IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

No. CL-2023-000286

NCN: [2024] EWHC 494 (Comm)

Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Tuesday, 27 February 2024

Before:

MR JUSTICE JACOBS

B E T W E E N :

CHRISTINE BANGS

Claimant

-and-

(1) F M CONWAY LIMITED
(2) WESTMINSTER CITY COUNCIL

Defendants

MS C BURZIO (instructed by **Richard Nelson LLP**) appeared on behalf of the **Claimant.**

MS E BOON (instructed by **DWF Law LLP**) appeared on behalf of the **First Defendant.**

MR A BURRELL (instructed by **DAC Beachcroft**) appeared on behalf of the **Second Defendant.**

J U D G M E N T

(Transcript prepared from poor quality recording)

MR JUSTICE JACOBS:

1 The key application in this case is an application by the claimant to extend time for service of the particulars of claim. The claim form was served on the first defendant and the second defendant on 26 May 2023.

2 The case was started in the Commercial Court, although it is not an appropriate case for this court. The rules in the Commercial Court require service within 28 days of acknowledgment of service by defendants. That is slightly different to the normal CPR rules, which require particulars of claim to be served within 28 days after service of the claim form. At all events, particulars of claim should have been served on 6 July 2023 on the first defendant and on 7 July 2023 on the second defendant, that being 28 days after each of them had acknowledged service.

3 Particulars of claim were not served at that time and this led to an application by the first defendant to strike out the claim on the basis of a failure to provide particulars of claim. That strike-out application came before Bright J on the papers and he granted it. That led to a number of applications. There was an application, which is the principal application with which I am concerned, by the claimant to extend time for service of particulars of claim. There was also an application by the second defendant, to strike out the claim and thereby to obtain the same relief as the first defendant had obtained. The hearing of those applications comes before me today.

4 The background to the case is, in summary, as follows. The claimant lives in Upper Wimpole Street, W1 in premises which had what are called “vaults”. The second defendant is the relevant highways authority and it instructed the first defendant, as a contractor, to undertake certain resurfacing work to Upper Wimpole Street and the surrounding areas. That work was due to take place between 9 to 13 March 2020.

5 The claimant alleges that she learned of the proposed works through a flyer and, prior to the works, there was an inspection of her property by an individual who was the agent for one or other of the defendants. The question of whose agent that person was will be litigated in due course in this trial, if it takes place. But at all events, the claimant’s case is that she was advised that her property was adequately waterproofed and the agent raised no concerns. The works were then carried out. There was, on the claimant’s case severe vibration, noise and disturbance and then the claimant discovered some cracking on 12 March 2020. On 19 March 2020, some six days after the works and after the first rainfall, there were further cracks which started to appear and water penetrated the vault cavity. The claimant’s case is that, since that time, damage has continued to worsen and deteriorate further.

6 The claimant wishes to bring proceedings for various losses which have been incurred in consequence of those events and the claim is now advanced at a sum in excess of £200,000. It appears, and it is the first defendant’s case, that, at an earlier stage of the discussions between the parties, the claim which was being advanced was much lower and was around 15 per cent of that sum.

7 Before I summarise the chronology, one feature of the background on which the claimant places particular emphasis is an admission which was made on the part of the first defendant through the loss adjuster whom they, or their insurers, had appointed. It is very common in situations such as that which arises in the claim, for a loss adjuster to be appointed by

insurers, and the evidence indicates that the first defendant was, indeed, insured and that a loss adjuster was appointed to look into the claimant's claim on their behalf.

8 On 6 October 2020, an e-mail was sent by the loss adjuster, Mr Biggleston at Sedgwicks, and he said in his e-mail:

> "I have today returned from annual leave and confirm that I am the loss adjuster appointed by the insurer of FM Conway in relation to your claim for property damage. I note the e-mail exchanges between yourself and Mr Harnett of FM Conway. We must advise that legal liability for the accidental damage caused to your property is conceded and this will not be raised in the future. The public liability policy held by FM Conway is underwritten on an indemnity basis. This means settlement will take account of any prior wear and tear and depreciation. It is not on a new for old basis."

9 Discussions then proceeded over a period of time but, on 19 April 2021, the loss adjuster wrote a detailed e-mail addressing various aspects of the claim that was being made, which by then had increased. The principal points were made in relation to quantum, but under the heading "Liability", the loss adjuster said:

> "The admission of liability had been made in an effort to narrow the issues between the parties so that constructive dialogue could take place, with the parties cooperating to find a resolution. However, in order to progress the matter evidence was required from your client in support of the losses she is claiming."

