far carried out, ie by making a payment of 161,505,000 riyals by 31/12/13 to the account in the name of Mr Massimiliano Pincione."

85. In his oral submissions, however, Mr Coppel submitted that the Undertaking reflected the fact that further work was to be carried out. The June 2013 agreement was, he said, in the nature of a "framework", where CPA could say that it would like a report on one topic or another. That is what CCI did. The Undertaking contained a sum which was far more than the sum in the invoices. The invoices had a total figure of around US$ 12 million, and it made no sense for CPA to be required to pay US$ 43 million for work valued at US$ 12 million. The US$ 43 million therefore represented an amount for work which had been done, and was to be done. As I have already noted, he also submitted that, by not making payment, CPA had repudiated the agreement, and that this repudiation had been accepted by bringing proceedings in Saudi Arabia.

The claim under the Undertaking: discussion

86. The starting point, on both the strike out application and the application under CPR Part 24, is the pleaded case. It is well-established that a strike out proceeds on the basis of the case as pleaded, with the assumption being made that the facts set out in the pleadings are true. The pleadings are also relevant to an application under CPR Part 24. It was common ground that the question was whether there is a real prospect of success

on the case as pleaded in the particulars of claim: see *Credit Suisse AG v Arabian Aircraft* [2013] EWCA Civ 1169. There has been no application to amend the Particulars of Claim.

87. Accordingly, I consider that – in considering whether the Undertaking affects my conclusion as to the limitation in respect of the invoices, or whether it gives rise to a wider and timely claim in its own right – I should consider the case that has been pleaded. That is the basis upon which Mr Kealey approached the argument. I accept his submission that in so far as evidence from Mr Pincione, or argument from counsel, sought to advance a different case to that which had been pleaded, such evidence or argument can be disregarded, at least unless and until an application to amend the pleaded case is made. It is, however, legitimate for the Claimant to contend that the existing pleadings are to be understood in a particular way, if that is how they can fairly be regarded.

88. It is plain, in my view, that there is nothing in the pleadings which can reasonably be understood as advancing a claim that damages were being sought for a repudiatory breach, still less a repudiatory breach which had been accepted as a result of the commencement of proceedings in Saudi Arabia. There is no claim for repudiatory breach at all, and no particularised claim for damages in consequence of that repudiation.

89. I am in fact doubtful as to whether such a claim could in fact be pleaded. The June 2013 agreement, relied upon by CCI, does not contain any agreement as to a minimum amount of work to be carried out, or a contractual time for performance. Mr Coppel submitted that the June 2013 agreement was a framework agreement, setting out what the parties committed to, Project Priorities and Corporate Objectives, but leaving CPA to instruct CCI on a "project-by-project basis, with an agreed sum for each". He said that the agreement gave CPA "considerable latitude" in what it could ask CCI to do. It would seem to follow that there is nothing which committed CPA to request any particular studies. On that basis, the failure of CPA to request further work from CCI could not be made the subject of a claim for substantial damages for repudiatory breach.

90. However, it is not necessary to consider that point in detail: whether or not a claim for damages consequent upon a repudiatory breach might be pleaded, it has not yet been pleaded. Rather, on a fair reading of both the Claim Form and the Particulars of Claim, the claim advanced was a straightforward claim for monies payable under the invoices "and/or the sum of US$ 43,055,500" said to be due under the Undertaking. When read in the light of paragraphs 1 and 4 of the Claim Form, it was (or certainly appeared to be) a claim for payment in respect of services actually provided.

91. A fair reading of the "and/or" part of the prayer is that the primary claim in respect of the Undertaking for US$ 43,055,500 was additional to the claim in respect of the specific invoices, with an alternative claim for that sum in the event that the claim for the invoices did not, for some reason, succeed.

92. As far as concerns the primary claim for US$ 43,055,500 in respect of the Undertaking, additional to the claim in respect of the invoices, it seems to me that there are a number of possibilities, each of which leads to the conclusion that the claim should be struck out or that summary judgment should be granted in favour of CPA.

93. One possibility is that, as both the terms of the Undertaking and paragraph 10 of the Particulars of Claim indicate, the amounts were payable in respect of work that had already been carried out. The Claimant's case in evidence (albeit not pleaded) is that the Undertaking was given in early October 2013. In any event, however, there is no plea of any invoice subsequent to 17 December 2013. Whether one is looking at the position of work performed up to early October 2013, or work performed prior to 17 December 2013, the claim is time-barred for the same reasons as the claim in respect of the invoices is time-barred. The limitation period would start to run on the date when the relevant work was done, and the fact that payment was to be made by 31 December 2013 would not affect the running of time.

