Neutral Citation Number: [2023] EWHC 166 (TCC)

Claim No: HT-2017-000175

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: Friday, 27th January 2023

Before:

MR. JUSTICE EYRE

- -

Between:

MORGAN SINDALL CONSTRUCTION AND INFRASTRUCTURE LIMITED	**Claimant**
- and -	
(1) CAPITA PROPERTY AND INFRASTRUCTURE (STRUCTURES) LIMITED **(2) SABRE STRUCTURES LIMITED**	**Defendants**

- -
- -

Neil Hext KC (instructed by **Dentons UKMEA LLP**) appeared for the **Claimant.**

Siân Mirchandani KC and **Philip Ahlquist** (instructed by **Weightmans LLP)** appeared for the First Defendant**.**

Hearing dates: 24th and 27th January 2023

- -

Approved Judgment

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MR JUSTICE EYRE :

1. This is the First Defendant's application for the claim to be struck out as an abuse of process: the alleged abuse taking the form of what is known as "warehousing".

The Nature of the Proceedings.

2. The Claimant is a design and build contractor which was engaged to build two new stadia at the Old Trafford Cricket Ground for Lancashire County Cricket Club. It engaged the First Defendant as consulting engineer. The formal engagement was signed or executed in September 2012. In fact, however, the First Defendant had been involved in the project since 2008 and had begun its role, for relevant purposes, in 2011 with the crucial events taking place in 2011.

3. The Claimant subcontracted part of the design and build work to the Second Defendant, a steelwork contractor. The design produced by the Second Defendant was said to be defective and substantial expenditure was incurred as a consequence by the Claimant resulting in a claim for, in round terms, £10 million.

4. The claim against the First Defendant in summary is this. It is said to be in breach of its obligations in failing to review Sabre (the Second Defendant)'s designs adequately and/or to warn sufficiently strongly and sufficiently early of the defects in Sabre's design.

5. The First Defendant says the claim is misconceived. The problems which resulted were not caused by the First Defendant but came from the Claimant's engagement of Sabre and/or the Claimant's actions in choosing not to follow or adopt the design provided by the First Defendant but instead to adopt a "value engineered" course and to use Sabre's design. The First Defendant says it provided warnings but was only able to do so to the extent that it was provided with information by the Claimant and that it is not responsible where it was not provided with such information and/or not provided with it early enough. In addition, it says that the alleged losses were not caused by any failings on the part of the First Defendant but would have resulted anyway from the engagement of Sabre. The First Defendant also alleges contributory negligence and says that such liability as it might have is limited to the sum of £5 million.

6. In reply the Claimant takes issue with the First Defendant's position as to the extent of the latter's duty and says that such warnings as were given by the First Defendant were insufficient to discharge its duty.

7. The Second Defendant was in administration. That is believed now to have ended but the company is insolvent and is in limbo, effectively awaiting dissolution. The Claimant obtained default judgment against the Second Defendant. The Claimant has also commenced proceedings against Aviva, the Second Defendant's insurers, contending that those insurers are liable under the Third Parties (Rights Against Insurers) Act 1930. Aviva denies liability in those proceedings saying that it validly avoided Sabre's policy. It also puts the Claimant to proof of Sabre's liability and says that the liability under the insurance cover was limited to £5 million. There is no dispute in those proceedings that the liability was limited to £5 million per claim although there is some difference of view as to how that operates and, in particular, as to how many claims are covered by the proceedings. However, it is clear that on any view there will

be a shortfall in the recovery against Aviva such that even if the claim against Aviva succeeds the Claimant will recover less than the sum of £10 million which is said to be the amount of its loss.

The Abuse Allegation in outline.

8. The First Defendant says that there has been delay and inaction on the part of the Claimant both before the commencement of the proceedings and during the course of the proceedings. It says that is because the Claimant commenced the proceedings with no intention of pursuing them or at least because in the course of the proceedings the Claimant was keeping them on the back burner while preferring to pursue other routes and that it has put the proceedings on hold during the course of this action. As the submissions developed it became clear that the core allegation is the putting of the claim on hold during the course of the proceedings. The First Defendant says that this conduct was abusive and that it has caused prejudice to the First Defendant. Strike-out of the claim, the First Defendant says, is appropriate even though the Claimant has now brought the claim to life and is now seeking to pursue the claim.

9. The Claimant contends that it has intended throughout to pursue the claim. It accepts that at times, the progress of the action has not been as expeditious as it should have been. To the extent that the proceedings have been put on hold that was because it was seeking to combine this action with the action against Aviva and to bring this action and that action into line so they could operate in tandem. As a consequence, it says there is no abuse. As a fallback position Mr. Hext KC, for the Claimant, says that the sanction of strike-out should not be imposed as being disproportionate.

The Applicable Law.

10. Warehousing of a claim can be an abuse of process justifying the striking out of a claim even in the absence of prejudice to a defendant but the court needs to consider the circumstances in which such abuse can arise and where it is appropriate to strike out. It is not every instance of putting an action on hold which will amount to abuse, let alone one which would result in striking out being appropriate. There is some scope for regarding the term "warehousing" as inappropriate and it is necessary to remember that it is not a technical term. Rather it is a useful shorthand description of a range of conduct where an action is deliberately not being pursued.

11. The starting point when considering the law in respect of this form of abuse is the decision of the House of Lords in the case of *Grovit v Doctor* [1997] 1 WLR 640.