The loss adjuster then referred to the fact that the amounts had increased significantly and the relevant part of his e-mail concluded as follows:

> "In matters such as this, we would expect to prospective claimant to notify their home insurer of the damage and seek redress accordingly through complying with the relevant pre-action protocol and, if required, in subsequent court proceedings. Accordingly, in the light of your client's unjustified complaints and unwillingness to adequately evidence her claim, whilst our client remains willing to engage in pre-action correspondence in accordance with its obligations under the Civil Procedure Rules, the admission of liability is hereby withdrawn."

10 There was in that e-mail, as far as I can see, no factual basis given for the withdrawal of the admission of liability; i.e. no factual basis which related to the conduct of the first defendant which had caused the damage. It was thus not suggested that some new facts had come to light which indicated that the first defendant had not in fact been negligent in relation to the works carried out and the infliction of damage on the claimant. It was also not suggested that there had been some error or mistake, on the part of the loss adjuster, in admitting liability.

11 It is now common ground between counsel that the first defendant does not in fact need the court's permission to withdraw the admission. That is the effect of CPR Part 14, as it stood prior to changes which were made in October 2023. There was argument before me as to whether permission would be required for the withdrawal of the admission. But, as I understand it, and in accordance with the submissions which have been made to me on the basis of CPR Part 14 by Ms Boon, it is now clear that permission to withdraw the admission is not required. In my view, however (and as discussed further below), it does not follow

that the admission is irrelevant to the question of whether the court should give relief from sanctions by way of granting permission to extend time for service of the particulars of claim.

12 I now turn to summarise the litigation background to the present proceedings. The claim form in these proceedings was issued on 24 May 2023 and it was served by e-mail on the solicitors for the first defendant's solicitors ("DWF") on 26 May, and on the same day it was served on the second defendant directly, again by e-mail. The second defendant has subsequently instructed solicitors ("DAC Beachcroft"). There were acknowledgements of service on behalf of the first defendant and the second defendant on 8 and 9 June 2023 respectively. That meant, as I have indicated earlier, that, on 6 July 2023, the claimant's particulars of claim should have been served on the first defendant and particulars of claim should have been served on the second defendant on the following day, 7 July 2023.

13 On 7 July 2023, no particulars of claim were served and DWF, acting for the first defendant told the claimant's solicitor that the particulars of claim had not been served and they should have been served. That did not provoke any reaction from the claimant's solicitor. She has subsequently served two witness statements in these proceedings. She has explained that, at around that time, albeit somewhat later than 7 July 2023, there was a family bereavement which affected her ability to work and, in fact, she was out of the office between 17 and 24 July. That was in the first witness statement of Louise Clair Johal of the claimant's solicitors, Richard Nelson LLP.

14 No particulars of claim having been served, the first defendant decided to apply to strike out the claim on the basis of the failure to serve them. That application was made on 21 July 2023. It was dealt with on the papers by Bright J, who made an order on 27 July 2023 which struck out the claim against the first defendant. Since the application had been dealt with on the papers and without a hearing, Bright J, as is usual, said that there could be an application to set aside or vary his order, such application to be made within seven days of service. Such an application was, indeed, in due course, made.

15 On 3 August 2023, the solicitors for the second defendant, DAC Beachcroft, decided to follow suit and made an application of their own to strike out the claim for failure to provide the particulars of claim. That application was, in due course, filed with the court, albeit some days later.

16 On 4 August 2023, the claimant reacted to Bright J's order by applying to set it aside. The application made by the claimant on that date was directed, as I read it, to the position of the first defendant which had obtained the strike-out order. There should have been an application, as against the second defendant, for relief from sanctions on account of the claimant's failure to serve particulars of claim when due. There is nothing to suggest from the material which I have seen that the claimant's application to set it aside was served on the second defendant at that time, or, indeed, at any other time. This reflects the fact that the application was indeed directed to the position of the first defendant.

17 On 9 August 2023, the second defendant's application of 1 August 2023 was filed at court. That was the application to strike out the claim on the basis of the failure to provide the particulars of claim.

