Neutral Citation Number: [2023] EWHC 32 (Ch)

Case No: BL-2018-001356

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

7 Rolls Building
Fetter Lane, London

Date: 12 January 2023

Before :

MASTER PESTER

- -

Between :

WATFORD CONTROL INSTRUMENTS LIMITED — **Claimant**

- and -

COLIN BROWN — **Defendant**

- -
- -

Richard Colbey (instructed on a Direct Access basis) for the Claimant
Niranjan Venkatesan (instructed by Buckles Solicitors) for the Defendant

Hearing date: 1 November 2022

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APPROVED JUDGMENT

This judgment was handed down by the Master remotely by circulation to the parties or their representatives by email. The date and time for hand-down is deemed to be 4.30pm on 12 January 2023.

MASTER PESTER:

A: Introduction

1. This is my judgment on an application, dated 16 September 2022, by the Defendant ("Mr Brown") for an order that "the claim form be struck out and the claim dismissed". The evidence in support of the application is found in two witness statements of Mr Brown's solicitor, Nicholas Porter.

2. Three grounds are put forward as to why the claim should be struck out:

   (1) It is said that the Claimant, a company known as Watford Control Instruments Ltd, is guilty of abuse of process, and the only appropriate sanction is to strike out the claim;

   (2) In the alternative, it is said that the want of prosecution of the claim justifies an order striking out the proceedings;

   (3) In the further alternative, it is said that the Claimant lacks standing to bring these proceedings.

3. In response, the Claimant relies on two witness statements. There is a witness statement of Mark Massetti, the Claimant's managing director, and a statement from Jeremy Paul Oddie, an insolvency practitioner, who was one of the two administrators of the company which allegedly has assigned the claim to the Claimant.

B: Background

The parties

4. The Claimant was incorporated on 18 May 2016 to acquire the goodwill, assets and debts of a company now known known as YZMA 00434553 Limited ("YMZA"), which is in liquidation. YMZA was previously known as "Watford Control Instruments Ltd", that is, the same name as the current claimant. YMZA is described, in the Particulars of Claim, as being the leading manufacturer of voltage control machines in the United Kingdom prior to its insolvency.

5. Mr Brown was a director of YMZA until 15 November 2016. He had been an employee of YMZA since 1984.

6. YMZA went into administration in May 2016, having been in financial difficulties for a number of years (at least since 2013, and possibly earlier). By a Sale and Purchase Agreement dated 18 May 2016, between the Claimant, YMZA, and YMZA's administrators ("the SPA"), YMZA agreed to sell "the Business" (defined as being YMZA's business of design and manufacture of AC voltage stabilisers, power conditioners and voltage optimisation products) to the Claimant.

7. I will come to the detailed provisions of the SPA below, but by a Deed of Variation dated 9 May 2017 ("the Deed of Variation"), the original definition of "Book Debts" found in the SPA was amended to make express reference to "the Colin Brown Claim". One of the issues that I need to consider is whether this claim has been validly assigned to the Claimant.

The claim

8. In broad terms, the Claimant contends that Mr Brown acted in breach of fiduciary duty and/or in breach of trust, in that he knowingly and dishonestly appropriated YZMA monies for his own purposes. The claim alleges that Mr Brown used the company credit card without authorisation for personal expenditure between December 2009 and April 2016, made unauthorised drawings from one of YZMA's bank accounts, and used YZMA funds to fund his pension and health insurance. The Claimant seeks £350,000 plus interest; alternatively, an inquiry and an account. Given the comparatively low value nature of the claim, one might have thought that it would more appropriately be tried in the County Court.

9. Mr Brown's defence has two strands to it. The first is that the Claimant has no title to sue. The second is that Mr Brown's use of the credit card, the withdrawals from the company bank account and the other matters of which the Claimant complains were not improper and indeed were authorised by YZMA.

10. Whilst Mr Brown is represented by solicitors and Counsel, the Claimant has acted as a litigant in person, although it has instructed Counsel to represent it on the strike-out application.

Steps in the proceedings

11. The claim form and Particulars of Claim were served on 15 June 2018. The Defence was served on 31 July 2018. The Claimant's Reply, if any, was due by 30 August 2018, but no reply was served.

12. A first Case Management Conference was held on 29 July 2019. Deputy Master Henderson gave certain directions about disclosure and other matters. Paragraph 8 of the Case Management Order provided that "*[t]he CCMC shall be adjourned to the first open date after 30 September 2019, with a time estimate of 2 hrs*". He also ordered, pursuant to paragraph 9 of the Case Management Order, that should the Claimant wish to apply for an order for interim account at that hearing, the Claimant should issue and serve an application notice seeking such an account, supported by witness statement, by 16 September 2019.

13. Disclosure and inspection took place in August and September 2019.

14. Mr Brown complains that, at or around this time, the Claimant ceased to take any steps to pursue the claim. On 27 September 2019, the Claimant issued, but did not serve, an application seeking an order for an "interim account for payment of certain sums said to be due by the Defendant to the Claimant". In fact, that application has never been served on Mr Brown. In part 10 of the application notice, it says "a full statement to follow". No statement was ever produced.

15. The last communication Mr Brown's solicitors received from the Claimant was on 27 September 2019. Thereafter, there was not a single communication from the Claimant until 25 March 2022, that is, some two and a half years.

16. On 5 July 2022, the Claimant wrote to the Court requesting that the CMC be "*relisted*". The CMC was listed for 27 September 2022.