12. The lead speech was given by Lord Woolf, who explained and expanded on the approach which was to be taken some six or so months later in *Arbuthnot Latham Bank v Trafalgar Holdings Ltd* [1998] 1 WLR 1426. In particular, at page 1437B, he said this:

> "It has been the unofficial practice of banks and others who are faced with a multitude of debtors from whom they are seeking to recover moneys to initiate a great many actions and then select which of those proceedings to pursue at any particular time. This practice should cease in so far as it is taking place without the consent of the court or other parties. If there is good reason for

> doing so the court can make the appropriate directions. Whereas hitherto it may have been arguable that for a party on its own initiative to, in effect, 'warehouse' proceedings until it is convenient to pursue them does not constitute an abuse of process, when hereafter this happens this will no longer be the practice. It leads to stale proceedings which bring the litigation process into disrespect."

13. Then a little further on, he added:

> "If, subject to any directions of the court, proceedings are not intended to be pursued in accordance with the rules they should not be brought."

14. The state of the authorities following from that and the decision of the Court of Appeal in *Asturion Foundation v Alibrahim* [2020] EWCA (Civ) 32; [2021] WLR 1627 was summarised by HH Judge Pearce, sitting as a judge of the High Court, in the case of *Alfozan v Quastel Midgen* [2022] EWHC (Comm) 66. Judge Pearce summarised the relevant law at [9] - [13] and I respectfully agree with and adopt his summary. In particular, drawing on the position in *Asturion* he said this at [12], referring to warehousing:

> "This type of case was considered by Arnold LJ in two cases from which the following principles can be drawn:
>
> > "(a) It may be an abuse of process for the claimant to 'warehouse' a claim by taking a decision not to pursue it for a substantial period of time, even if the claimant subsequently decides to pursue it (*Solland International Limited v Clifford Harris* [2015] EWHC 3295 or even is intent on pursuing the claim, albeit at some later time (*Asturion Fondation v Alibrahim* [2021] 1 WLR 617);
> >
> > "(b) However, mere delay in pursuing a claim, however inordinate and inexcusable, does not, without more, constitute an abuse of process (*Asturion Fondation v Alibrahim*);
> >
> > "(c) In deciding whether to strike out a claim for 'warehousing' as an abuse of the court's process, it is necessary for the court to undertake a two-stage analysis, considering first whether the conduct is an abuse of process and second whether, if it is, it is proportionate to strike out on the basis (*Asturion Fondation v Alibrahim*)."

15. At [13] Judge Pearce said:

> "In considering the issue of proportionality, the court should have regard to the various powers in its armoury to avoid unnecessary delay."

16. The judge then quoted from the decision of Mr Philip Marshall QC, sitting as a deputy High Court Judge, in the *Quaradeghini v Mishcon de Reya* [2019] EWHC 3523. There Mr. Marshall pointed out that striking out a claim was a remedy of last resort and drew attention to the other remedies that are available.

17. At [15] Judge Pearce said that it was clear from that judgment and from that of Nicklin J in *London Borough of Havering v Persons Unknown* that:

> "It is important to bear in mind the court's powers to take steps short of striking out the claim when considering the exercise of the power to strike out once an abuse of process is established. But the availability of such powers is not relevant to the prior issue identified by Arnold LJ in *Asturion Fondation v Alibrahim* as to whether the conduct amounts to abuse of process. Establishing whether the conduct is an abuse involves examining the state of mind of the claimant, not the powers available to the court to change that state of mind.
>
> "16. Further, even in respect of the exercise of the judgment as to whether to strike out the claim, the availability of alternative powers can only be one factor."

18. Then, Judge Pearce expanded on that by reference to the approach set out by Lord Woolf in *Arbuthnot Latham Bank.*

19. At [17], referring to *Asiansky Television plc v Bayer-Rosin* [2001] EWCA Civ 1792 Judge Pearce pointed out that the court must also bear in mind that the obligation to progress litigation lies on all parties not simply the claimant.

20. At [38], dealing with the facts of the particular case before him, Judge Pearce described the picture there as being of almost complete inactivity by the claimant beyond the basics of issuing and serving the claim. He added that

> "it is of course implicit in any application to strike out of this kind that the claim has been issued and served, had it not no strike out would be necessary or the application would be brought on different grounds. So, those basics provide little assistance to the Claimant where other evidence of inactivity is present."

21. At [39] Judge Pearce made the point that the failure there by the defendant (seeking strike out in that case) of its own motion to seek a case management conference was a point which had little weight saying:

> "If the Claimant is in fact guilty of warehousing a claim, it is difficult to see that it is incumbent on the Second Defendant to incur cost so as to try to force the Claimant to change its approach, at risk of the court failing to act on the Claimant's abuse of process. Of course, in any practical case, the court might conclude that the failure of the Second Defendant to take steps that it could have taken to progress the case mean that the

> inference of warehousing is not a proper inference to be drawn, but if the inference is in fact drawn from other material, the fact that the Second Defendant could have driven matters forward by itself applying for a CMC would go only to the exercise of the discretion and in particular the question as to whether the Second Defendant had acquiesced in the Claimant's inaction so as to make striking out a disproportionate response."

22. Finally, it is to be noted that, on the facts of that case, the judge found that there had been warehousing and that striking out was the proportionate sanction.

