Five common perils of standstill agreements in professional liability claims

With standstill agreements back in the legal news following judgment being handed down in the *Muduroglu* matter ([2017] EWHC 29 (Ch)), below I have set out five frequently encountered problems with standstill agreements in professional liability claims.

1. Whose claim is it anyway?
   It may sound obvious but thinking through the list of potential claimants is often not as straightforward as you may suppose. This is particularly the case if there is an insolvency or company law angle. For instance, are you sure that the company is the proper claimant against the defendant? Do some of the claims belong to the directors? Or if the company is insolvent, do some of them need to be brought by and in the name of the liquidators?

2. Who's the proper defendant?
   A principle that is overlooked surprisingly commonly is the fact that a professional negligence claim against a firm lies against the firm at the time (or times) when the cause (or causes) of action accrued: *Brook v AH Brooks (a firm)* [2001] 2 All ER 982 and 7APD.5A. If you are not sure when the cause of action accrued you may need to name a list of firms spanning a period. You need to factor in time to do your homework (which can include seeking partnership membership statements under CPR 7APD5B).

   A common feature of standstill agreements is to include a "catch all" clause stating that the standstill binds predecessor and successor firms. Can you be confident that the entity entering into the standstill in fact has capacity to bind these other firms? If it does not, you may be left with the prospect of a claim for breach of warranty of authority against the firm that entered into the standstill rather than a claim against the successor or predecessor firm. In other words, don't rely on this fall back unless you really have to.

3. What is, or might, the claim be about?
   In *Mortgage Express v Countrywide Surveyors* [2015] EWCA Civ 1110 the parties entered into a standstill which began as follows:

   > *"1. The Surveyors were instructed on various dates to act on behalf of the Claimant in relation to the production of a valuation report of a number of properties for mortgage purposes. In reliance upon the valuation report, the Claimant issued a mortgage offer to the borrower to either remortgage or purchase and mortgage each property. Completion of the remortgage or purchase and mortgage of the property followed.*
   > *2. The properties in respect of which the Surveyors were instructed to provide valuations, and which are relevant to the Claimant's intimated claims and to this Agreement, are set out in the attached schedule (the 'Properties').*
   > *3. It is alleged, as more particularly set out in the Claimant's Letter of Claim dated 12 November 2010, that the valuations of the Properties produced by the Surveyors were outside the parameters of what would be regarded as reasonable in that each valuation was negligent and beyond the level of skill, care and diligence expected of a reasonably competent surveyor.*

4. In this Agreement, 'Dispute' means any claim or claims directly or indirectly arising out of or in any way connected with the matters referred to in paragraphs 1, 2 and 3 above."

It was common ground that the standstill covered a claim in negligence against Countrywide, but what about a claim for fraudulent misrepresentation, or in deceit? The point was challenged by the defendants as far as the Court of Appeal (albeit ultimately decided in the claimants' favour). Even if your interpretation is successful, it is hardly the aim of a standstill to generate satellite litigation, so think through what your claim may come to include and not merely what it currently comprises.

4. What if you need to extend the standstill period?

   Always check whether there is a clause setting out the formalities that have to be observed. For instance, it is common for standstills to specify that any variations have to be in writing. A phone call to agree an extension of time is not enough, and any arguments based on estoppel face (at best) a serious challenge: *Thomas v Home Office* [2007] 1 WLR 230 (a case dealing with an alleged oral agreement to extend time for service of a claim form).

5. Think about the endgame:

   Such is the relief on the part of the claimant at entering into a standstill that it is not uncommon for it to overlook the arrangements for the end of the standstill. Does the period expire at a weekend, for instance? If so, when are you planning to issue a claim?

   The effect of a standstill agreement containing a clause stating that neither party would issue proceedings during the currency of the agreement was recently considered in *Muduroglu & Anr v Stephenson Harwood & An*r (in which judgment was handed down on 28 July 2017). Here, the claimants issued proceedings before the expiry of the standstill period on the basis that it was a "procedurally risky approach" to leave matters to the last minute. The defendants argued that this amounted to a repudiatory breach of the standstill agreement with the effect that the claimants were not entitled to rely on the suspension of time at all and the claim was statute barred. On the facts before him, the judge (Mark Cawson QC) construed the relevant clause of the standstill agreement as an innominate term rather than a condition. He also concluded that the breach of the term did not amount to a repudiation of the standstill agreement or go to the "root of the contract". In other words- the claimants won on this issue (although various parts of the claim were struck out or made subject to summary judgment on other grounds).

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