17. On 16 September 2022, Mr Brown issued the application to strike out the claim on the ground (among others) that the Claimant's "warehousing" of the claim was an abuse of process. At the CMC on 27 September, the court gave directions for the determination of the strike out application, which was subsequently listed for hearing on 1 November 2022.

Explanations for the delay

18. The Claimant provides some explanation for the delay in pursuing the claim in the witness statement of Mr Massetti. In summary, it can be said that there are three separate periods to be considered, September 2019 to March 2020, March 2020 to May 2021, and May 2021 to March 2022.

19. The first period (September 2019 – March 2020): In relation to the first period, up to March 2020, Mr Massetti refers to the adjourned Case Management Conference, and explains that "… we assumed that the court would provide the date in respect of this" and "… we were waiting on the court as to the next hearing". In other words, Mr Massetti and the Claimant seem to have assumed that the court would fix the next hearing of its own motion. This assumption, it seems to me, was wrong. The Claimant should have contacted the court and provided the dates of availability for the parties.

20. In Mr Massetti's favour, it could be said that the wording of paragraph 8 of the Case Management Order is ambiguous, particularly for a litigant in person. The order provides that "the CCMC shall be adjourned", but does not state in terms that it is for the Claimant to seek to relist it. Mr Massetti says that it was "not unusual for there to be many months between hearing dates". Counsel for Mr Brown pointed out that the Claimant's company secretary at the time, Philip Proctor, was a "former solicitor" and so it was submitted to me that the Claimant's assumption was unreasonable. However, I do not know much of Mr Proctor's background and how much experience he had in the conduct of litigation, so I do not place a great deal of weight on that factor alone.

21. In the circumstances, although I accept that Mr Massetti and Mr Proctor were waiting for the Court to relist the Case Management Conference, it is surprising to see that the Claimant made no attempt to contact the Court to see when a further hearing would be listed, more than six months after the Case Management Order of July 2019. The Court expects a party to pro-actively advance its case and, if necessary, to chase up the Court to ensure that proceedings are pursued without undue delay. See, in a slightly different context, *Walton v Pickerings Solicitors* [2022] EWHC 2073 (Ch).

22. The second period (March 2020 to May 2021): A second period commenced in March 2020 with the onset of the Covid 19 pandemic. The government announced a lockdown at the beginning of this period, and an unprecedented stage in the nation's post-war history began, affecting to a greater or less degree all segments of society. Mr Massetti refers to the Lord Chief Justice's announcement on 23 March 2020, but does not quote from it. In fact, what the Lord Chief Justice said was that "[w]e have put in place arrangements to use telephone, video and other technology to continue as many hearings as possible remotely".

23. Mr Massetti says that he assumed that "the court would get around to list [the CMC] once the pandemic had subsided". However, the announcement of the Lord Chief Justice does not support Mr Massetti's view that the court would wait until the

pandemic "had subsided" before listing any hearing. I do note that Mr Massetti also explains that that from March 2020, his focus was on the safety of the Claimant's employees at its factory. Some of the Claimant's customers and many suppliers were shutting down. Mr Proctor, who was not "in great health", decided to shield himself. Mr Massetti states that this was an extremely difficult and stressful time, with some staff taking unpaid leave.

24. In or around July 2020, Mr Proctor suffered a heart attack. He then fell ill with cancer, and died in March 2021. Mr Massetti refers to this as "a major blow, as a friend and legal advisor to our multiple businesses". Mr Massetti's evidence is that it was Mr Proctor who had conducted and managed every aspect of the current proceedings and his sudden death left the Claimant wondering how to take matters forward. Mr Massetti also says that this was coupled with the fact that "the factory was even busier than before and in fact 2021 turned out to be a record year for the company".

25. The third period (May 2021 to March 2022): Mr Massetti's evidence is that he sought advice in June 2021 from Carter Clark, specialist accountancy, forensics and legal advisors (but not, I understand, solicitors). He agreed a letter of engagement in May 2021 and had a meeting with them in June 2021. Still matters did not move forward. Mr Massetti then states that "It is regrettable that given the pressures of the business and on me personally, that I did not advance matters again until March 2022 …" when he contacted Mr Brown's solicitors. The Claimant also contacted a law firm in Hertfordshire.

26. In any event, by May 2022 the Claimant had contacted a direct access barrister, who is now representing the Claimant at the hearings before me. There was then a further period of drift, because the Claimant did not apply to fix a resumed CMC until 5 July 2022.

27. This third period of delay seems to me the most egregious. The Claimant, as Mr Massetti in part appears to accept, did not have any proper reason for not progressing the claim during this latest period.

C: Legal principles on abuse of process and want of prosecution

28. Both parties' Counsel referred me to a large number of authorities. The key principles established by those authorities are as follows.

The Grovit *limb of Abuse of process*

29. Abuse of process takes many forms. It was common ground that delay on its own, even a long delay, is not categorised as an abuse of process without there being some additional factor. However, in circumstances where a claimant brings proceedings and deliberately fails to prosecute the claim to its conclusion, the court may find that the claimant's disregard of its obligation to advance the claim amounts to an abuse. This type of abuse of process is founded on the decision of the House of Lords in *Grovit v Doctor* [1997] 1 WLR 640 and of the Court of Appeal in *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998]1 WLR 1426.