18 On 10 August 2023, steps were taken to serve the claim form and the particulars of claim on DAC Beachcroft. The particulars of claim were sent to DAC Beachcroft. However, they do not appear to have been served on the first defendants at that time. However, on 15 August

2023, there was an e-mail which was sent by Ms Johal to the solicitors for the first defendant and that enclosed the application by the claimant to set aside the order of Bright J. It also included as an attachment the particulars of claim which had by that time been served on the second defendant. The e-mail is a curious one because it refers to the particulars of claim, and it attaches them, and it refers to the fact that they had previously been filed on CE-File (the court's electronic filing system), but there was nothing in the e-mail itself which indicated that the particulars of claim were thereby being formally served on the first defendant.

19 I consider that the position is that they were not formally served at that time, but I also take the view that it was clear to the first defendant's solicitors that those were the particulars of claim which were applicable to both the first and second defendants. Accordingly, there was no doubt as to the details of the claim that was being made on both defendants.

20 It was at a rather later stage, on 22 September 2023, that the claimant's solicitors appear to have woken up to the fact they had not actually served the particulars of claim on the first defendant, and it was on that day that, by the way of service, the particulars of claim were sent to DWF.

21 The upshot of all of that is that there are, as I have said, two related applications which I am considering. The primary application, as I have indicated, is an application by the claimant to extend time for service of particulars of claim vis-à-vis both the first defendant and the second defendant. It is now accepted on behalf of the claimant that an extension of time is indeed needed, because the particulars should have been served in July 2023, and it is also common ground that the relevant principles are those that are set out in well-known *Denton* decision, to which I will refer in due course.

22 At the same time, I am also dealing with the related application by the second defendant to strike out the claim, but it seems to me that that does not raise any separate issues from the claimant's own application for an extension of time. If the claimant's application for an extension of time vis-à-vis the second defendant succeeds, then the strike- out application will necessarily fail. Equally, if, applying the relevant *Denton* principles (*Denton v T H White* [2014] EWCA Civ 906) , the application by the claimant vis-à-vis the second defendant does not succeed, then it seems to me that a strike-out is inevitable.

23 That, therefore, is the litigation background to the proceedings and the steps which have been hitherto taken.

24 The relevant principles which apply in the present context have been discussed in a number of cases and I found particularly helpful the recent summary of the position in a decision of Henshaw J in this court of *Excotek Limited v City Air Express Ltd (In Liquidation) & Anor.* [2021] EWHC 2615 (Comm). That judgment summarises all of the more recent authorities.

25 The central authority that is relevant is, of course, the decision in *Denton* and I take the following summary of the case from another decision of the Court of Appeal in *R (on the application of Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633. That is a case referred to in the *White Book* paragraph 3.9.20, under the heading "Whether the defaulting party's claim or defence has merit", to which I was referred in the course of argument. The relevant principles are, in summary, as follows, it being common ground that this is a case where the claimant needs to apply for leave for sanctions:

> '24. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and

> significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second or third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]"."

Factors (a) and (b) are the well-known factors which are set out in CPR 3.9(1) and refer to the need for litigation to be conducted efficiently and at proportionate case, and also the need to enforce compliance with rules.

26 One particular issue has been debated in argument before me, and that is the relevance or otherwise of the admission to which I have referred and which, as is now common ground, the first defendant is entitled to withdraw. On behalf of the first defendant, Ms Boon, who has presented the case, if I may say so, extremely well on behalf of her client, has submitted to me in forceful terms that anything said in relation to that admission is wholly irrelevant. She has referred me to the discussion in para.3.9.20 of the *White Book* under the heading "Whether the defaulting party's claim or defence has merit". That discussion refers to two cases, one of which is a Supreme Court case, *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd* [2014] UKSC 64, and the second case is the *Hysaj* case to which I have already referred. The Supreme Court case was not in fact a case involving the application of the *Denton* principles. It was a case where there had been a failure to comply with the unless orders which had been imposed by the court. Nevertheless, what is said in that case is plainly of relevance to the debate as to the status or relevance of the admission.

27 The legal position in that regard is, as it seems to me, addressed in the judgment in *Hysaj* in paras.46 and 47. In para.46, under the heading "The merits", Moore-Bick LJ, delivering the leading judgment of the court, in the context of applications for extension time for permission to appeal, (which he said earlier in the judgment were governed by the *Denton* principles), said as follows:

> "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties' incurring substantial costs. It in most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process. In most cases the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them. Here too a robust exercise of the jurisdiction in relation to costs is appropriate in order to discourage those who would otherwise seek to impress the court with the strength of their cases."