23. As I have already said, Judge Pearce summarised the approach set out in Asturion. That means I need not quote at length from the judgment of Arnold LJ in that case with which Leggatt, Ryder LJJ agreed. It is pertinent to note that at [55], referring to the judgment of Lord Woolf in *Arbuthnot Latham Bank*, Arnold LJ said this:

> "Although this passage was strictly obiter, it was plainly intended to lay down the approach that the courts would adopt in future. It is clear from what Lord Woolf MR said that it is 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 remains intent on pursuing the claim at some future point. In my view Lord Woolf MR cannot have meant that this will always constitute an abuse of process given what he had reiterated about the *Grovit* case. Nor is there any indication that Lord Woolf MR was differentiating between counsel for Asturion's second and third classes of case."

24. By that Arnold LJ was referring to a proposed taxonomy which had been put forward by counsel and which he had summarised at [46] saying:

> "The second class was where the claimant had no current intention to pursue the claim, but might pursue it in the future depending on contingencies which were extraneous to the claim (such as the claimants pursuit of other claims against other defendants). The third class was where the claimant always intended to pursue the claim, but decided temporarily to pause its progress for reasons legitimately connected with the claim."

25. Then, it is also of note that, at [61], Arnold LJ said this:

> "In my judgment the decisions in *Grovit*, *Arbuthnot*, *Realkredit* and *Braunstein* show that 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, but does not necessarily do so. It 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."

26. Mr. Hext KC submitted that there is a difference between abuse which takes the form of starting proceedings with no intention of continuing the case and that where a case was originally started with the intention of continuing to judgment but where there is warehousing in the course of proceedings. He says the former is more serious than the latter.

27. Initially I was not attracted by that argument but on reflection I am persuaded Mr. Hext is right, to say that the distinction follows from the approach set out by Arnold LJ in *Asturion*.

28. In that case at [49] Arnold LJ referred to the reasoning in *Grovit* and said this:

> "The first is that, as Leggatt LJ pointed out during the course of argument, the words which you have no intention to bring to a conclusion could embrace both (i) cases in which the claimant has no intention of ever bringing the claim to a conclusion and (ii) cases in which the claimant has no intention of bringing to a conclusion at present, but intends to do so in future, perhaps depending upon some contingency.
>
> "50. The second point is that Lord Woolf was clear that such conduct can constitute abuse of process, not that it will automatically do so, and that it will frequently be the case that the court will strike out the claim, not that it will always do so. If that is the position with respect to cases of the first kind identified in the preceding paragraph, then it is difficult to see why cases of the second kind should be treated more stringently."

29. It is of note that, at [69], Arnold LJ identified one of the respects in which the Master at first instance had erred in law as being that the Master had treated the two categories as being the same: an approach which Arnold LJ said was "legally erroneous".

30. So it is right to say that a distinction is drawn between the two kinds of abuse: starting proceedings with no intention of continuing them; and starting with an intention of continuing but then putting the case on hold in the course of proceedings. The former is the graver abuse. That does not, of course, mean that putting proceedings on hold in the course of proceedings is not an abuse: the authorities are clear that it can be. The distinction between the two categories can be relevant to sanction and in particular to whether the proportionate response is striking out.

31. In *Asturion* Arnold LJ said, at [64], that a two-stage process was to be adopted. The two stages being: first, determining whether the claimant's conduct was an abuse of conduct; second, deciding whether the court should exercise its discretion so as to strike out the claim.

32. In deciding whether there was abuse the court will need to consider whether the circumstances and in particular the relevant delay amounted to a deliberate putting of the proceedings on hold. Doing that requires an analysis of the intention underlying the delay and the failure to progress to the action and the court will then have to consider in light of its conclusion as to the intention whether there was abuse. The relevant intention is subjective. A party who is delaying proceedings or who is inactive through incompetence or the like will not be guilty of this form of abuse. Such a party may well be liable to have its claim struck out but that would be on a different basis.

33. Mr. Hext is right to say that it is necessary to consider the claimant's subjective intent. That was a point that was made by Judge Pearce in *Alfozan* at [18] where he said that the focus on this type of abuse is on the state of mind of the claimant.

34. However, for her part Miss. Mirchandani KC, for the First Defendant, was right to say that the claimant's intention is to be deduced from the evidence as a whole. It is not sufficient for a party or a party's solicitor simply to say in resisting an application on this footing that in fact the claimant was not proceeding with the intention to put matters on hold. Inevitably, when such evidence is being put forward that will be in the context of facing an abuse allegation. Such evidence can of course be perfectly honest at the time of the statement. Let me emphasise that here there is no suggestion at all that Miss. McDermott, who put in evidence on behalf of the Claimant, was doing anything other than seeking to give her honest recollection and an honest account of the Claimant's intention. Nonetheless, the capacity for recollection even of a solicitor will inevitably be influenced to some extent by the viewpoint from which the recollection is being undertaken and by the circumstances in which the person concerned is engaging in the recollection. Therefore, the court must look to the circumstances and it may be that the circumstances are such as to compel a conclusion that the intention at the relevant time was to put the proceedings on hold even if such an intention is now disavowed.

35. The court must be on guard against making undue assumptions. It is necessary for the court to remember that what might appear, with hindsight, to be a deliberate course of conduct can be, and often will be, the result of a combination of unrelated decisions or omissions with a different intent or with no combined intent at all.

36. The dividing line between putting proceedings on hold in such a way as to be warehousing them and failing to progress a claim with proper expedition will often be a narrow one but there is a distinction and the distinction lies in the intention with which the actions are done.

