Neutral Citation Number: [2022] EWCA Civ 1699

Case No: CA-2022-000625

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT
MR JUSTICE JACOBS
[2022] EWHC 461 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2022

Before :

LORD JUSTICE PETER JACKSON
LADY JUSTICE ANDREWS
and
LADY JUSTICE WHIPPLE

- -

Between :

CONSULTING CONCEPTS INTERNATIONAL INC	**Claimant and Appellant**
- and -	
CONSUMER PROTECTION ASSOCIATION (SAUDI ARABIA)	**Defendant and Respondent**

- -
- -

Philip Coppel KC and Zachary Kell (instructed by **Francis Wilks & Jones**) for the **Appellant**
Gavin Kealey KC and Henry Moore (instructed by **Squire Patton Boggs (UK) LLP**) for the **Respondent**

Hearing date: 6 December 2022

- -

Approved Judgment

LADY JUSTICE ANDREWS:

INTRODUCTION

1. This appeal raises a short issue, namely, when did the Appellant's cause of action for payment for work done and services rendered to the Respondent arise for limitation purposes? Did it arise when the work was complete, or when 90 days had elapsed from the service of an invoice for that work (being the contractually agreed time in which to make payment), or, if further time to pay was granted, after the expiry of that time?

2. On 27 December 2019, the Appellant ("CCI"), a New York corporation, issued a claim form seeking payment from the Respondent ("CPA"), a civil organisation incorporated under the laws of Saudi Arabia, of:

    i) US$15,129,800, being the total amount said to be due under three invoices (two of which are "Summary Invoices" attaching a series of more detailed invoices) for services provided by CCI to CPA prior to 17 December 2013; and

    ii) 161,500,000 Saudi Riyals pursuant to a document entitled "Undertaking and Commitment" by which CPA expressly undertook to pay that sum by transferring it to a bank account in the name of Mr Massimiliano Pincione (the owner and CEO of CCI) by 31 December 2013 ("the Undertaking"). The amount claimed under the Undertaking was US$43,055,500, the dollar equivalent of 161,500,000 Saudi Riyals on the date the claim was issued. Although the Undertaking is undated, Mr Pincione received it on or around 2 October 2013.

3. All bar one of the invoices (No 9) were submitted by CCI to CPA less than 90 days before 27 December 2013. They designated Mr Pincione's bank account as the account to which payment should be made. Even on CCI's case, its claim under invoice No 9 was brought outside the limitation period.

4. CPA applied to strike out the claim under CPR 3.4(2)(a) or (c), or for summary judgment, principally on the basis that it was time-barred. For the purposes of the application, it was assumed that the facts pleaded by CCI were true; the same assumption will be made for the purposes of this appeal.

5. Jacobs J ("the Judge") acceded to CPA's application. In a judgment handed down on 3 March 2022, [2022] EWHC 461 (Comm), he found that the cause of action for payment in respect of the services performed by CCI accrued when the services were provided, and therefore no later than 17 December 2013. This was so irrespective of whether the invoiced amounts were encompassed, or at least partially encompassed, in the amount of the Undertaking (which was far from clear from the Claim Form or the Particulars of Claim).

6. As the Judge said at para 75 of the judgment, the materials before the court did not give a consistent explanation as to the nature of the case advanced in relation to the Undertaking. He held that, if and insofar as the Undertaking was a promise to make a

prepayment for future services, which in the event were not carried out, the problem was not limitation, but a total failure of consideration. Moreover, there was no pleaded claim for damages for repudiation. The claim brought under the Undertaking *in respect of an advance payment for future work* would therefore be struck out, or summary judgment granted, on that basis. (My emphasis).

7. It was the Judge himself who granted permission to appeal on the issue identified in para 1 above. He refused permission to appeal in respect of his decision about the claims for advance payment for future work which had not been performed. A renewed application for permission to appeal against the striking-out of the latter claim was refused by Males LJ, and that refusal was affirmed by him on reconsideration.

8. It is regrettable that, when permission to appeal was sought from the Judge, CCI did not comply with the requirements of para J.12.3 of the Commercial Court Guide which provides that:

> "If at the time judgment is given any party wishes to apply for permission to appeal to the Court of Appeal, that application should be supported by written draft grounds of appeal."