28 He then went on to say that support for that conclusion can be found in the recent decision of the Supreme Court, and he referred, in paragraph [47], to *Global Torch Ltd v Apex Global Management Ltd No.2*. That is the same Supreme Court case, with a different name, as that to which I have already referred. Moore-Bick LJ referred to the judgment of Lord Neuberger, with whom the other members of the court agreed. Lord Neuberger said:

"...even in a case of striking out, the merits of the claim or defence were relevant only when they were so strong that there was no real answer to them, in other words, in cases where an application for summary judgment could be expected to succeed."

29 Having considered both of those cases, I do not accept that the admission that was previously made by the loss adjuster on behalf of the first defendant can be disregarded as irrelevant. The judgment of Moore-Bick LJ in the Court of Appeal, in the context of the application of the *Denton* principles, indicates that it is permissible, when those principles are being considered and the court is concerned with all the circumstances of the case, to pay regard to whether a party's case is very strong or very weak, provided that can be seen without much investigation. That is the point which he was making in paragraph [46]. He does not go as far, in the context of the application of the *Denton* principles, to say that it would be necessary for a summary judgment application to succeed.

30 It seems to me that, where an admission has been made after consideration of the relevant facts by a loss adjuster on behalf of an insurer, instructed or appointed on behalf of the defendant insured, that admission may have some potential significance in considering "all the circumstances of the case", because it may give an indication as to whether the case is very strong.

31 It does seem to me that loss adjusters, who are regularly appointed in situations such as the present, do not lightly make admissions in circumstances where there is a strong or realistic case to be advanced that there was no liability on behalf of the insured. That is not, of course, something which, when considering "all the circumstances of the case", is necessarily decisive in itself. But it can be a significant factor, in particular in circumstances where the withdrawal of the admission has not been accompanied by a factual explanation as to why there is now perceived to be a defence on liability, and where the factual basis of any such defence is not apparent from any materials before the court. It seems to me that the court is entitled, in accordance with Moore-Bick LJ's approach, to look at an admission in the context of considering whether a case is very strong or very weak, albeit that it is inappropriate to embark on a detailed investigation of the merits.

32 Another issue which was debated before me was the extent to which it is relevant to pay regard to the possibility that the effect of the strike-out would be to prevent the case from ever being advanced in the future. I agree with Ms Burzio that the question of whether or not a claim can be advanced in the future may arise in different contexts, for example, limitation, which does not appear to be an issue in the present case, or abuse of process. The latter may potentially be an issue in the present case if the present case were to be struck out and an attempt was made to start fresh proceedings.

33 The point was considered in the most recent decision of Henshaw J, in particular in para.77. He said, and I agree, in the context of limitation, as follows:

"77. ... Conversely, the possibility that refusal to grant relief from sanctions will result in a claim for some £770,000 becoming time barred is relevant when considering the proportionality of the court's response, bearing in mind the point made by Lord Clarke in *Summers v Fairclough Homes*_(para.46 above) that striking out is a draconian sanction of last resort."

The reference to para.46 and Lord Clarke is to the following statement:

> "The draconian step of striking a claim out is always a last resort, *a fortiori* where to do so would deprive the claimant of a substantive right to which the court had held that he was entitled after a fair trial."

34 It seems to me that the court should have in mind, although I accept it is not in itself a decisive factor, the possibility that the effect of a strike-out would be to expose the claimant to the further expense of a further strike-out application on the basis of abuse of process in the event that further proceedings were commenced; and, if that application were to be successful, to the possible loss of a claim forever.

35 Against that background, I turn to the various factors which are in play as far as the *Denton* principles are concerned. I will begin by dealing with serious breach and with whether there is a good reason for the breach. I will deal with that as far as it concerns both defendants, although when comes to looking at the circumstances of the case I will look at each defendant separately.

36 As far as serious breach is concerned, it appears to be accepted by Ms Burzio, on behalf of the claimant, that there was a serious breach in terms of a failure to provide particulars of claim on time. Reliance was placed by the defendants on the fact that there is some significant period before particulars of claim were actually served on one or both of them. I will come back to the detail of that point in due course, when considering the first defendant's position. But there is no dispute that there was a serious breach in this case and Ms Burzio, on behalf of the claimant, does not seek to downplay it.