37. There was a degree of debate between counsel before me as to the relevance of pre-action delay although in reality there was little between the competing positions in this case. My understanding of the law is this. The relevant abuse must be in the context of an action which has been commenced. So, where a party is saying that an action has been put on hold during the course of proceedings it is that action in the course of the proceedings which is the abuse. Delay in the period before proceedings were commenced can, however, be highly relevant. First, it can support the view that a claimant intended to put the action on hold and also the conclusion that a claimant has no real intention to continue proceedings. It can support the view that a claimant's actions are to be seen as doing the bare minimum necessary to keep a potential claim alive. Second, it can be highly relevant to the question of whether putting the proceedings on hold is an abuse and to the related question of the sanction if it is.

38. A party who has delayed significantly before starting proceedings will find harder to show that it was appropriate to put the proceedings on hold at some point during the course of proceedings than a party who has been energetic in the pre-action stages. In addition a party who has delayed before the start of proceedings will find a contention that the proceedings were put on hold for good reason being viewed more sceptically.

39. Similarly, if there is pre-action delay as well as putting on hold during the course of proceedings it is more likely that it will be appropriate to strike out the claim as a response to the abuse of this kind. In such circumstances that will be because where there has been pre-action delay the adverse effects of putting the proceedings on hold in the course of proceedings will be compounded and there will be a greater risk that the administration of justice will be hindered and the defendant prejudiced by the staleness of the case.

The Issues Here.

40. There are three issues which I have to determine. First, whether the Claimant deliberately placed the claim on hold for a substantial period. Second, whether in the circumstances of this case doing that amounted to abuse. Third, if it was an abuse whether the appropriate sanction is striking out or some other step. Potentially factors relevant to whether the conduct was an abuse will also be relevant to whether striking out is a proportionate sanction.

The History of the Proceedings.

41. I am only going to identify the key elements in what is a lengthy and detailed history. I am conscious that repeated small delays can amount to a substantial overall delay and/or to an indication of warehousing but I am also conscious that what it is necessary for the court to do is to stand back and look at the overall effect.

42. Turning first to the pre-action stage. The relevant works were between July 2011 and July 2012 with the First Defendant's alleged failings occurring in 2011. Practical completion was not until 13th May 2014 because of the difficulties which had arisen. On 11th September 2012, the Claimant requested that the First Defendant notify its insurers of ongoing issues with the steel frames on the project. However, it was not until the end of February 2014 that a pre-action protocol letter of claim was sent.

43. There then followed correspondence about the information which the First Defendant contended should be provided. There was a letter of response denying liability on 28th May 2014 and a reply to that on 1st October 2014. There was correspondence in the summer of 2015 and on 9th July 2015 the solicitors for the First Defendant wrote to those acting for the Claimant against the background of matters concerned with testing of the material. Under the heading "Quantum information" they said this:

> "You have stated that some sums quoted in the Letter of Claim were estimates of Loss. This is further evidence that your client's claim has been issued prematurely.
>
> "We consider that it would be premature for our client to incur the costs of instructing an expert quantity surveyor to inspect the files while the testing is taking place. Unless you are able to

> convince our client they have any liability, there is no point in our client incurring costs relating to the quantum of the claim."

44. There was further correspondence in February 2016 when, on 25th February, the First Defendant's solicitors in responding to a letter of 10th February from the Claimant's solicitors pointed out that it had been more than six months since they had heard from those solicitors. They said in that context it was not needless or unhelpful for them to enquire as to whether the Claimant was still intending to pursue the claim and added this:

> "We remain baffled by the glacial pace at which your client is progressing this matter and can only conclude that there is no real appetite on the part of your client to pursue this claim."

45. That was 25th February. On 25th August the First Defendant's solicitors wrote again, pointing out that again there had been a six-month interval with no response and referring to the distinct lack of momentum in the pursuit of the Claimant's claim. The letter ended, after making that reference, by saying this:

> "It is not just reasonable or professional to allow our client to continue to incur costs and the Claimant clearly cannot move forward, so please confirm your client's position as soon as possible."

46. In a somewhat desultory manner there was correspondence throughout 2016 between the Claimant and Aviva. In part that involved the Claimant pressing Aviva to provide documents.

47. Proceedings were issued in this action on 6th July 2017.

48. There is a dispute as to the relevant limitation period. The Claimant says the period is 12 years because the First Defendant's engagement was by deed and it says that the proceedings were issued in 2017 well within the limitation period. It says that there was some doubt in its mind as to whether the contract had in fact been executed by a deed and that the proceedings were issued then to avoid any risk of argument about that. The First Defendant says that the relevant period is six years and so the proceedings were issued close to the expiry of the limitation period. It points to this as a further instance of the Claimant doing the bare minimum necessary to keep the proceedings alive.

49. The proceedings, although issued in July, were only served on 1st November 2017. That is very close to the end of the four-month period for valid service and is again said by the First Defendant to be an indication of the Claimant doing the bare minimum to keep the proceedings alive.

50. I turn to the history of the proceedings after they were commenced.

51. In November 2017 the Claimant and the First Defendant agreed that the proceedings should be stayed. It is relevant to note the correspondence that led up to that agreement.

52. By an e-mail of 22nd November the First Defendant's solicitors wrote to those acting for the Claimant attaching a draft of a proposed letter to the court and saying this:

> "I note that your application did not have attached to it a draft order. As we are now seeking to agree different terms, are you able to provide me with a draft order which incorporates the following: a three-month stay to the proceedings against Capita. During that stay period, your client will pursue the matter against the second Defendant and your client will pursue the second Defendant's insurers under the Third Parties (Rights Against Insurers) Act 1930."