30. *Grovit v Doctor* was a case where, having commenced "wide-ranging proceedings against the defendants" in August 1989, by March 1990 the only remaining claim was

an allegation of libel. By the time the defendants applied to strike out the claim, the claimant had done nothing for over two years. The House of Lords held that the conduct complained of constituted an abuse of process. Lord Woolf said this:

> *"The courts exist to enable parties to have their disputes resolved. To commence and continue proceedings which you have no intention to bring to a conclusion can amount to an abuse of process. Where this is the situation the party against whom proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse may be the plaintiff's inactivity."* (at p. 647G-H) (emphases added)

31. Subsequently, in *Arbuthnot Latham v Trafalgar Holdings*, the Court of Appeal considered two appeals concerned with striking out on the ground of want of prosecution. What was said was it was likely to be an abuse of process for the claimant unilaterally to decide not to pursue a claim for a substantial period of time, even if the claimant remained intent on pursuing the claim at some future point: see p. 1437B - E. This was described by the pejorative label as "warehousing".

32. In *Solland International Ltd v Clifford Harris & Co* [2015] EWHC 3295 (Ch), Arnold J (on appeal from Master Bowles) referred to both *Grovit v Doctor* and *Arbuthnot Latham v Trafalgar Holdings*. He indicated that, on the basis of those authorities, it was not a requirement for so-called *Grovit* abuse of process that the claimant's lack of intention to pursue the claim to trial should persist as at the date of the application to strike out, still less at a later date (such as the date of the hearing or an appeal). Thus, it may be an abuse of process for the claimant unilaterally to "warehouse" the claim for a substantial period of time, even if the claimant subsequently decides to pursue it: see at [54]. The burden of showing that there is an abuse lies on the applicant.

33. In *Asturion Foundation v Alibrahim* [2020] 1 WLR 1627, the Court of Appeal indicated an application to strike out a claim on the ground of abuse of process should be analysed in two stages. First, the court should determine whether the claimant's conduct was an abuse of process. Secondly, if an abuse of process is found, the court should exercise its discretion as to whether to strike out the claim. This two-stage analysis is supported by the language of the Civil Procedure Rules, r. 3.4(2)(b) of which of provides that the court "may" strike out a statement of case where it is an abuse of the court's process: see at [64], [81] – [82].

34. Arnold LJ (as he had since become) gave the leading judgment in *Asturion Fondation v Alibrahim*. He made the point that whilst a unilateral decision by a claimant not to pursue its claim for a substantial period of time, while maintaining an intention to pursue it at a later juncture, may well constitute an abuse of process, it does not necessarily do so. It all depends on the reason why the claimant decided to put the proceedings on hold, and on the strength of that reason, objectively considered, having regard to the length of the period in question. A claimant who wishes to obtain a stay of proceedings for a period of time should seek the defendant's consent or, failing that, apply to the court; but it is not the law that a failure to obtain the consent of the other party or the approval of the court to putting the claim on hold automatically renders the claimant's conduct abusive no matter how good its reason may be or the length of the delay.

35. On the facts of that case, it was held by the High Court Judge (disagreeing with the Deputy Master who first heard the application) that there was no abuse of process; and this finding was upheld by the Court of Appeal. Asturion had an objectively reasonable ground for not pursuing the proceedings, given that its authority to bring the proceedings was under attack by Ms Alibrahim in Liechtenstein and in that context she was complaining about costs being incurred by the claimant in the English proceedings. Although the court indicated that Asturion should have sought Ms Alibrahim's consent to a stay and, in the absence of consent, applied to the court, the conclusion was that its conduct was not an abuse. Arnold LJ concluded by stating that even if the Judge had been wrong to conclude that Asturion's conduct was not an abuse of process, the question would have been whether the Judge was entitled to exercise his discretion not to strike out the claim. The Judge found that, even if there was an abuse it was of a "relatively minor nature" and "did not justify the sanction of striking out". Arnold LJ held that the Judge was fully entitled to take that view. The point was made that there were lesser sanctions available to the court which were more proportionate to the abuse, if abuse there had been: see at [78] – [79].

Want of prosecution

36. A separate ground for striking out a claim is excessive delay, even if this does not amount to an abuse of process. The two requirements, as established in the case law, are that there has been inordinate and inexcusable delay, on the one hand, and the delay gives rises to at least a substantial risk that it is not possible to have a fair trial, or is such as is likely to cause serious prejudice to the defendant: see *Birkett v James* [1978] Ac 297, House of Lords, at p. 318.

37. Further guidance from the case law establishes the following principles:

    (1) There are no hard and fast rules. The court has to make a broad judgment having regard to all relevant circumstances and the justice of the case.

    (2) The relevant circumstances may include the length of, explanation for and responsibility for the delay; whether the defendant has suffered prejudice as a result and if so how it can be compensated for, and whether the delay is such that it is no longer possible to have a fair trial.

    (3) A defendant cannot let time go by without taking action so where delay does cause prejudice to him he cannot say it is entirely the fault of the claimant.

    (4) In considering what is the just and proportionate order to make, the court should have regard to the alternative sanctions to that of striking out provided by the CPR.

    See *Owners and/or Bailees of the Cargo of the Ship Panamax Star v The Owners of the Ship Auk* [2015] 1 All ER (Comm) 292, at [37], per Hamblen J ("the Auk").