37 The next question is whether there was some good reason for the breach. I have read the two witness statements of Ms Johal and I am firmly of the view that no good reason for the breach has been shown in this case. There appears, looking at those witness statements and looking at the correspondence as a whole, to have been a considerable misapprehension as to not simply the rules which apply in the Commercial Court but also, more broadly, rules which apply under the CPR. The position in the Commercial Courts is that service of particulars of claim is required within 28 days after acknowledgment of service. That is a small change from the CPR rules which gave such a period after service of the claim form. But, on any view, it requires reasonably prompt service of particulars of claim. The claimant failed to do this and it failed to do it even though, at the very moment when particulars of claim should have been served on the 6 or 7 July, the first defendant's solicitors pointed out that there had been a failure to serve. When one looks at the explanations given for that failure, in my view, they have no real substance.

38 One point which has made by Ms Johal in her witness statement is that she was hoping to engage in settlement discussions with the defendants and that the real purpose of serving the claim form or issuing the claim form was to show to the defendants, contrary to what they may have previously thought, that the claimant was in a position to serve proceedings and was going to be serious about it.

39 It is often the case that parties decide to engage in certain discussions after the service of a claim form. However, in those situations, it is incumbent upon the party who wishes not to serve particulars of claim to obtain the other party's consent to an extension of time, or to make an application to the court. In the Commercial Court, judges are frequently presented with "paper" applications (i.e. applications for a decision on the documents filed using the CE filing system) where parties have agreed an extension of time in order to facilitate settlement discussions. There is nothing, in my view, which might be good reason for a claimant not to serve simply because there was a hope that there might be settlement

discussions. There may have been that hope, but it is essential, if the claimant wished to delay service, to make sure that an appropriate consent order was given to the court, or an application made.

40 Another point which was raised in the early evidence of Ms Johal is a point which ultimately has not been argued (quite sensibly) by Ms Burzio. The point that was being ventilated was that there had not in fact been any valid and proper service of the proceedings in May 2023. It was suggested that there was not really an intention to serve, and that in essence the claim form was only being provided for information purposes. Ms Burzio submitted that there may have been some misunderstanding on the part of her solicitors, arising from the fact that there had been no certificate of service in relation to at least one of the defendants. It does not seem to me that any point along those lines has any substance or provides a good reason for the delay. The proceedings were undoubtedly served on both defendants in May 2023, and the contrary is not arguable.

41 The only other point that was made was that Ms Johal had, unfortunately, suffered a bereavement. However, that bereavement explains her absence between 17 and 24 July 2023; it does not explain the failure to serve particulars of claim before then, in particular after the reminder from DWF. There is authority as well that if a solicitor is working in a substantial practice (and here the claimant's solicitors have, I think, approximately 55 solicitors), then a bereavement or matters of that kind do not provide a good reason; because there are other people within the firm who should pick up the pieces if a particular person is unable to act temporarily.

42 In all, it does seem to me, when I look at the case as a whole, that the approach which has been taken by the claimant's solicitors, really throughout, was (to say the least) casual. That is illustrated by the fact that he claimant's solicitors effectively ignored DWF's point, made in correspondence in July, that the particulars of claim should have been served. It is also illustrated by the fact that, as I have already indicated, the application to extend time was only made, as I read the documents, in relation to the first defendants, those defendants having obtained their strike-out. It also seems to me relevant, as far as the casual nature of the approach of the claimant's solicitors is concerned, that the particulars of claim were not formally served on DWF until 22 September 2023. That was when the claim form and particulars were posted to the first defendant. It is true that the first defendant's solicitors were aware of it on 15 August 2023, but there was then nothing in the nature of formal service. So, I have no doubt that, overall, there has been no good reason for the delay which has occurred.

43 I, therefore, turn to all the circumstances of the case. In this context, I consider that I ought to consider the positions of the first defendant and second defendant separately.

44 Taking the first defendant first, a number of points were made to me by Ms Boon on their behalf in the context of considering all the circumstances of the case. It does seem to me that many of these points are points of substance which certainly are to be weighed in the balance. Her first point was that there was a failure to serve the particulars of claim until 22 September 2023. That was 81 days after the deadline and she submits that that is a long time. I agree. I do think it is relevant, however, when considering all the circumstances of the case, to take into account the fact that the first defendant was fully aware of the particulars of claim much earlier in the piece, on 15 August 2023, albeit not formally served on that day which is itself much later than the date when should have been served. As I have already indicated, an e-mail was sent which contained the application to set aside the order of Bright J and enclosed Ms Johal's witness statement. It also referred to particulars of claim

on the CE-File and attached a copy for records. In my view, that mitigates the delay certainly between 15 August and 22 September, albeit that that does not mitigate the delay which had occurred prior to that time.