No draft grounds of appeal were provided to the Judge, despite the fact that the application for permission to appeal was the subject of a separate oral hearing. This subsequently gave rise to unnecessary confusion and debate about the scope of the limited permission which the Judge granted, particularly as regards what could and could not be argued in respect of sums claimed under the Undertaking.

9. The procedural requirements in the Guide should be followed. They serve a useful purpose in ensuring that, when permission to appeal is considered, the judge considering the application knows why it is contended by the applicant that they fell into error. The judge then has a proper foundation for evaluating whether that argument has a real prospect of success on appeal. It also means that if the High Court judge grants permission, there is no uncertainty going forward as to what issues are or are not the subject-matter of the appeal (particularly in a case such as this, where permission is granted on some matters and refused on others).

10. The Judge dealt with the matter as best he could in the circumstances with which he was faced. He indicated where the line was to be drawn between the matters on which he was granting and refusing permission to appeal; but he should not have been put in the position in which he had to do this. Unfortunately, that indication did not preclude a dispute arising between the parties about whether the appeal was confined to the claim based on the invoices. This was based on the eventual formulation of Ground 1 in the Appellant's Notice. In order to avoid this type of situation arising in future, it would be preferable for a judge of the Commercial Court faced with an application for permission which does not comply with the requirements of para J.12.3 to refuse to consider the application until the draft grounds are produced, or else to refuse permission and require the applicant to seek permission from the Court of Appeal.

BACKGROUND

11. CCI is a special purpose vehicle which was incorporated in the state of New York in June 2013. CPA is an agency of the Kingdom of Saudi Arabia, which has separate legal personality. By an agreement dated 4 June 2013, signed by the parties on 10 June 2013, ("the June 2013 Agreement") and more fully described in the judgment at paras 6-10, CCI and CPA agreed to "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 Saudi Arabia, as well as to promote proven therapeutic protocols to enhance and improve the life of Saudi Arabia's youth." (Emphasis added). The parties expressly agreed to submit themselves to "the jurisdiction of [sic] the laws of the United Kingdom for any and all disputes arising from this agreement". A copy of the June 2013 Agreement was annexed to the Particulars of Claim.

12. The June 2013 Agreement envisaged that CCI would be remunerated for its work, but it made no provision for the rate of remuneration. The key provision for the purposes of this appeal is to be found under the heading "Responsibilities of Consumer Protection Association":

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

I shall refer to this as "the invoicing provision". At all material times CPA had funds of Stakeholders available to make payment.

13. It is pleaded in para 5 of the Particulars of Claim that "shortly after 10 June 2013" the parties (CCI by Mr Pincione, and CPA by its Chairman Dr Nasser Al Tweam) made an oral agreement "by way of extension to" the June 2013 Agreement, referred to in the pleading as "the Second Agreement", whereby CCI agreed to provide consultancy, labour and related services (in the form of *non-Asthma* health, sociologic, epidemiologic and economic studies) to CPA at its request, and CPA agreed that it would pay CCI US$12,000,000 for those services.

14. The Claim Form makes no mention of this further agreement. The claims for payment of the three invoices identified in the Claim Form specifically relate to the June 2013 Agreement. The relevance of this is that only one of the three main invoices on which the claim is based, an invoice dated 17 December 2013 in the sum of US$3,000,000 (which neither party has produced) related solely to Asthma Reform Research and Analysis. The other two "Summary Invoices" which total US$9,955,500 and US$2,174,300 respectively, are for various services under the umbrella title "Economic & Health Reform Studies".

15. Only one of the underlying invoices whose components make up the totals in the "Summary Invoices" appears to relate to the subject-matter of the June 2013 Agreement. That is an invoice dated September 2013 in the sum of US$1,716,000 for "Asthma & Pulmonary Healthcare" services rendered between 7 June and 14 September 2013, which is annexed to the first and larger of the Summary Invoices. On the face of it, therefore, CCI would have to rely on the Second Agreement as the

foundation for its contractual claim to payment of most of the sums comprised in the two Summary Invoices (particularly if they are not included in the Undertaking).