38. In *the Auk* the period of delay which the claimant had allowed to go by was nearly eight years. The claimant should have fixed a CMC in early July 2005, but did not seek to do so until March 2013. It is entirely unsurprising that the court found the delay to have been "inordinate and inexcusable": at [57]. The court also made plain

that primary responsibility for progressing a claim, and fixing a CMC, is that of the claimant: again at [57].

39. Thus, the two limbs grounds for striking out with which I am concerned, *Grovit* abuse of process and want of prosecution, differ essentially it would seem in that *Grovit* abuse does not require the defendant to establish prejudice. *"An abuse of process can occur regardless of whether or not there is unfairness, let alone manifest unfairness, to the other party"* per Coulson LJ in *Cable v Liverpool Victoria Insurance Co Ltd* [2020] 4 WLR 110, CA, at [72]. But questions of unfairness and whether or not a fair trial remains possible are relevant to the second part of the test, namely the balancing exercise to be undertaken when considering the proportionate sanction.

D: Discussion and Analysis

(1) Abuse of process

40. I must now apply the two-stage test by asking myself, first, whether the Claimant's conduct amounts to an abuse of process, and second, if so, whether the court should exercise its discretion to strike out the claim in all the circumstances. In considering these questions, I recognise that the Claimant is a litigant in person. However, the Supreme Court has indicated that whilst a litigant's lack of representation often justifies "making allowances in making case management decisions and in conducting hearings … it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court": *Barton v Wright Hassall llp* [2018] 1 WLR 1119, per Lord Sumption, at [18].

Was there an abuse of process ("warehousing")?

41. A unilateral decision by a claimant not to pursue its claim for a substantial period of time, while maintaining an intention to pursue it a later juncture, may well constitute an abuse of process, but does not necessarily do so. One needs to consider the reason why the claimant decided to put the proceedings on hold, and consider the strength of those reasons, objectively considered, having regard to the period in question. The burden of proof in establishing abuse of process lies on the applicant. On the facts of this case, it seems to me that Mr Brown has established that there is abuse of process in the *Grovit* sense. My reasons for that conclusion are as follows.

42. First, in relation to the first period (September 2019 to March 2020) I accept in the Claimant's favour that it was waiting for the court to fix the resumed CMC. However, I note that the Claimant had taken no steps no steps to contact the court to request any updates with regard to listing, and further that it took no steps to progress the application which it did issue, not even serving it on Mr Brown. In those circumstances, I find that the Claimant has provided a partial explanation for the initial period of delay, but objectively considered the reasons given are not strong.

43. Second, turning to the second period (March 2020 to May 2021, I have some sympathy with the submission that at the onset of pandemic, the Claimant wished to prioritise the health of its staff whilst trying to continue its business. It would be easy, but wrong, now (in late 2022) to forget just how disruptive the onset of the pandemic was for all segments of society. Mr Brown's Counsel submitted to me that had the Claimant applied at this time (in March 2020) for a stay, it would not have been

granted one. I am not sure I agree. It seems to me that the Court *might* have been willing to grant a stay for perhaps a period of up to six months.

44. Mr Brown's Counsel referred me to the decision of Neuberger J (as he then was) in *Ledra Fisheries Ltd v Turner* [2003] EWHC 1049 (Ch), at [12], in support of the proposition that a stay would not have been granted. I do not obtain any assistance from that authority, which was clearly directed at another situation, namely, where a claimant has issued proceedings in two jurisdictions at the same time, and then seeks to obtain a stay. Of course, one can readily see that in that situation, absent very unusual circumstances, the court would not grant a stay at the instance of the very party which has chosen to start both sets of proceedings. That is not this case.

45. However, any conclusion on a stay can only be tentative, given that the Claimant did not in fact apply for a stay. Even assuming, perhaps generously, that some delay during this period is explained, it seems to me that by at the latest September 2020 the Claimant should have been chasing the court to fix a resumed CMC. I do not consider that Mr Proctor's illness and death justifies the total inactivity of the Claimant.

46. Third, in relation to the third period (May 2021 to March 2022), this is the least justifiable period of delay. Mr Massetti explains that he did seek professional advice during this period, from Carter Clark. But nothing seems to have come of this. Mr Massetti himself appears to accept that it was "regrettable" that he did not advance matters during this period, given the pressures on his business and himself personally.

47. Finally, when one steps back and looks at the overall position, the total period of delay, from September 2019 to March 2022, nearly two and a half years, is on any view very long. It would need a very cogent explanation to justify a failure to progress the claim for such a long period. Even taking a very generous approach to the Claimant's conduct of the proceedings, it does seem to me that there were extended periods of time when either no or at best only very weak justifications for the delay is given.

The appropriate sanction

48. I therefore find that there was abuse of process on the part of the Claimant. Where there is such a finding, the court frequently, but not invariably, strikes out the claim. That leads me to consider the appropriate sanction. Mr Brown gave six reasons why it is said that the only sanction appropriate in the circumstances of this case is strike out.

49. The starting point for my analysis is that it is always a draconian step to strike out an apparently arguable claim. While it is unnecessary for me to express any views on the merits, I consider that the Claimant's claim is, at the very least, arguable. Whilst accepting that it is always a strong thing to strike out a claim, Mr Brown's Counsel submitted that striking out on the facts of this case would not be a disproportionate response to the serious abuse of process on the part of the Claimant. Reference was made to *Solland v Clifford Harris*, where the claimant had warehoused the claim for a period of a little over two and a half years.