45 Secondly, Ms Boon says, and I think there is some force in this point, that this is not a case where, on the claimant's side, there was a mistake which was fully and frankly admitted, at least for some time. The argument in Ms Johal's first witness statement sought in many ways to justify what had happened. The point that was advanced at that stage was that valid service had not in fact taken place in May 2023, and therefore, the time had not in fact started to run. That was a point made not just in the witness statement but also in the application notice as well. It was only on 5 October 2023 that, in the correspondence, there was a concession, or something close to it, that service had in fact been effectively carried out in May 2023. That e-mail acknowledged that the first defendant would have understood that it had actually been served back in May 2023. It was, even then, not wholly clear as to whether the point on service was still being run, and certainly the second defendant to some extent addressed that point in its skeleton argument.

46 Thirdly, and again I consider this is a significant point in relation to all the circumstances of the case, Ms Boon was able to refer me to the fact that, on 6 July 2023, the first defendant's solicitors had pointed out that the particulars of claim should have been served and had not been served. This did not provoke any immediate action on the part of the claimant and, indeed, when the first defendant's application was made to Bright J, it did not provoke immediate reaction either.

47 Next, Ms Boon referred me to the fact that CPR 3.9 requires the court to pay regard to the need for litigation to be conducted efficiently and at proportionate cost, and to enforce compliance with the rules, practice directions and orders. In all cases where there is an application for relief against sanctions those are important factors, and I agree that they are here too.

48 She also relied on other aspects of alleged non-compliance with the rules, in particular that the claim form when originally served did not include a response pack and that initial disclosure had not been given in accordance with the rules which now apply in the Commercial Court. It did not seem to me that those particular points really added to the main point about the lack of service of particulars of claim and there is some dispute as to the extent to which initial disclosure was in fact provided. So, I do not consider that those points were of any real significance beyond the points to which I have already referred.

49 On the other side of the coin and in the overall mix of "all the circumstances", I must consider factors to which Ms Burzio, on behalf the claimant, has referred. The particular point on which she has placed significant reliance is the admission that was made at an early stage and only withdrawn some six months or so after it had been made. I should say that if the facts to which I have previously referred stood alone, and I did not have the admission and certain other matters relating to the admission, I would have little doubt that the extension of time should be refused. So, I consider that the admission and those other matters are potentially important points in relation to the consideration of all the circumstances of the case.

50 It does seem to me that, in circumstances where there was an admission at an early stage, combined with the fact that there is, on the material before me, no factual basis (relating to the liability of the first defendant) which enabled me to understand why the admission has

been withdrawn, and also no explanation of what the factual defence actually is on liability, those are significant matters in the context of considering the circumstances of the case.

51 Ms Boon had some criticism of the particulars of claim, namely the quality of their drafting and the particularistion. But, as far as I can see, they are very well particularised, at least as far as liability is concerned, and it is really not difficult to see the nature of the case advanced. The substance of that case is that: the claimant's premises were, prior to the works carried out by the first defendant, in a sound condition, as recognised by the individual who came round prior to the work starting; that a considerable amount of work was then carried out; and this resulted in cracks and subsequent leaks when it rained; and that the first defendant had failed to exercise reasonable care in various respects. It is fair to say that quantum is not particularised properly in the particulars of claim and there will no doubt be a significant dispute on quantum. But, on liability, it seems to me that, if one combines the fact of the admission, the fact that the factual basis for withdrawing the admission had not been explained, the nature of the factual case advanced in the particulars of claim, and the fact that none of the evidence explains what the defence is on liability, this is a case where, at least on the present material, the claimant's case does appear to be very strong.

52 It is, in my view, an unusual feature of the case that there was some time ago an admission of liability and a very clear statement that this would not be disputed. The admission was made by what I understand to be an experienced loss adjuster, who would have been, no doubt, looking into the facts carefully, at a time when they were relatively fresh in everyone's mind. As I indicated, there is nothing in the papers which indicates what the factual basis is for the withdrawal of the admission, except that there was plainly concern that quantum had increased significantly, and so what looked like a relatively claim of around £30,000 had grown to a claim in excess of £200,000. To my mind, that does not provide a factual basis for the withdrawal of the admission, nor explain what the defence on liability actually would be.