53. The Claimant's solicitors responded to that saying that a draft order had accompanied the application but that it would be revised following the correspondence from the First Defendant. Dealing with the three points from the First Defendant's solicitors' email, they said this:

> "The first two are covered in the draft order. The third point is a matter for the Claimant. It is at present irrelevant to the proceedings against Capita and Sabre. It is not appropriate for this to be detailed in a court order in these proceedings. Please confirm once your letter has been e-filed. Following submission of your letter to the court, we will confirm our agreement to your proposal and apply for judgement in default against Sabre. Once judgment in default is issued, the Claimant will issue a claim against Aviva under the Third Parties (Rights Against Insurers) Act."

54. The First Defendant's solicitors responded saying:

> "We are content to agree to the revisions of the draft letter, but are only ultimately prepared to agree to send this letter to the court and to agree to a stay in the proceedings on the basis that it is an express provision of the order sought in relation to the stay that the Claimant will pursue Aviva under the 1930 Act. This was explicitly addressed during your discussions with Mike Grant [the solicitor for the First Defendant]. We do not agree that this point is irrelevant to the proceedings. Your client has agreed, following obtaining judgment in default, to pursue a claim against Aviva. We see no reason why an order cannot be agreed in those terms."

55. Later the same day the Claimant's solicitors replied to that saying:

> "The court has no power to order that our client pursues a claim against Aviva under the 1930 Act. Any such obligation is also vague. What does 'pursue a claim' mean? Does the Claimant have to issue proceedings against Aviva? We are not looking for your client to consent to the draft order. Your client cannot consent to an order granting judgment in default against Sabre.
>
> "As explained in my discussions with Mike Grant, the Claimant intends to pursue a claim against Aviva once judgment in default is obtained against Sabre. It would be absurd not to. However,

> it is not appropriate for this to be dealt with in a court order and I can see no basis on which such an order would be granted by the court."

56. That triggered a response on 28th November saying:

> "We are happy to agree to a stay subject to the entering of judgment against Sabre and confirmation by you that you will pursue Aviva under the [1930 Act] - this is an open side letter not to be included in the order."

57. The Claimant's solicitors replied to that thus:

> "The Claimant will pursue Aviva as it is in its commercial interests to do so, but what that looks like will depend entirely on how Aviva responds and/or the advice the Claimant receives as to the merits of its claim or potential claim once Aviva's position is understood."

58. They also sought some clarification as to the proposed wording of the side letter.

59. Mr. Grant of the First Defendant's solicitors replied to that on 29th November saying:

> "The Claimant must pursue Aviva via the 1930 Act if there is a reasonable prospect of establishing that full indemnity in relation to this claim ought to have been granted by Aviva. It is not for me to advise you how to run this litigation. As you say, it is in your client's interests to pursue Sabre and Aviva. I think it is important that all remedies against Aviva with a reasonable prospect of success are exhausted."

60. There was further correspondence culminating in the provision to the Claimant's solicitors of the letter which was going to be sent to the court. That letter was, indeed, sent on 29th November by the First Defendant's solicitors confirming the willingness of the First Defendant to agree to a stay and then saying this:

> "The First Defendant maintains that Sabre is liable for any loss suffered by the Claimant. In the circumstances, it is vital to establish the insurance position of Sabre as Capita says that Sabre's insurers ought to be dealing with this claim. Capita has a claim against Sabre pursuant to the Civil Liability Contribution Act. It is understood that Sabre had professional indemnity insurance at the relevant time, but the position concerning indemnity pursuant to (unclear) insurance is not clear. It therefore requires clarification as soon as possible. Therefore, Capita is prepared to agree to a stay of the proceedings upon the basis that during the course of that stay, the Claimant proceeds against Sabre and its insurers in order to ensure, in the interests of justice and fairness, that they play an appropriate part in these proceedings."

61. It will be seen from those exchanges that the First Defendant was anticipating the need for the Claimant to pursue Aviva and even trying to get the Claimant to commit itself to pursuing Aviva as part of the terms for agreeing to the stay of the proceedings. The Claimant says that this is significant and, as will be seen, I agree. The stay was approved on 14th December 2017 and there was default judgment against the Second Defendant.

62. On the 26th February 2018 the First Defendant proposed mediation but the Claimant declined at that stage saying the position was not yet sufficiently clear. The Defence was served on 8th April 2018. On 6th June 2018 the Claimant commenced Part 8 proceedings against Aviva for the disclosure of documents. In September 2018, in the face of that Part 8 claim, Aviva agreed to provide the documents as sought by the Claimant.

63. In March 2019 the First Defendant sought copies of documents referred to in the Claimant's Reply and raised a Part 18 request for information to which the Claimants responded in May 2019. Other than that there had been little progress in the action in the latter part of 2018 and 2019.

64. From October 2019 onwards there was correspondence about the fixing of a case management conference with the First Defendant responding to the Claimant's proposal of such a conference by saying that there should be mediation before any CMC. That correspondence came to an end in March 2020 with neither a CMC having been fixed nor a mediation having been arranged.

65. On 4th November 2020 the Claimant issued proceedings against Aviva.

66. On 17th December 2021 the Claimant's solicitors proposed a tripartite mediation between the Claimant, the First Defendant, and Aviva. That was the first correspondence between the Claimant and the First Defendant in the period between March 2020 and December 2021. There then followed correspondence about mediation. In February 2022, the parties agreed that there should be a mediation and on 13th May 2022 a mediation was fixed for 1st September 2022.

67. On 6th June 2022, the Claimant's solicitors wrote to the court seeking a date for a CMC. There was further correspondence to the court in August 2022 with the parties being unable to agree on a date for a CMC. There was a listing appointment in respect of a CMC in October 2022 and that led to the fixing of a CMC which is to be heard on 21st February 2023.