50. It was submitted on behalf of Mr Brown that the Claimant does not have anything resembling a good reason for its abusive conduct. I have already explained above that the Claimant has provided explanations for part at least of the period of inactivity, but

not for the entire period, and in any event the reasons given are not very strong. The explanations given do not justify the long periods of inactivity. But this does not seem to me a separate ground for striking out the claim. It is merely a restating of the finding of abuse.

51. Next, it is said that the only appropriate sanction is striking out because the Claimant has been in breach of other court orders or rules. What was said is that the Claimant failed to issue its an application for an interim account with supporting evidence by 16 September 2019, and whilst the application was issued, on 27 September 2019, it was issued late, never served, and no evidence was provided in support of it. It is also said that the Claimant is in breach of paragraph 3 of the CMC order, which required the Claimant and Mr Brown to disclose emails and other correspondence, and company records, covering the period of Mr Brown's alleged wrongdoing. Finally, it was said that in the run-up to the hearing before me, the Claimant committed various failings in relation to the production of a bundle, and in terms of serving a skeleton argument.

52. As to the application for an interim account, this was expressed in the CMC order as being optional ("should the Claimant wish to apply for an order for interim account …"). Therefore, I do not place a great deal of weight on the Claimant's undoubted failure to pursue this application when I come to the question of the appropriate sanction. The position in respect of disclosure, on the other hand, is more complex. On the basis of the evidence before me, it seems that the Claimant has provided some of the disclosure ordered, but certain categories of documents have not yet been produced. I note that in the run-up to the hearing direct access counsel instructed by the Claimant and Mr Brown's solicitor exchanged perfectly cordial emails in which both parties sought to identify what further searches needed to be made for relevant documents. I note also that Mr Brown himself may not have disclosed all relevant documents relating to the claim against him.

53. I will proceed on the basis that there was not full compliance with the order for disclosure made pursuant to paragraph 3 of the CMC order. I accept that there were other breaches on the part the Claimant, but as Mr Brown appeared to accept, those breaches on their own would not have justified the striking out of the claim. I can accept that those further breaches are matters to which I should have regard in deciding whether to strike out the claim, but even combined with the finding of abuse in relation to the warehousing of the claim I do not accept that the existence of those further breaches necessarily requires the striking out of the claim as the only appropriate sanction.

54. A more substantial point is the suggestion that Mr Brown has suffered substantial prejudice as a result of the abuse in warehousing the claim. What is said that Mr Brown's mental health has suffered as a result of the Claimant's delay in progressing these proceedings. Mr Brown's solicitor has exhibited Mr Brown's health records, which show that Mr Brown was diagnosed in July 2019 with Adjustment disorder with prolonged depressive reaction. Mr Brown was prescribed with sertraline, an anti-depressant. Mr Brown's condition improved thereafter during the period when the Claimant was not progressing the claim. A recent NHS assessment records that Mr Brown was "… relatively settled from July 2020 until April/May 2022 when your solicitor contacted you". The assessment then goes on to record that Mr Brown is now experiencing "… low mood, suicidal thoughts" and "has plans and means to end [his] life."

55. Counsel for the Claimant did not submit that I should not take into consideration the evidence as to Mr Brown's mental health, despite this not being expert evidence. Mr Porter, Mr Brown's solicitor, suggests that "… having spoken to the Defendant and his wife about his mood, I am sure that it is the delay in these proceedings, followed by their resurrection, that has caused the Defendant's current mental health crisis." This is plainly the giving of opinion, non-expert evidence. What the records themselves show is it is the existence of the litigation itself which is fuelling Mr Brown's depression and suicidal ideation, and not the delay in and of itself. Mr Brown's mental health issues were first diagnosed in July 2019, that is, after the proceedings were first brought. Later, when Mr Brown wrongly concluded that the proceedings had been abandoned, his health improved, only to get worse again when the Claimant sought to revive them in spring 2022.

56. It is unfortunate that the very fact of being involved in court proceedings is a highly stressful process. On the evidence, however, I do not accept that the delay in proceeding with the claim has itself caused Mr Brown's health problems. Rather, it is the existence of the proceedings themselves. While it is of course concerning to hear of Mr Brown's health issues, this factor does not justify the striking out of an arguable claim. It is in any event reassuring to record that Mr Brown has been prepared to obtain medical help for his depression and that, as Mr Porter explains, he has a very supportive family to help him cope with the stress of this litigation.

57. It was also submitted that the Claimant's delay meant that there was a substantial risk that a fair trial is no longer possible. It is said that this is a matter where there is very little contemporaneous documentation and, accordingly, the outcome of the case is likely to turn on the written and oral evidence of Mr Brown and the other employees of YMZA at the time.

58. I think I need to be somewhat cautious about this point. How much disclosure is outstanding remains unclear. Mr Brown may have additional disclosure to provide, particularly with regard to purchases he made on Amazon. In any event, assuming Mr Porter is correct that there is "very little" documentation in this case, whilst there will be some dimming of memory after a two and a half year gap, the central plank in Mr Brown's defence is that any appropriations he may have made from YMZA were authorised. He says he has a number of witnesses, former employees, who are willing to confirm this. That central point should still be capable of being established by Mr Brown's witnesses one way or another, notwithstanding the passage of time.