16. Mr Coppel KC, on behalf of CCI, in his oral argument put a gloss on the pleaded case by describing the non-Asthma work as being carried out "pursuant to oral instructions given under the June 2013 agreement." He said that this was the way in which CCI put the case before the Judge, and referred to his skeleton argument in the court below, which described that agreement as a "framework agreement" which gave CPA "considerable latitude in what it could ask CCI to do". Quite apart from the difficulty of reconciling that submission with the pleaded case, the problem is that the June 2013 agreement appears to me to make no provision for CPA to give instructions to CCI to carry out non-Asthma related work. If it did, there would have been no need for an oral "extension".

17. In its Respondent's Notice, CPA has sought to uphold the Judge's decision to strike out claims founded upon the "Second Agreement" on the further or alternative basis that, on any view, no claims founded on that agreement have been brought within six years of the accrual of the cause of action.

18. The claim in respect of the Undertaking is also far from clear. Mr Pincione says in a witness statement dated 20 April 2021 that the Undertaking was supplied to him after CCI had completed some of its work, and after he had expressed some anxiety about getting paid. It is written in Arabic; an English translation is annexed to the Particulars of Claim. The material part reads as follows:

> "In accordance with the agreement made between [CPA] and [CCI]… 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 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."

19. Despite the reference in the Undertaking to CCI having "performed consultations and multiple studies," which on the face of it appears to be linked to the sum to be paid by 31 December, Mr Pincione's evidence in a subsequent witness statement dated 28 May 2021 was that the Undertaking was provided "in anticipation that [CCI] would be performing a significant amount of additional work." That must refer to work to be carried out after the Undertaking, and thus after 2 October 2013.

20. If the Undertaking is to be regarded as an additional agreement, rather than a unilateral promise to pay sums that were already outstanding under the June 2013 Agreement and/or the Second Agreement, the consideration for it is the provision of services by CCI to CPA. As mentioned earlier in this judgment, it is unclear whether

the figure of 161,500,000 Riyals encompasses any or all of the sums claimed in respect of the invoices that pre-date the Undertaking; plainly it cannot encompass any sum claimed under an invoice for work completed *after* 2 October 2013 unless it represented advance payment for such work.

21. We were told by Mr Coppel that CCI's primary case was that the sums claimed under the Undertaking were in addition to the sums claimed under all three main invoices; that appears to be somewhat different from the way in which matters were argued before the Judge (see e.g. paras 53 and 54, 83 and 84, and 95 of the judgment, about which he understandably expressed doubts at para 96). Fortunately, this does not affect the analysis on the issue with which this appeal is concerned.

ARE THE CLAIMS TIME-BARRED?

22. All the claims are for payment of sums due under a contract for services. Section 5 of the Limitation Act 1980 provides that:

> "An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued."

23. It is common ground that all the work done for which CCI seeks to be paid, whether the subject of the Invoices or the Undertaking, was completed by 17 December 2013.

24. As Dyson LJ said in *Henry Boot Ltd v Alstom Ltd* [2005] EWCA Civ 814, [2005] 1 WLR 3850 ("*Henry Boot*") at [20]:

> "[W]here A does work for B at B's request on terms that A is entitled to be paid for it, his right to be paid for it (i.e. his cause of action) arises as soon as the work is done "unless there is some special term of the agreement to the contrary." "

In such circumstances, the right to payment does not depend on the making of a claim for payment or demand by the party that provided the work or services (e.g. by service of an invoice).

25. That proposition is derived from *Coburn v Colledge* [1897] 1 QB 702, ("*Coburn"*) a case on which both parties relied. That case concerned a claim by a solicitor for his fees. Section 37 of the Solicitors Act 1843 ("the 1843 Act") prohibited the commencement of a suit for the recovery of such fees until after the expiry of one month from the delivery of a bill to the client. The issue was whether this prevented time from running for limitation purposes. The Court of Appeal held that it did not.

26. Lord Esher MR began by setting out the basic principle that in the absence of a special term of the agreement to the contrary, the right of the service provider to payment for his work arises as soon as the work is done. That would have been the position had the solicitor been any other type of service provider, or if the solicitor had brought a claim for his fees before the 1843 Act came into force. He then went on to explain, at p.706, that s. 37 of the 1843 Act took away the right of the solicitor to bring an action directly the work was done, but it did not take away his right to

payment for that work, which is the cause of action. It did not "touch the cause of action, but only the remedy for enforcing it".