68. The mediation, which was held as intended on 1st September 2022, did not result in resolution of the proceedings and it was followed on 5th December 2022 by the First Defendant's strike-out application which is now before me.

The Parties' Positions in Summary.

69. The First Defendant contends that the following conclusions appear from that history.

70. There were long periods of delay and inaction showing, the First Defendant says, a claimant deliberately doing the bare minimum necessary to keep the action alive while looking to pursue other options. The First Defendant says that this is patently a stale

claim as can be shown by the periods involved. Miss. Mirchandani pointed out that the period from the first notification of a potential claim to the CMC will be a period of ten years and five months; the period from the first notification of a potential claim to the conclusion of the pre-action protocol process one of four years and three months; and that from issue to the first CMC one of five years and seven months.

71. The First Defendant points in particular to the delay between March 2020 and November 2021: a period of 21 months where the Claimant was silent towards the First Defendant. That is not the only delay asserted. The First Defendant says it was not complicit in the delay because the history shows the First Defendant chasing for responses at various stages pre-action and that the First Defendant cooperated, as was appropriate, in the course of proceedings. The First Defendant says that the Aviva action is a separate action and that the Claimant was putting the current action on hold to pursue that separate action.

72. The First Defendant accepts that matters might have been different if the Claimant had pursued the Aviva action energetically but it says that, on the contrary, there was tardiness in the pursuit of that action. Miss. Mirchandani's analysis of the time periods in that action was that there will be an interval of nine years between the letter of claim and the first CMC; a period of three and a half years between the letter of claim and the default judgment against Sabre; and a period of nearly three years between the default judgment and the issue of proceedings against Aviva.

73. It is accepted by the First Defendant that the Claimant may now be intending to pursue this claim but the First Defendant says that there were clearly periods when the Claimant was not intending to do so and it says that that is the only proper explanation of the history.

74. The First Defendant rightly says that it does not have to show prejudice but adds that it has in fact suffered prejudice. It is pointed out that this is a stale claim. Two of the potential lay witnesses for the First Defendant have left the First Defendant's employ and there has been no response from them to recent correspondence. The First Defendant's expert is a gentleman who is said, and I have no doubt that this is correct, to be an eminently well-qualified expert in a field where there are a limited number of such experts. He was engaged in 2014. The passage of time has meant that he has got older. He is now aged 78 and there is an inevitable risk that he will not be available for a trial at some point in the future in a case where the CMC is only being conducted in February 2023. Moreover, the First Defendant points out that this a professional negligence claim in what is potentially a high-profile matter and that it has been hanging over the First Defendant for many years.

75. By way of explanation for the fact that the strike-out application came in December 2022 rather than shortly after the revival of the proceedings, so perhaps at a time in January in 2022, it is said that when the matter came back to life the First Defendant hoped and believed that matters would be progressed rapidly and properly. It says that hope has been dashed by the fact that we are still not yet at the stage of a first CMC.

76. The Claimant's analysis of the position is as follows. It does not accept that there was a putting of the proceedings on hold let alone improper warehousing although it is accepted that matters could have been addressed more speedily and indeed should have been addressed more speedily.

77. Reference is made by the Claimant to the complexity of the case. I accept that this is not a straightforward case but it is very far from being the most complex of the cases dealt with in this court and the complexity, such as it was, would not warrant a delay of the scale that there has been in this case.

78. The Claimant points to delay on the part of the First Defendant. In particular, emphasis is placed on what is said to have been a failure to co-operate in getting the CMC listed. It is pointed out that the First Defendant was agreeable to the course of moving to a tripartite mediation with Aviva. It is said that the Aviva action and this claim are so closely related that the two should be seen together and that pursuing the Aviva claim should be seen as part and parcel of progressing this action with a view to bringing the two into line. There was, it is said, delay on the part of Aviva and reference is there made to the need to take Part 8 proceedings to get documentation from Aviva.

79. Part of the claim is subrogated with a body of nine different insurers behind the claim. The Claimant says that because of the number of insurers involved there has inevitably been difficulty in getting instructions.

80. Reference is also made to the difficulty of dealing with matters in the course of COVID-19 pandemic. That provides some very limited explanation. It is easy now to forget the scale of the difficulties that there were in the early stages of the pandemic and in particular adjusting to the circumstances of lockdown. In his first witness statement for the First Defendant Mr. Grant said that the pandemic should not be regarded as a proper explanation for delay at all. He said, "This firm's experience of the pandemic was that business generally continued as usual." I am bound to say that I find that dismissal of the difficulties which existed at that time as rather too sweeping and as perhaps being influenced by a degree of wishful thinking or a desire to forget unhappy circumstances. However, it is right to say that the influence of the pandemic cannot be a major factor given the scale of the claim and the resources of the Claimant's solicitors. At most, it can be seen as a very modest justification for a limited period of delay in and around March 2020.

The First Issue: was the Action deliberately put on hold?

81. I do not accept the Claimant's argument that the claim against Aviva was so closely related to this claim that progressing the Aviva claim was tantamount to progressing the current action. They were related but they were distinct claims and progressing one was not equivalent to progressing the other.

82. The only interpretation I can put on the history is that for periods of time the Claimant was deliberately putting this matter on hold in order for it to tread water while the Claimant pursued Aviva in an attempt to clarify the position *vis-à-vis* Aviva and/or to bring the matters into line. That goes beyond mere delay and there were undoubtedly periods when this action was not being pursued because the Claimant had decided to put it on hold waiting for developments in the Aviva action.