59. Previous authorities have warned that the court must be careful not too readily to infer that a fair trial is no longer possible. I conclude that whilst there is inevitably some prejudice to Mr Brown through the delay, in the fading or potential fading of witness memories, I reject the submission that there is a substantial risk that a fair trial is no longer possible. That is particularly the case if these proceedings now proceed to trial swiftly.

60. Finally, it is submitted on behalf of Mr Brown that where a claimant obtains "some advantage" by issuing and maintaining proceedings, a decision to warehouse is still more serious. In this case, a sum of £4,000 was payable to Mr Brown under a settlement agreement unless the Claimant issued a claim on or before 16 June 2018. This claim was in fact issued on 15 June 2018, one day before the sum due would otherwise have become payable, with the result that the payment obligation was

suspended. Mr Porter suggested that the proceedings were only issued in order that the Claimant could avoid paying the sum of £4,000 to Mr Brown. I do not accept this suggestion. The Claimant had to pay a fee of £10,000 to issue the claim, and it seems to me very unlikely that any business would pay a fee of £10,000 as a reason to avoid a payment of £4,000.

61. Before deciding what sanction to impose for the admitted delay in progressing these proceedings, I need to consider whether there is some more appropriate alternative to striking out. Mr Porter, in his first witness statement in support of the claim, says this:

> *"My suspicion is that the Claimant issued proceedings against [Mr Brown] on 15 June 2018 just so that it could avoid payment of the second tranche of the monies due under the settlement agreement in the employment tribunal. Having avoided that, the Claimant was then perfectly content not to progress the claim, particularly faced with the real prospect of a security for costs application. The matter is only now being revived when the Claimant has sufficient funds to resist such an application and progress the claim."*

62. In this case, I note that the original complaint made, as set out in Mr Porter's first witness statement in support of the application to strike out, was that the Claimant was perfectly content not to progress the claim "particularly faced with the real prospect of a security for costs application". The Claimant's financial position has improved since 2019, so that a security for costs application is now longer a realistic prospect. But it seems to me that a possible sanction in this case, rather than striking out the claim, is to order the Claimant to provide security for Mr Brown's costs of defending the claim.

63. Indeed, Mr Massetti for the Claimant indicates that the Claimant, or those standing behind it, are prepared to meet an order for security for costs, up to the sum of around £150,000. It seems to me that ordering the Claimant to provide Mr Brown with security for costs would address Mr Porter's complaint about Mr Brown no longer being able to apply for security for costs, while at the same time being a less draconian sanction than to strike out the claim. I am also prepared to disallow any costs which the Claimant may have incurred in the period September 2019 up to the hearing of the resumed Case Management Conference in September 2022, although it seems likely that those costs were not, in any event, very great.

64. Anticipating this line of argument, Counsel for Mr Brown submitted to me that an order for security for costs was not appropriate, as it would in effect mean that a claimant could "buy" a right to put proceedings on hold for several years. However, the court must not overlook the fact that the striking out of the claim is a last resort. It does seem to be that on the particular facts of this case, the Claimant's conduct here is less culpable than some of the other authorities cited to me, such as *Solland v Clifford Harris*: see in particular at [86] where Arnold J set out the factors relied upon by the Master as justifying the striking out of the claim. In *Solland v Clifford Harris*, the court formed the view that given the start/stop manner in which the litigation had been pursued before it fell into abeyance it was "… very difficult to believe in Damascene conversion, and that there is now in the Claimants, a full-hearted intention to pursue this litigation in compliance with the rules." In contrast, in this case, the Claimant itself took the decision to ask for the relisting of the case management conference. I

conclude that the Claimant here has now taken a decision to pursue this litigation expeditiously and in compliance with the rules.

65. I also remind myself that one of the great virtues of the CPR is that, by providing more flexible remedies for breaches of rules as well as a stricter regulatory environment, the courts are given the powers and the opportunities to make the sanction fit the breach: see *Cable v Liverpool Victoria Insurance Co Ltd* [2020] 4 WLR 110, Court of Appeal, at [45].

66. I accept entirely that there is a disciplinary factor in the decision as to what sanction to impose. However, it does seem to me that in this case, a more proportionate sanction, having regard to the length of the delay in pursuing the claim, and the explanations for that delay (some of which, as I have explained above, have more justificatory force than others) is to order the Claimant to pay into court a sum to cover Mr Brown's costs of defending the action. I will hear further submissions from the parties as to the appropriate sum. I will also disallow any costs which the Claimant incurred during the period September 2019 to September 2022. In addition, I can also order that some or all of the costs of Mr Brown's application (depending on my decision on the lack of standing point) be paid by the Claimant.

67. Finally, whilst it will be a matter for the trial judge, my view is that the Claimant should not be entitled to recover any interest during the period September 2019 to November 2022 (when the strike out application was heard) even if the Claimant turns out to be successful at trial.

68. Accordingly, despite having found there to have been an abuse of process on the party of the Claimant, in all the circumstances I consider that there is a more proportionate and less draconian sanction which would nevertheless serve as a disciplinary factor, and which should be imposed in these circumstances rather than the striking out of the claim. Ordering a payment into court will also have the effect of compelling the Claimant to pursue the litigation without further delay.

(2) Want of prosecution

69. It seems to me that the argument on want of prosecution were very much a fall-back on the part of Mr Brown, in the sense that it only arose were I to have decided that there was no abuse of process on the part of the Claimant. In this case, I have decided that notwithstanding the fact that the Claimant's conduct was an abuse of process, nevertheless it is not appropriate to strike out the claim. It would be wholly exceptional for the court to find that conduct was abusive, but the claim should not be struck out, but nevertheless the claim should be struck out for want of prosecution.