27. Lord Esher confirmed that a cause of action is complete when the claimant can assert all the facts which it would be necessary for him to prove in order to support his right to judgment. When the work was finished, the solicitor could have brought his action claiming money payable for work done at the request of the defendant, and unless the defendant set up something to defeat the claim, the action would have been maintainable. The defendant might plead that no bill of costs had been delivered, but that would only be by way of answer to a case which constituted a good cause of action. The Master of the Rolls was there drawing a distinction between circumstances in which a defendant can strike out the claim as disclosing no cause of action, and circumstances in which he can raise a substantive defence to the claim. The fact that the debtor has not yet received an invoice seeking payment or other notification that the work has been done falls into the latter category.

28. In his concurring judgment, Lopes LJ accepted the contention that the cause of action arose in that case as soon as the work was completed. He pointed out that the delivery of the bill formed no part of the solicitor's cause of action at any time prior to the enactment of s.37. He said at p.709 that that section appeared to him to assume that there was a cause of action, and merely to postpone the bringing of an action upon it until the period of one month from the delivery of the bill. He also said that if the contention of the solicitor in that case was correct:

> "the solicitor may abstain from delivering his bill for twenty years, and then at the end of that time he may deliver it and sue after the expiration of a month from its delivery. It seems to me that this would be a very anomalous and inconvenient result."

29. Likewise, Chitty LJ said at pp.709-710 that the statute did not bar the debt, but only took away the remedy by action. The statute therefore made a distinction between the action and the cause of action:

> "[I]t in no way affects the cause of action, which is money payable for work done, but only postpones the right of action upon it for at least one month from delivery of the bill."

30. Chitty LJ accepted that the effect of the Court of Appeal's decision was that the solicitor had only 5 years and 11 months in which to sue for the amount of his bill of costs. However, if the solicitor was right, he might postpone for any time the delivery of his bill of costs and so prevent the statute of limitation from beginning to run. He rejected a submission that the answer to this objection was that the solicitor must deliver the bill within a reasonable time, primarily on the basis that:

> "that suggestion is contrary to the whole scope of the Statutes of Limitation, which is, that, instead of it being left in case of delay to the Court to say what is unreasonable delay, as occurred sometimes in cases in the Court of Chancery, a fixed period should be laid down by enactment."

31. Mr Coppel submitted that the basic principle as to when the cause of action arose referred to in *Coburn* applied only in cases where the contracting parties had not included a provision in the contract stipulating a time for payment (or a deadline for payment). If the parties do stipulate a time for payment, as they did in this case, there is no cause of action until that time has arrived and there is a default in payment. The facts which were necessary for the claimant to plead in this case would include an assertion that CPA had failed to pay within 90 days after delivery of the invoice, despite being in funds from its Stakeholders to do so. That was the point at which CPA would be in breach of its contractual obligation to pay, and the breach would become actionable.

32. In answer to a question by my Lord, Peter Jackson LJ, Mr Coppel accepted that on that analysis, if CPA was not put in funds by its Stakeholders to pay the invoice within the 90 days, there would be no breach until it *had* been put in funds, which would postpone the accrual of the cause of action still further. However this would mean that CCI would be completely at the mercy of CPA's Stakeholders, which makes no commercial sense. In my view, the alternative and more natural interpretation of the agreement is that CPA was given up to 90 days from receipt of each invoice in which to make payment for the work, if it was in funds to make such payment, and day 91 would be the point at which CCI would be entitled to sue unless (arguably) CPA could demonstrate that it could not pay within the 90 days because it had not been put in funds by its Stakeholders. On that analysis, the Stakeholders' behaviour would not affect CCI's right to payment for the work it had performed but only, potentially, the time at which it could enforce that right.

33. I have no hesitation in rejecting Mr Coppel's contention that the principle articulated in *Coburn* only arises in the absence of a term in the contract stipulating when payment is to be made. There is no such qualification, either express or implied, in *Coburn* itself, and that is not how the underlying principle has been understood in the many cases in which it has been applied since. Nor is there any principled legal basis for introducing such a qualification. The debt accrues when the work is done; the time at or by which the debt must be discharged is a different matter altogether. Indeed, a provision in a contract which sets a time for payment for services rendered is implicitly premised on the existence of a liability to pay for those services. The right to sue for the payment may not arise until the time has elapsed, but that does not affect the accrual of the right to payment.