94. Another possibility is that the payment under the Undertaking was a payment which was unrelated to past work, or work to be carried out prior to 31 December 2013, but was a prepayment for work that would be carried out in the future. If this is the correct analysis, then I do not think that the difficulty with the case would be limitation. It seems to me that the cause of action relating to the obligation to prepay for future services would arise on 31 December 2013, rather than any earlier date. On this basis, the claim for breach of the obligation to prepay would not be time-barred, because proceedings were begun (just) within 6 years of 31 December 2013. However, as Mr Kealey submitted in his reply, the claim to recover the amount of the prepayment would be unsustainable, because it would be a prepayment for services that were never carried out. Any claim for the prepayment would be met by the response that there was a total failure of consideration in relation to the sums due by way of prepayment, and that therefore nothing could be awarded in favour of CCI. There is no suggestion in the pleadings or the evidence that any work was in fact carried out after 31 December 2013. On the contrary, the final invoice was dated 17 December 2013. Such work as was carried out by CCI was therefore carried out prior to that time.

95. The case in fact advanced by CCI at the hearing was that neither of the above two possibilities was correct. As outlined above, Mr Coppel submitted that the correct position, as set out in Mr Pincione's evidence, was that the US$ 43 million to be paid on 31 December 2013 had a mixed character. It could not be a claim simply in respect of past services: that would make no sense, because the sum vastly exceeded the amount of work actually performed, as evidenced by the invoices actually submitted. The figure was therefore a composite figure which was intended to cover both: (i) payment for the work actually done, and which had either been or was in due course invoiced; and (ii) a payment in the nature of a prepayment for future work. Accordingly, the amount payable in respect of the invoices was on this basis wrapped into the overall payment of US$ 43,055,500.

96. I am doubtful as to whether this way of putting the case is consistent with the pleaded case. I do not consider that there is anything in the Claim Form or Particulars of Claim which suggests that the US$ 43,055,500 represented a part payment for invoiced amounts, and a pre-payment of uninvoiced amounts in respect of work to be carried out in the future. Paragraph 10 of the Particulars of Claim indicates that the amounts were due in respect of work that had already been performed. This is consistent with the terms of the Undertaking itself. This referred to the fact that CCI "has performed consultations and multiple studies in this field", and it goes on to thank "Mr. Max and his colleagues for the professional work and effort exerted for undertaking such studies". There is nothing here which pleads that the monies were for work to be

performed in the future. That view of the pleadings is consistent with the way in which the case was advanced in the New York Amended Complaint, upon which the Particulars of Claim in the present proceedings appear to be based. It is also consistent with paragraph 1 of the Claim Form.

97. However, even if the US$ 43,055,500 claim on the Undertaking, as pleaded in the Particulars of Claim, is to be regarded as containing a composite figure covering both (i) payment for work invoiced, and (ii) prepayment for future work, I do not consider that this affects the analysis.

98. As far as concerns the amounts actually invoiced: there is nothing in the Undertaking which means that the cause of action arose subsequent to the time that the work covered by the invoices was performed. The Undertaking does not assist CCI any more than the 90-day provision in the original June 2013 agreement. The effect of agreeing 31 December 2013 for payment of those invoices was in relation to some invoices to extend the credit period, and in respect of other invoices to shorten the credit period. This makes no difference as a matter of principle. Time still began to run when the work covered by each invoice was completed.

99. As far as concerns the second element within the US$ 43,055,500, namely the prepayment for future work: this cannot be claimed for the same reasons (total failure of consideration) that no recovery could be made if the entire amount had been a prepayment. CCI is therefore no better off by contending that only a portion of that sum was a prepayment for services which, in the event, were not performed.

100. I did not understand Mr Coppel to submit that any different considerations apply to the separate claim for expenses of US$ 500,000 allegedly incurred in consequence of CPA's failure to pay the invoices. In so far as the claim relates to costs incurred in seeking to recover monies due under the unpaid invoices, there was no breach which was separate and later than that which gives rise to the claim for non-payment of the invoices themselves. In so far as the claim relates to costs incurred in seeking to recover a prepayment under the Undertaking, this can in my view be no better than the claim for the prepayment itself; a claim which has no realistic prospect of success for the reasons already given.

101. Accordingly, I conclude that the claim as advanced in the Claim Form and Particulars of Claim, however it is analysed, should be struck out.

102. It is therefore unnecessary to consider CPA's "freestanding" limitation point as to whether CCI could rely upon the "Second" agreement pleaded in the Particulars of Claim, given the absence of any specific reference to such agreement in the Claim Form. Nor is it necessary to consider a separate "title to sue" argument based on the fact that the Undertaking referred to a payment to Mr Pincione. I was doubtful as to whether the former point was sound, or whether it really led anywhere. I considered that the title to sue argument was unsound: the Undertaking did not purport to give any rights to Mr Pincione, but simply gave a direction as to where a payment to CCI should be made.

103. Mr Kealey also submitted that the claim would be unsustainable, irrespective of limitation, because of the principle that past consideration is no consideration. It is again not necessary to address that point. I am again doubtful whether it is correct, and it is

certainly not sufficiently correct to warrant striking out of the proceedings or summary judgment. If work had been done in the past on the basis that it would be paid for, and the parties then agree upon the precise amount to be paid, there would be a reasonable case for saying that the later agreement simply quantified the amount of consideration to be paid: see *Chitty on Contracts* 34th edition, paragraph 6-033.