70. In the circumstances, I think I can dispose of this point shortly. The principles helpfully summarised in *the Auk* is that there are "no hard and fast rules" when dealing with striking out for want of prosecution. In the context of want of prosecution, two significant factors are, first, I have already held that a fair trial can still take place and, two, it is important to recall that Mr Brown could always have himself brought matters back to court. A defendant cannot let time go by without taking action, so where delay does cause him prejudice he cannot, in this context, say it is entirely the fault of the claimant.

71. In the context of want of prosecution, just as when dealing with abuse of process for "warehousing", the court must have regard to the alternative sanctions to striking out. I have sought to do that in this judgment, and for the reasons already given, consider that the sanction of striking out in this case to be disproportionate. The right sanction is to order the provision of security of costs, coupled with a costs order and a loss of interest.

(3) Lack of standing to sue

72. Mr Brown's third point in support of his strike out application is that there was no valid assignment of the cause of action which is brought in these proceedings from YMZA to the Claimant.

73. The Defence, paragraph 7.2, pleads that the assets and debts of YMZA acquired by the Claimant on 18 May 2016 did not include any right of action against Mr Brown.

74. In relation to the title to sue point, the Claimant's case is that YZMA's right to sue Mr Brown was assigned to him pursuant to a Share Purchase Agreement dated 18 May 2016 ("the SPA") as amended by a Deed of Variation to the SPA dated 9 May 2017 ("the Deed of Variation"). By clause 2.1 of the SPA, YMZA agreed to sell and the Claimant agreed to buy YZMA's "Book Debts". "Book Debts" are defined in the definition section of the SPA as follows:

> *"(a) the right to receive and recover all payments due to be made to the Seller of the Administrators at any time, in respect of services provided, goods completed but not yet despatched, or any goods despatched by the Seller (or by any third party holding or despatching the same on behalf of the Seller) prior to or on the Transfer Date (whether or not invoices at that date); and*
>
> *(b) all book and other debts, choses in action and rights of action whatsoever accrued or accruing due to the Seller and/or the Administrators as at or prior to the Transfer Date, irrespective of their due date for payment, including, without limitation, claims for damages or other remedies, or under any policy of insurance, in respect of matters occurring at any time at or prior to the Transfer Date;"*

75. It has been said that "… the question what is a book debt has regrettably remained one of those mysteries of company law": see Oditah, *Receivables Financing* (1991), p. 23. A claim for breach of fiduciary duty may not be encompassed by the technical term "book debt". However, the reference in the SPA to "… rights of action whatsoever … including, without limitation, claims for damages or other remedies …" (emphases added) would at first sight be apt to cover the claim against Mr Brown, as an allegedly defaulting director.

76. However, the position is muddied by the fact that at the time of the SPA, Mr Massetti and the administrators of YMZA were unaware of the claim against Mr Brown. On discovering it, the parties entered into a Deed of Variation, dated 9 May 2017. The Deed of Variation provides that where there is any discrepancy between the SPA and this Deed of Variation, the Deed of Variation shall prevail. The Deed of Variation amends the SPA, to insert a new definition of "the Colin Brown Claim", so as to refer to the potential claim in relation to allegation of the misappropriation of moneys

belonging to YZMA, and then provides that the definition of "Book Debts" in the SPA is amended so as to exclude "the Colin Brown Claim". The Deed of Variation then provides, at clause 4.6.1, that whilst the Claimant would have "full conduct and control of all matters and administration relating to the Colin Brown Claim", neither YMZA nor the Administrators were to be parties to any proceedings in relation to the recovery of monies or other claim connected with the Colin Brown Claim. The Deed of Variation also provides that the Claimant shall pay the Administrators as agents of YMZA an amount equal to 40% of any award, damages or payment received in relation to the Colin Brown Claim.

77. Mr Massetti explains that he spent many hours discussing the Deed of Variation with Mr Oddie, the administrator of YMZA. Mr Oddie has also filed a witness statement, explaining in relation to the Deed of Variation, that the parties agreed that the Claimant could if it chose bring a claim against Mr Brown at its own expense, but on the basis that the administrators would be entitled to an agreed share of any proceeds recovered in such action. Mr Oddie also says that he had always been of the view that the Deed of Variation provided that any claim against Mr Brown formed part of the assets transferred to the Claimant.

78. The simple point made on behalf of Mr Brown is that on a true construction of the SPA and the Deed of Variation, the Colin Brown Claim is not a book debt (being excluded from the otherwise wide definition in the SPA) and was not transferred or assigned to the Claimant pursuant to clause 2.1 of the SPA. This is a technical, and it might be thought unattractive, argument. But cases are sometimes won on the basis of technical arguments.

79. It seems to me that the Deed of Variation was, from the Claimant's point of view, a serious own-goal. Whilst the original SPA arguably had the effect of transferring any cause of action against Mr Brown that might have existed to the Claimant, the Deed of Variation, on a straightforward reading, confirms that the thing in action representing the claim remains with the original company YMZA. This is because the reference to the Claimant having "full conduct and control" of the Colin Brown Claim is a recognition that the claim has not been assigned to the Claimant. Had the claim been assigned, then there would have been no need to grant the Claimant "full conduct and control". Further support for this reading is the reference found in clause 4.6.2 of the Deed of Variation, which provides that the Claimant "as agent" shall pay to the administrators of YZMA an amount equal to 40% of any recovery made in relation to the Colin Brown Claim. That is consistent with an agency agreement, and not an assignment.