34. Accordingly, even in a contract for services which provides for the delivery of an invoice and payment on a particular date or within a certain time thereafter, the starting point of the analysis is the established principle that the right to payment accrues as soon as the work is complete. As the Judge observed at para 58(ii), it is a question of construction whether the terms of the contract produce a different result. The "special term" to the contrary has to be one which means that the right of the service provider to be paid for the work arises at some later time, or is dependent upon the fulfilment of a condition. A classic example is where, as in *Henry Boot*, the right to payment depends on the certification by a third party of the value of the work done. The amount that was payable in that case was the amount that an engineer regarded (and certified) as due, and so the cause of action was not complete until such certification.

35. The Judge rightly identified in para 58(iv) that the critical distinction is between terms which are conditions precedent to the right to payment arising, and terms which impose conditions for the bringing of proceedings, which are concerned with limiting the creditor's right to bring an action to enforce an entitlement to payment. The latter are procedural obstacles which do not prevent the running of time unless they are covered by one of the exceptions in the Limitation Act 1980. The fact that, as is commonplace, the debtor is afforded a certain amount of time to pay does not postpone the accrual of the cause of action, though it may afford him a defence to a claim which is brought before the expiry of the period of credit.

36. There have been dicta in a number of cases that "clear words" are needed to displace the default position referred to in *Coburn*, especially if the "special term" gives the service provider complete control over the running of time for limitation purposes (as it would in the present case). See e.g. the observations of Lord Neuberger MR in *Legal Services Commission v Henthorn* [2011] EWCA Civ 1415, [2012] 1 WLR 1173 at [31]:

> "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."

There is nothing particularly surprising, let alone heretical, about the suggestion that contracting parties will not be taken to have deviated from a principle which has been established for over 100 years, unless they have clearly spelled out their intention to do so.

37. Lord Neuberger went on to point out at [45] that it is always a matter of construction in the individual case whether there is a difference between the date on which the claim arose, and the date from which it was actionable.

38. Mr Coppel sought to advance an argument based upon the Late Payment of Commercial Debts (Interest) Act 1998 (which, as he made clear, did not apply to the contracts in this case, but would have done had they been entered into within this jurisdiction). In broad terms, that statute ("the 1998 Act") implies a term into every contract to which it applies that interest at the prescribed statutory rate (currently 11%) will run from the day after the "relevant day for the debt". That will be the agreed payment date, if there is one. If there is no agreed payment date, the relevant day will be 30 days from the latest of a number of specified events, including the date of performance of the obligation to which the claim for payment relates, and the date on which the debtor has notice of the amount claimed.

39. Mr Coppel submitted that if the right to payment arose as soon as the work was completed, there would be a divergence between the time at which the creditor could seek payment of the debt and the time from which statutory interest under the 1998 Act could be claimed. Thus it was theoretically possible that the limitation period for bringing the claim for the debt would expire before the limitation period for bringing the claim for statutory interest accruing on it.

40. This argument appears to me to be fundamentally misconceived. As Jacob LJ explained in *Ruttle Plant Hire Ltd v Secretary of State for Environment, Food and Rural Affairs* [2009] EWCA Civ 97, [2010] 1 All ER (Comm) 444 at [69] the accrual of a cause of action for the purposes of the Limitation Act 1980 is a separate question from whether interest is to be awarded in respect of that cause of action under statute. The 1998 Act does not affect the time when the cause of action in debt accrues; it merely sets out the time from which statutory interest may be claimed on it. If that date is later than the time on which the cause of action in debt accrues, then even if it has the consequences to which Mr Coppel alludes (which I doubt, as his argument assumes that the statute gives rise to an independent cause of action for the interest) this is merely a function of the application of the statute. The statute itself lends no support to the argument that where a date (or deadline) for payment is prescribed, the accrual of the right of action on the debt and the claim for the interest must necessarily coincide.