D: The extension application

The parties' arguments

104. Mr Coppel described the retrospective extension of time required as "modest". This was required in order to accommodate Mr Pincione's difficulty giving instructions because of a particularly hard instance of Covid-19, coupled with parallel proceedings in the USA and solicitor change issues. CPA has not suggested any prejudice to it from the extension, other than a tactical opportunity loss.

105. Mr Coppel submitted that, even assuming that the well-known criteria in *Denton v White* [2014] EWCA Civ 906 were applicable, the criteria were overwhelmingly in favour of granting an extension of time in the present case.

106. Mr Kealey submitted that the *Denton* criteria were indeed applicable. This was a serious and significant breach. The reason for the default had changed over time. The original reasons given by Giambrone, in their letter dated 9 April 2021, related to Mr Pincione's health, and a misunderstanding in the formal change of solicitors. More recently, some other points had been added in CCI's evidence, including that instructions had been hampered by Mr Pincione being in the USA and travel being practically impossible, and the parties' focus being on the New York Proceedings prior to 1 April 2021. Whilst not challenging the veracity of the medical evidence, CPA submitted that the explanation was incomplete and unsatisfactory: Mr Pincione's New York lawyers were able to apply for an adjournment in the New York Proceedings in March 2021, and there was no reason why the necessary instructions (for example to ask for a further stay) could not have been given in relation to the present proceedings. Mr Pincione was not so incapacitated as to be unable to change solicitors, which he did. If one reason for the failure to serve the Particulars of Claim was the New York Proceedings, and Mr Pincione's focus on those proceedings, that was not a good reason.

107. In relation to the consideration of "all the circumstances of the case", Mr Kealey submitted, first, that CCI had never really put its cards on the table as to how the default came about. DLA were still instructed at the time of the default, and there has been no proper explanation as to why Particulars of Claim were not served or an extension sought. There was no clear evidence as to precisely what went wrong. Secondly, CCI had disregarded "rule after rule" and did not seem to appreciate the importance of complying with the rules of the English court. Thirdly, both the Claim Form and the Particulars of Claim remain inadequately pleaded. Overall, there came a point where a busy court needed to shut its door to its resources and offer the time to other and deserving litigants.

Discussion

108. I accept Mr Kealey's submission, supported by the approach taken in prior authority, that the *Denton* criteria are applicable. I also accept (and Mr Coppel did not really

dispute) that the failure to serve Particulars of Claim was a serious and significant breach.

109. As far as the reason for the default is concerned, I thought that there was some force in Mr Kealey's submission that a precise explanation as to why Particulars of Claim were not served, or an extension requested, had not been provided in circumstances where, at the time of the default, DLA were solicitors on the record. However, to my mind the most significant point is that there is evidence as to Mr Pincione's health at the time, and it is obvious from the medical evidence that he was unable properly to attend to his business affairs at the time. If a person is mostly bed-ridden, and suffering from fevers, chills, nausea and chronic fatigue, it really is not surprising if his business affairs are not attended to properly, and in the way that a healthy person may be able to attend to them. I therefore consider that the reason, or at least a principal reason, for the default has been provided and that the reason does excuse the default.

110. Even if that conclusion were too generous to Mr Pincione, I accept Mr Coppel's submission that "all the circumstances of the case" do provide a compelling if not overwhelming reason for granting the extension. Mr Coppel submitted that the reasons summarised below provide a compelling and clear case for an extension, in addition to the very substantial claim that CCI would stand to lose if no extension were granted. I agree.

i) The 21-day period of default (25 March 2021 to 15 April 2021) for which an extension of time is sought is modest.

ii) The extension is sought against a backdrop where the parties had been agreeing between themselves extensions of time to await the outcome of the US Court proceedings. Although SPB had expressed the expectation that the extension agreed in January would be the last one, they did not rule out a further extension. It is likely that, if requested, a short further extension would have been agreed in view of the imminence of the New York judgment, and the fact that the parties were both awaiting the outcome of that case.

iii) The New York judgment was given on 1 April 2021. This was only a week after the expiry of the extended deadline. CCI's new solicitors acted promptly thereafter.

iv) Mr Pincione was, at the time, bed-ridden with Covid-19 and had been very unwell since January.

v) There is no prejudice to CPA from the delay, and Mr Kealey made it clear that he was not suggesting otherwise.

vi) There is no prejudice to the administration of justice from granting the extension of time.

vii) This is the first request by CCI that has had to be made to the Court.

111. For these reasons, I grant the extension of time for service of the Particulars of Claim.

Conclusion

112. CCI's application for an extension of time for service of the Particulars of Claim is granted. However, CPA's application to strike out the Claim Form and the Particulars of Claim succeeds.