80. However, in an attempt to avoid the problem of standing to sue, shortly before the hearing, the Company and YZMA by its administrators entered into a further agreement, a "Deed of Declaration alternatively of Rectification" dated 9 October 2022. The recital to the Deed of Declaration alternatively of Rectification sets out the parties belief that "the Deed of Variation assigned the Colin Brown Claim" to the Claimant. It then amends clause 4.6.1 of the Deed of Variation by adding the underlined words to clause 4.6.1:

> *"With effect from Completion [the Claimant] shall have full conduct and control of all matters and administration relating to the Colin Brown Claim <u>and shall now (and at all times since Completion) be (and has been) able to bring such</u>*

claim in their own name and that the right to bring the Colin Brown claim is assigned absolutely to [the Claimant] …"

81. Mr Brown, by his Counsel's skeleton argument, realistically accepted that the wording of the Deed of Declaration evinced an intention on the part of YMZA to assign the Colin Brown claim to the Claimant. However, it was submitted that the Claimant would only have the right to sue Mr Brown in its own name if the assignment was a legal assignment under section 136 of the Law of Property Act 1925. An assignment under section 136 only takes effect on the date when notice is given to the debtor, not on the date when the assignment is entered into.

82. Whilst he did not refer to it in his skeleton argument, during the course of submissions to me, Mr Brown's counsel referred me to *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101 (*the Colombiana*), a decision of Roskill J, as he then was. In that case, Roskill J held that antecedent notice to the debtor before action brought is clearly required as a matter of English law where the claimant relies on a legal assignment: pages 128 - 129. The formalities governing the giving of a notice to a debtor, such as Mr Brown, are set out in section 193 (3) of the Law of Property Act 1925.

83. It seemed to me that the reliance on *the Colombiana* was a new argument, and because the point was not entirely straightforward, I thought it best to give the Claimant's counsel an opportunity to file supplemental written submissions after the hearing concluded addressing the issue of the application of *the Colombiana*. Sensibly, Mr Brown's counsel did not oppose my suggestion that this was the fairest way to proceed. I also allowed Mr Brown's counsel to file written submissions in reply.

84. Perhaps unfortunately, the Claimant's counsel filed rather more extensive written submissions than I had envisaged, which were not limited to the effect of *the Colombiana*, but went on to address the Court's power to permit amendments adding a new cause of action, both before or after the expiry of a relevant limitation period. The question of when to allow amendments to statements of case is a separate point.

85. It seems to me that, at this stage, I should limit myself to the following:

(1) I have no reason to doubt the authority of *the Colombiana* regarding whether, in the case of a legal assignment, notice is required to be given to the debtor before the action is begun. No authority has been cited to me doubting that proposition. Indeed, the case has been followed on a number of occasions, both in this jurisdiction and abroad, and cited as good law in various textbooks.

(2) There is, however, a footnote in *Chitty on Contracts* (34th ed., 2021) at 22-017, footnote 73, which states that it is arguable that *the Colombiana* principle should "no longer be the rule". Instead, the court can prevent potential unfairness to a party when considering whether to allow an application to amend. Whatever the attraction of that suggestion, I do not consider that it open to me to depart from the relatively long-standing principle recognised in *the Colombiana*.

(3) Therefore, if the Deed of Declaration is to operate as a valid assignment, in circumstances where no notice was given to Mr Brown before the commencement

of the present action, it can only operate as an equitable assignment.

(4) In order to maintain the present action, the Claimant must issue an application to amend so as to plead that assignment. In order to successfully bring such an application, the assignors would probably need to be joined to the action. I am now told that the administrators are prepared to be joined to the proceedings, either as claimants or defendant.

86. Counsel for Mr Brown invited me to give directions as to when such an application should be made, and suggested that the claim would be struck out without further order unless that application is successful. I do not consider that it is appropriate to provide such directions at this juncture. My intention is that, following the handing down of this judgment, a case management conference should be fixed as soon as possible, in order that the large number of outstanding procedural matters can be addressed, and a timetable fixed for trial.

87. Finally, I should make it clear that I am not deciding in this judgment whether any application to plead the assignment will necessarily succeed. It would be wrong for me to make any decision in respect of an application which has not yet been made. Mr Brown, if so advised, is entitled to oppose it. It was, perhaps somewhat faintly, submitted to me that the existing assignment was perhaps champertous and could be challenged on that basis. But arguments on that point are a matter for another day.

E: Conclusion

88. Accordingly, for the reasons set out in this judgment, I decline to strike out the Claimant's claim against Mr Brown. This is despite finding that the Claimant is guilty of abuse of process, in respect of its failure to prosecute its claim following the CMC held in July 2019. Instead, a more appropriate sanction is to order the Claimant to provide security for Mr Brown's costs of defending the claim, and to disallow the Claimant recovering any costs incurred in the period September 2019 to September 2022. I will hear the parties as to the precise sum to be provided by way of security for costs at a hearing to be fixed to deal with consequential matters.

89. Further, it is my intention that the hearing to deal with consequential matters should also be an opportunity to provide further case management directions with regard to the claim. The Claimant should provide Mr Brown with draft Amended Particulars of Claim in advance of that hearing.