41. If time to pay has been granted to the debtor, and the creditor seeks to enforce the debt before that time has elapsed, the debtor will have a defence. If the date on or by which payment must be made has not been specified in a contract qualifying under the 1998 Act, Parliament has decided that a reasonable time for payment is 30 days from the date of the work or date of notification of the amount claimed, and if the creditor brings his claim within that period, he will not be able to claim interest under the 1998 Act until that time has elapsed. None of this supports the contention that the granting of credit, or a contractual provision for payment on or after the service of an invoice, postpones the accrual of the cause of action until the time for payment elapses.

42. *ICE Architects Ltd v Empowering People Inspiring Communities* [2018] EWHC 281 (QB), [2018] TCLR 3 is an example of the application of the *Coburn* principle in a situation that was strikingly similar to the present case, where the parties envisaged that payment would be made within a certain time after delivery of an invoice. A letter setting out the terms of a contract for services to be provided by an architect on a housing project, provided for the delivery of monthly invoices for the work completed to date. It also provided that the client "will endeavour to make payment within 30 days of receipt (unless otherwise stated)". The architect brought a claim for payment more than six years after completion of the work.

43. Lambert J, sitting in an appellate capacity, upheld the decision of the County Court judge that, on an application of the principle in *Coburn*, the claim was time-barred. Her judgment contains, at paras 22-28, a masterly analysis and application of the relevant principles to the contract in that case. She concluded 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.

44. The primary argument advanced by the appellant architect was that there was a "special clause" by which the parties agreed that the cause of action in respect of the monthly invoices did not arise until 30 days after receipt of the invoices (para 19 of the judgment). Lambert J said, at para 22, that 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. In the context of a rolling design project, some agreement concerning billing and payment would have been important.

45. It was also contended by the architect that the provision for monthly invoicing was an answer to the potential mischief that otherwise the creditor would have control of the time at which the limitation period starts running. Lambert J said at [24] that this was not a satisfactory answer. It is worth quoting what she said in full:

> "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."

I respectfully endorse that approach, which applies equally to the present case.

46. The Judge was right to describe Lambert J's decision as a "powerful authority in the present context". He was also right to find that, although the words of the contract in that case were different, they were not materially different in nature. Given the nature of the June 2013 Agreement, which contemplated the provision of many different types of services over a period of time at the request of CPA, it would be important for the parties to make provision for the mechanics of billing and payment for those services. Here, they agreed that all invoices would be paid by CPA within 90 days (if funds were made available). They did *not* agree that payment would not fall due until the 90th day. The invoicing provision is clearly concerned with the mechanics of billing and payment and not with the time at which the right to payment for the work done arises. Indeed, as the Judge held at para 65, the phrase "invoices…will be paid within 90 days" contemplates that there is a subsisting entitlement to payment.

47. Mr Kealey KC, on behalf of CPA, made the further (to my mind, unanswerable) point that if CPA had paid an invoice within the 90 days, it could not have then sought to claim the money back on the basis that it was not legally obliged to pay it. As he elegantly put it, "the invoicing provision is logically to be given effect as an arrangement as to payment which temporarily limits the creditor's right to recover sums by action before an invoice is issued and sufficient time has passed."

48. Moreover, as the Judge pointed out at para 71, CCI's construction would lead to CCI being able to postpone the limitation period indefinitely by not submitting an invoice; he rightly found that Lambert J's riposte to the argument that this mischief could be overcome by implying a term that an invoice be submitted within a reasonable time applied with equal force to this case. Mr Coppel submitted that, even if the date of

substantial completion of the work is taken as the date of accrual of the cause of action this may not avoid satellite litigation, but that is beside the point. It is not an answer to the objection that the contracting parties are unlikely to have agreed to allow CCI to have complete control over the timing of commencement of the limitation period. The words they used do not have that effect.

49. Two further points were made by CCI in its written submissions, namely (i) that a creditor would have a commercial reason for not wanting to delay issuing an invoice and (ii) certainty is achieved by linking the accrual of the cause of action to a set number of days from receipt of an invoice. Neither of these answers the objection articulated by both Lopes and Chitty LJJ in *Coburn*. As Mr Kealey submitted, the first point ignores the debtor's commercial interest in being protected from the possibility of historic claims, irrespective of the creditor's commercial interest in getting paid sooner rather than later. The second ignores the fact that the creditor remains in control of the running of the limitation period because he decides when to serve the invoice, and the set number of days only begins to run once he has done so. Thus the debtor is still deprived of any prospective certainty about when the limitation period will start to run.