53 Accordingly, it seems to me that the court is being asked to strike out a claim where, as far as the first defendant is concerned, liability was previously admitted, and where there are the other features to which I have referred. There is no explanation as to what defence on liability will be advanced, and nothing which suggests that the withdrawal of the admission had any factual basis, in terms of a defence which is now to be advanced. It is possible to do no more than to speculate as to what the defence on liability might be. On the present materials it appears to be a case, as far as the claimant is concerned, which is very strong. As per Moore-Bick LJ's judgment, that is a factor which is one which is to be put in the mix.

54 The second factor which is in the mix is the possibility that, if further proceedings were to be started following the strike out of the existing claim, there would be an application to strike out the fresh proceedings as an abuse of process. Ms Boon, very fairly, was not in a position to offer any undertaking that her client would not seek to do that, although she identified that there would be some difficulty with such a strike-out application. I proceed on the basis that this is a point which might well be taken in relation to fresh proceedings. It is true that, in view of the summary of the authorities referred to in the *White Book* paragraph 3.4.8, the case to strike out is not particularly strong; particularly because this first action, on the present hypothesis, would not have been dismissed for an abuse of process. Nevertheless, the claimant, who as I said has what appears to be a very strong case on liability, would be faced with more expense and more satellite litigation as to whether her

subsequent case should be struck out, and at least a possibility that an argument would be successfully deployed to that end. It does not seem to me that that is a prospect which, in the context of the weighing exercise that is required under the *Denton* principles, the court should disregard or treat with equanimity. I refer in that context to Henshaw J's judgment at para.77 (see above).

55 In my view, when the two factors to which I have referred are put in the mix, in particular the admission and the related matters, the circumstances in the present case are such as to justify the extension which is sought and setting aside of the order, notwithstanding the points which Ms Boon has raised.

56 The second factor, namely the possibility of a fresh action being struck out, would not, on its own, be sufficient. But when taken in conjunction with the admission and that the present claim appears very strong on liability, it would in my view be unjust for the claimant to face the prospect of restarting and having to fight abuse arguments in due course.

57 So, I am prepared to grant the extension which the claimant seeks against the first defendant and, to that extent, set aside the order of Bright J.

58 As far as the second defendant is concerned, the position is, in my view, different. The claimant does not have the benefit of any admission. The claimant is not in a position, at least in my view on the present material, to say that she had a very strong claim against the second defendant. The second defendant has put in a defence. Suffice it to say that, having read that defence, there are points in there that which may well have considerable merit: for example, the arguments that, in substance, this was work which had been carried out by the first defendant, who had been reasonably selected to do that work by the second defendant. I say no more about the merits of the case against the second defendant except to say that it is by no means an obvious case that can be advanced.

59 It does seem to me that the position, therefore, is that the claim does not, vis-à-vis the second defendant, have the advantage of the points which have been submitted as far as the first defendant is concerned. The second defendant has most of the points which were made by Ms Boon on behalf of the first defendant, which, as I have indicated, should be weighed in the balance, and the claimant does not have the strong countervailing points which ultimately persuaded me to grant an extension vis-à-vis the first defendant.

60 It also seems to me that the striking out of the claim against the second defendant may, in all the circumstances, be appropriate for a separate reason. It appears to me that there was not a great deal of thought given, before commencing the present proceedings, to the claim which was actually made and articulated against both of the defendants (and in particular the second defendant), and that is one of the reasons why no particulars of claim were available to be served when the claim form was itself served. The strike-out of the claim against second defendant may have the advantage of focusing the claimant and her adviser's minds on whether it is really necessary to proceed against the second defendant at all.

61 There was some discussion in the course of argument as to whether realistically there were any circumstances in which the claim against the first defendant would fail but a claim against the second defendant would succeed. It seemed to me to be very difficult to identify any such circumstances, and that the value of an additional claim against the second defendant was not at all apparent. This is not a case, as far as I can see, where there is any risk of insolvency on the part of the first defendant, which is insured, and which might explain the need to join the second defendant.

62 So, for those reasons, the claimant's application against the first defendant succeeds but the application against the second defendant fails.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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