The Second Issue: whether, in the Circumstances of this Case, putting the Action on Hold was Abuse.

83. There are a number of factors which support the First Defendant's interpretation of the position and which favour the conclusion that the Claimant’s conduct was abusive.

84. The first is the very significant periods of inaction and the repetition of the periods of inaction. In particular, there was inaction between August 2016, indeed perhaps from a little earlier than that, and November 2017, and also in the period from March 2020 to December 2021.

85. The length of time for which an action is put on hold is highly relevant to whether doing so is an abuse. That was made clear by Arnold LJ in *Asturion*. That follows from the passage at [61] which I have already quoted. Also, at [63] Arnold LJ made the point that Popplewell J, in *Société Generali v Goldas* [2017] EWHC 667 (Comm), had clearly regarded the length of delay in the particular case to be germane to the question of abuse. The longer the period of stasis in an action the more risk there is of prejudice to the other party and the greater the potential for an adverse impact upon the administration of justice.

86. There were other shorter periods when this action was put on hold. The relevance of those is that they show that the lengthy periods to which I have just referred did not stand alone. Those longer periods are not to be seen as exceptional but rather they are to be considered in the context of a lack of urgency at other times and as being part of a pattern. That is coupled with the reference that the First Defendant properly makes to the proceedings being issued arguably at the end of the limitation period; to the delay pre-action; and to the delay in service of the claim form.

87. The First Defendant also points to the fact there was a deliberate putting on hold to bring in line with Aviva but that adds little to the finding I have already made that this was a deliberate putting on hold and the motivation of tying up with Aviva is a factor which is relied on conversely by the Claimant as justifying the conduct.

88. A factor in favour of the First Defendant's position and in favour of interpreting this conduct as abusive is that the conduct resulted from a unilateral decision on the part of the Claimant. The Claimant could have sought formal or express consent from the First Defendant or a court order but it chose not to do so.

89. It is right to note that the Aviva action involves different issues from the current action. Even though Aviva is putting the Claimant to proof of Sabre's liability the issues as between Sabre and the Claimant are different from those between the Claimant and the First Defendant. There is some overlapping but showing a failure by Sabre in respect of its obligations is very different from establishing a failure by the First Defendant in respect of its alleged obligation to warn about Sabre's actions and failings.

90. It is also relevant to note that the delay in this case and the putting on hold are in the context where, as matters now stand, the First Defendant has at the very least a limitation argument with potential for success if the matter is struck out. There is more than a potential argument in terms of the negligence claims, where absent special circumstances, those aspects of the claim appear to be statute-barred. Even if the claim is not statute-barred it will potentially be abusive conduct for the Claimant to start fresh proceedings if these proceedings have been struck out for abuse of process.

91. The First Defendant is also right to say that the claim is ambitious in its nature. It is being said that the First Defendant is liable for a failure to warn in respect of failures of another party where the Claimant had chosen that other party and in particular had deliberately decided not to adopt the First Defendant's design but had gone for a less

costly option. The First Defendant proceeds from that interpretation to say that the implication is that the Claimant knows that this claim is an ambitious one and that it is adopted as a fallback position. There is some force in that contention.

92. There was also delay in the Aviva claim. Not all of that was the responsibility of the Claimant and it appears that Aviva was not co-operative in those proceedings. Nonetheless, it is relevant because if the Claimant is saying that it was legitimate to put these proceedings on hold while pursuing the Aviva claim then it was all the more important to move promptly in those proceedings.

93. As I indicated earlier there is an overlap in terms of the relevance of those factors both as to the question of whether there is abuse and also what the relevant sanction would be if there is abuse.

94. What are the factors pointing the other way?

95. It is right to note that this is not a case of simply putting the matter on hold until it was convenient for the Claimant or waiting until the Claimant had dealt with other unrelated claims. The matter was put on hold because of a desire to tie this action up with the action against Aviva. Tying the action up with the action against Aviva was commercially sensible and acknowledged by the First Defendant to be such. The First Defendant had, indeed, urged that course in November 2017 and again in 2018. This is very significant because it is apparent that the course which the Claimant took was the course which the First Defendant was saying was appropriate even though the Claimant took longer over it than the First Defendant believed it should have done. It would be putting matters too high to say that the First Defendant was complicit in the course that was taken but that course was that which the First Defendant (certainly as in November 2017) was saying it regarded as appropriate or at the very lowest the course which it represented to the Claimant as being the appropriate one.

96. It is relevant in that context to note that ultimately there was a tripartite mediation. The proceedings against Aviva were not straightforward and it appears that Aviva was not facilitating a speedy progress although those are far from being the most complex of proceedings and, as I have already noted, they could have been dealt with more expeditiously.

97. Although there was delay and although the matters were put on hold not all of the delay was of the scale now being alleged by the First Defendant. As I have already indicated, the explanations given on behalf of the Claimant, although not carrying the potency which the Claimant places on them are not to be dismissed as readily as the First Defendant seeks to do.

98. The First Defendant could itself have applied to the court for a CMC. For the reasons given by Judge Pearce in *Alfozan* at [39] that factor has only limited weight. However, it does have some relevance because of the background of the First Defendant having contended that tying matters up with the Aviva action and establishing what the position was in that action was the appropriate course. The First Defendant could at some point in the history have said that it had come to the view that the adverse effects of the delay outweighed the benefits of that course. It could have said expressly to the Claimant or expressly to the court in seeking a CMC that the stage had come when it was no longer

appropriate to tie the proceedings up with the Aviva action and that this matter should be proceeded with separately.