50. CCI's claim for payment which is based upon the Undertaking takes matters no further, essentially for the reasons given by the Judge at para 93. If and insofar as the Undertaking relates to amounts that had already been invoiced, or for work that was completed by CCI before 2 October 2013 but not yet invoiced, it amounts to a promise to pay for work already done, by a deadline of 31 December 2013. The cause of action in respect of that past work had already arisen by the time the Undertaking was given. Therefore, even taken at its highest, the provision for payment in the Undertaking could amount to no more than an agreement that CCI would allow CPA until 31 December 2013 to pay the accrued debts. The Undertaking did not give rise to a fresh cause of action on 31 December to recover those debts.

51. Even if the Undertaking were construed as a promise in advance to make payment by 31 December 2013 of sums due in future for work which had not yet been done, but which was actually performed between 2 October and 17 December 2013, it would make no difference to the outcome of this appeal, for the reasons already stated. The latest date on which the causes of action for that work arose would be 17 December 2013 and the claim was brought more than six years thereafter.

52. For those reasons, the Judge was right to find that the claims for work done by CCI on or before 17 December 2013, pursuant to whichever of the various agreements is alleged, and irrespective of whether those services were covered by the invoices, the Undertaking, or both, are time-barred, and to strike out the claims or enter summary judgment in favour of CPA on that basis. I would therefore dismiss this appeal.

53. For the sake of completeness, I agree with CPA that the Judge would have been entitled to strike out any claims for payment for work done based *solely* on invoices for non-Asthma related services arising under the "Second Agreement" on the further and independent ground that, properly construed, the claim form does not include claims for sums arising under that Agreement. The generic prayer for payment for work done and services rendered at the request of CPA is not a sufficient basis for introducing claims under a different agreement from the specific agreement referred to in the claim form, particularly when the invoices are all said to relate to that (June

2013) agreement. That deficiency cannot be cured by including the new claims in the Particulars of Claim. No claim in respect of payments allegedly due under the Second Agreement was brought even within six years after 90 days elapsed from service of the relevant invoices, or within six years from 31 December 2013.

EVENTS FOLLOWING THE HEARING OF THE APPEAL

54. In para 2 of the Appellant's skeleton argument for the hearing of this appeal, after setting out the pleaded claims in debt arising under the invoices and/or the Undertaking, it is stated in terms that:

> "C alleged alternative claims for unjust enrichment … and for damages for breach of contract (prayer (3)), *but does not persist with these alternative claims."*[Emphasis supplied].

55. Unsurprisingly, therefore, the argument at the hearing concentrated on the claims in debt (both under the invoices and the Undertaking) although it was submitted by Mr Coppel that the cause of action to recover those sums comprised a breach of contract which only arose on CPA's failure to pay for the services rendered on or before the (latest) date specified for payment in the June 2013 Agreement or the Undertaking (as the case may be). The analysis of the limitation issue set out above does not depend on how the cause of action for payment is framed.

56. On 15 December 2022, the Appellant's solicitors, Francis Wilks & Jones sent an unsolicited letter to the Court "by way of further closing submissions" in which they sought, inter alia, to make points about the fact that the claim form and Particulars of Claim included a claim for damages for breach of contract. There is no suggestion that the Appellant's counsel were in any way involved, or even aware of this communication. The letter said that the Court of Appeal was required to consider not only the limitation date applicable for pursuit of the debt(s) but the limitation period applicable for pursuit of the claims for damages for breach of contract.

57. The Court responded by pointing out to the solicitors that it will not normally accept uninvited written submissions after conclusion of a hearing; it will only do so after compliance with the procedure prescribed at para 54 of *R (MH(Eritrea)) v Secretary of State for the Home Department* [2022] EWCA Civ 1296, and then only if it is satisfied that the arguments are not ones that could have been made at the hearing. It informed them that the letter would not be considered, and that if they sought to make further submissions they should follow the prescribed procedure.

58. I would reinforce the message that attempts to reargue the case after the hearing is over and without seeking the Court's prior permission are to be deprecated, all the more so if the party concerned is seeking to resurrect claims or arguments which they have expressly abandoned.

Lady Justice Whipple:

59. I agree.

Lord Justice Peter Jackson:

60. I also agree.