



Standstill Agreements

Introduction

Standstill agreements can be a useful tool in civil litigation and can offer flexibility in turbulent times particularly as we navigate through the current economic uncertainty. Standstill agreements have become much more common and this article looks at some of the issues that parties and their advisors should be alive to when entering into standstill agreements.

How it works

A claim must be issued within the relevant limitation period. Different types of claims have different limitation periods. The statutory limitation period for contractual claims is six years, with time running from the date on which the cause of action accrued. On the other hand, claims in tort must be commenced within six years of the cause of action and in negligence, this is usually when there is damage. If the limitation period has expired, the claim will be time-barred and the defendant will have a complete defence to the claim.

When the expiry of a limitation period is approaching on a prospective claim, standstill agreements “stop the clock” for limitation purposes. A standstill agreement prevents a party from issuing proceedings during the currency of that agreement. As such a standstill agreement is a voluntary contractual arrangement between the parties to pause limitation for an agreed length of time (typically 3-6 months).

Why would parties want to enter into a standstill agreement? It has advantages and can ease the pressure associated with limitation deadlines. It allows parties time to consider the merits of the claim and/or the defence; and gives some breathing space to explore a resolution without needing to spend otherwise unnecessary time and costs heading down the route of litigation.

However, standstill agreements can also lead to a further source of conflict. To avoid a standstill agreement generating satellite litigation, the following are some issues to be alive to when considering such agreements:

1. Contract basics

A standstill agreement is a contract and subject to the same interpretation rules as other contracts. Parties need to proceed with caution when negotiating standstill agreements. If the parties choose the ‘standstill’ route, there should be clear written agreement setting out the terms and duration of such an agreement and each of the potential parties should be included in the agreement. The use of clear language and precisely defined times and dates (as opposed to days or weeks) is imperative so there is no room for confusion.

2. Who are the parties now and prospectively?

When complex company structures come into play, it is less than certain who the proper party (claimant or defendant) will be. Are there mergers on the horizon or is there a risk that a party could fall insolvent given the recent economic uncertainty? For example, if a party is insolvent, would the claim need to be brought against or in the name of the liquidators and have they been captured? It is important to make

sure that the parties' respective names and details are correct within the standstill agreement itself. Failing to do this may leave the standstill agreement invalid and limitation will not pause, which of course could prove helpful to a Defendant.

3. What is the cause of action?

The standstill agreement should set out clearly the subject (or cause of action) of the potential claim. If this is not yet clear, has the standstill captured all potential causes of action? A 'dispute' may be broadly defined to capture any claim, or all claims directly or indirectly arising out of or in any way connected with the matters referred to (or involving the parties). A claimant or their advisors do not want to end up in a situation where the standstill agreement captures the wrong type of claim or was not sufficiently wide to capture the claim at all.

4. Extensions

Often standstill agreements need to be extended. An effective mechanism for extending the standstill agreement is arguably one of the main operating parts of the contract, so particular care should be taken over that aspect when entering into one. If one side wants to extend the standstill period, always check whether there is a clause setting out the formalities such as notice that must be observed. A phone call to agree an extension of time may not be enough and generally standstills require that any variations be in writing. Also, check there is somebody present and willing to consider the extension on the other side, particularly during a pandemic. Parties should allow plenty of time for agreeing extensions.

5. Ending the standstill

It is key for both parties to keep in mind when the standstill agreement is likely to end and how long will be left to run in terms of limitation following the expiry. If, for example, the agreement is due to expire on a Saturday it would be prudent for a claimant to extend it to the following Monday. Parties and their solicitors should diarise standstill deadlines properly and should leave enough time to either agree and document any further extension, or else to issue proceedings.

6. Prospective third parties

Defendants need to be careful before entering into standstill agreements with claimants without proper information particularly where third parties may be an avenue of recourse. Defendants could find themselves in a difficult position if they are unable to persuade a potential third party to enter into a back-to-back standstill agreement and the clock on that space keeps running.

7. Suspend or extend

Most standstill agreements are drafted to suspend time. Standstill agreements have the effect of suspending or extending the limitation period. It is important for the parties to consider: is the agreement to suspend or extend the limitation period?

Suspension 'freezes' time, so on expiry of the standstill period the claimant will have the same amount of time left in which to issue its claim as it did as at the date of the agreement. If the standstill agreement merely extends time, the claimant must issue proceedings on expiry of the standstill period. If parties propose to extend time, they should clearly state the final date by which the claimant must commence proceedings.

8. Multiple Defendants

Where there is more than one potential defendant, the Claimant will want to consider agreeing similar standstill agreements with them all.

Conclusion

Standstill agreements are becoming increasingly common. However, they do take time to negotiate, agree the terms, draft and execute. It is important not to rush the detail and to get the drafting of the standstill agreement right. Careful consideration must be made to ensure that the parties expressly agree the intended effect of the standstill and that the wording of the standstill agreement clearly and consistently reflects that intention. If mistakes are made the consequences can be severe for the client, the solicitor and quite possibly, their professional indemnity insurers. Act in haste, repent at leisure, as the saying goes.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a particular matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note.

If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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