99. It is also relevant to note the reaction of the First Defendant in December 2021 when the matter came to life. It is right that the First Defendant was highly critical of the "radio silence" (in my term not its) that there had been and of the actions of the Claimant. However, it did not at that stage say that the conduct had been abusive and at that stage it agreed to move to a mediation.

100. It is also of note that progress is now being made: a CMC is imminent and is to be held in less than a month's time. Although this is a factor of relevance it has limited weight because in almost every case of this kind where there is an allegation of abuse there will be a response by the claimant of seeking to move matters forward. That cannot be a sound answer if a strike out application is otherwise meritorious. It is, however, relevant to note that the movement forward here on the part of the Claimant did not come in response to a strike out application or even to the threat of such an application.

101. What is the conclusion on the question of abuse? No single factor is conclusive but I am satisfied that it was not abuse here to put this action on hold for significant periods of time to await the clarification of the position *vis-à-vis* Aviva and/or to bring into line with the Aviva action. The key is that the reason for putting matters on hold was to line up with the Aviva claim and to get all the parties, including Aviva, to the stage of a mediation together or of being able to combine the proceedings. That was a sensible course and it was, moreover, one which the First Defendant had, at the time a stay was imposed, indicated in clear terms that it believed it to be appropriate. In addition the First Defendant's continued acceptance of that appropriateness was indicated at least to some extent by its participation in the tripartite mediation when the action was revived.

102. It follows that I am not persuaded that the action of the Claimant was abuse of process of the form characterised as improper warehousing.

The Third Issue: the appropriate Sanction.

103. In the light of my conclusion on the question of abuse the third issue does not arise. However, even if I had concluded that the Claimant's actions were such as to amount to abuse I would not have imposed a sanction on the Claimant in the circumstances here let alone the sanction of striking out the claim. That, in part, is because the factors which led me to the conclusion that the Claimant's conduct was not abuse of process would operate, if the balance tipped the other way and the behaviour was found to be abusive, to reduce the gravity of that abuse.

104. More significantly, it is because of the delay on the part of the First Defendant in making this application. The action came to life again in December 2021. From then, although there was a contention that there was some further delay, it was clear that the Claimant was no longer warehousing the claim and that the Claimant was moving the matter forward. The First Defendant chose not to make an application to strike out in January 2022 or thereabouts. Instead, it took part in a tripartite mediation and waited until December 2022 to seek strike out. A party who alleges abuse of this kind must act promptly. Such a party cannot allow the action to continue and then some time later seek to strike out for this form of abuse. Here, the First Defendant's explanation of that

interval between the revival of the action and the strike out application was that it hoped or believed that matters would move more quickly once the action came back to life. That is not a persuasive explanation. It should and must have been apparent that with the best will in the world fixing a tripartite mediation in a matter of this kind would take some considerable time. I am driven to the conclusion that the reality is that the First Defendant kept the possibility of applying to strike out in reserve and only brought it into play when the mediation failed to resolve matters. A party who chooses to do that will not be given relief. This is not a matter of some form of estoppel but a matter of the court's exercise of its discretion. The actions of a party seeking strike out are highly relevant as to whether to grant that remedy in the light of the overriding objective. A party who holds in reserve the option of applying for this form of strike out will not get relief if the consequence of its holding the option in reserve is to allow the action to continue and for substantive steps between the parties to take place over a period of some months.

105. It follows that the application is dismissed.

(After further submissions)

MR. JUSTICE EYRE: Summary assessment is not some form of ersatz detailed assessment. It is a matter of the court looking at the figures to determine what is a reasonable and proportionate sum to be recovered on an *inter partes* basis having regard to particular points that are raised.

106. The points raised by the First Defendant are as follows. First, the difference between the number of hours spent by the Claimant, which are markedly more than those spent by the First Defendant's solicitors, even though the First Defendant was the one whose application it was. Reference is made in particular to the considerable amount of time spent on items 4 and 5 in the Schedule of Work on Documents, which was, in large part, work on a chronology and looking at drafting instruction and the like. Next, it is said that that work in particular, with other aspects as well, involved multiple fee-earners in a way which must have involved a degree of duplication. Finally, the point is made that there were three fee-earners attending behind leading counsel for the hearing.

107. Mr. Hext responds to those points by emphasising the importance of this application and the need to get matters right in circumstances where there was an application to strike out in its entirety a £10m claim. He did not put it quite like this but it comes down to saying that to get documents like chronologies right proper time has to be spent. He also said that although he had three fee-earners behind him at the hearing he did not have a junior counsel.

108. I am concerned as to the amount of time spent on items 4 and 5 of the work on documents and by the presence of three fee-earners behind counsel, all of whom were charging at rates more than the First Defendant's solicitors charged. I accept that this is an important matter. I accept that there will be a degree of having to get it done at comparatively short notice but it was not akin to dealing with an urgent application at two days' notice. Although I am conscious that to produce a good document involves time and has to be done properly there needs to be a degree of proportionality. Something over 100 hours at line 4 and 96 hours at line 5 is more than is reasonable and proportionate given the material that was produced. Also, I am not persuaded that

Mr. Hext needed three people behind him even though he did not have a junior. Looking at matters in the round, I am going to assess this schedule at £95,000 which, in my view is at the upper end of what can be justified as fair and reasonable and proportionate in the context here. That will be the sum assessed.

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