Neutral Citation Number: [2024] EWHC 3449 (TCC)

Case No: HT-2023-000311

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

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 5 July 2024

Before:

MRS JUSTICE JEFFORD

- -

Between:

WILLMOTT DIXON HOLDINGS LTD	**Claimant**
- and -	
(1) KARAKUSEVIC CARSON ARCHITECTS LLP	**Defendants**
(2) PETER BRETT ASSOCIATES LLP	
(3) TOUREEN CONTRACTORS LTD	

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PAUL BURY appeared for the **Claimant**
HANNAH McCARTHY appeared for the **First Defendant**

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APPROVED JUDGMENT

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MRS JUSTICE JEFFORD:

Introduction

1. This is an application by the first defendant, Karakusevic Carson Architects LLP, to strike out the Claim Form issued by the claimant, Willmott Dixon Holdings Ltd. The action arises out of alleged defects in a residential development known as Bridport House in Hackney.

2. The claimant is the parent company of a Willmott Dixon company that was the design and build contractor for that project and I intend, in giving judgment, as was the case in the course of the hearing, to adopt "Willmott Dixon" as the short way of referring to the claimant. The employer was the London Borough of Hackney ("LBH"). The first defendant, which has been referred to as "KCA", was the project architect for Bridport House and was engaged by an appointment made under seal and dated 11 August 2010. Practical Completion of the development was certified on 31 August 2011.

3. The Claim Form was issued on 30 August 2023. That is one day before the potential expiry of the limitation period, if that period is taken as running from the date of Practical Completion. The Claim Form sets out a little of the history in three short paragraphs and then, in the final two paragraphs, sets out the claim against KCA as follows:

> *"LBH has alleged that there are defects in the Works and that the Claimant is liable for these defects. LBH intends to claim against the Claimant for damages, costs and losses arising out of and/or as a consequence of the defects.*
>
> *The Claimant claims damages, costs and losses from the Defendants to the extent that the defects were caused or contributed to by any breaches, negligence, contribution or default by the Defendants."*

4. These proceedings were issued not only against KCA but also against two other defendants, Peter Brett Associates LLP and Toureen Contractors Ltd. Willmott Dixon has also intimated proceedings against a number of other subcontractors or subconsultants who have agreed to standstill agreements.

5. By this application, the Claim Form in those terms is sought to be struck out on the grounds that it is an abuse of process.

The law

6. In the course of submissions, I have been referred to the decisions in *Nomura International plc v Granada Group Ltd* [2007] EWHC 642; *USAF Nominee No. 18 Ltd v Watkin Jones & Son Ltd* [2021] EWHC 3173 (TCC); *Bam Glory Mill Ltd v Balicrest Ltd* [2018] EWHC 3926 (TCC); *Nash v 4M Ltd* [2021] EWHC 3611 (TCC); and *Children's Arc Partnerships v Kajima Construction Europe* [2022] EWHC 1595 (TCC). For the purposes of this decision, I intend to concentrate on the decisions in *Nomura* and *USAF Nominee.*

7. *Nomura* was a decision of Cooke J, and the paragraphs that I have been taken to and that are particularly relevant are paragraphs 37 and 41. The position in that case was that *Nomura* issued proceedings when it did not know if a claim was going to be made against it and it did not know to whom it might pass on that claim and on what basis. At paragraph 37, Cooke J said this:

> *"In my judgment, when regard is had to these authorities [that is those that had been cited to him] the key question must always be whether or not, at the time of issuing a writ, the claimant was in a position properly to identify the essence of the tort or breach of contract complained of and if given appropriate time to marshal what it knew, to formulate particulars of claim. If the claimant was not in a position to do so, then the claimant could have no present intention of prosecuting proceedings, since it had no known basis for doing so. Whilst therefore the absence of present intention to prosecute proceedings is not enough to constitute an abuse of process, without the additional absence of known valid grounds for a claim, the latter carries with it, as a matter of necessity, the former. If a claimant cannot do that which is necessary to prosecute the claim by setting out the basis of it, even in a rudimentary way, a claimant has no business to issue a claim form at all 'in the hope that something may turn up'. The effect of issuing a writ or claim form in such circumstances is, so the plaintiff/claimant hopes, to stop the limitation period running and thus deprive the defendant of a potential limitation defence. The plaintiff/claimant thus, unilaterally, by its own action, seeks to achieve for itself an extension of the time allowed by statute for the commencement of an action, even though it is in no position properly to formulate a claim against the relevant defendant. That must, in my judgment, be an abuse of process and one for which there can be no remedy save that of striking out the proceedings so as to deprive the claimant of its putative advantage. The illegitimate benefit hopefully achieved can only be nullified by this means. Whatever powers may be available to the court for other abuses, if this is an abuse, there is only one suitable sanction."*

8. Later, at paragraph 41, Cooke J he said this:

> *"In my judgment, therefore, if Nomura, at the time of issuing its claim form, was not in a position to do the minimum necessary to set out the nature of the claim it was making, it would be seeking an illegitimate benefit, namely the prevention of further time running under the Limitation Acts for a claim which it could not properly identify or plead. That would be an abuse of the process of the court. Insofar as it sought to make any claim in contract, it would be necessary for it to be able to identify the particular contract and the alleged breach. … For the purposes of negligent misstatement, Nomura would have to*

> *be able to identify what advice or information was inaccurate and what was given negligently, at least in essence. If Nomura was not in a position to do this, it was not in a position properly to issue a claim, since it could not have proceeded properly to plead particulars of claim without the off- chance occurring that something would turn up. In such circumstances it could have no present intention to pursue a claim since it had no sufficient idea of the claim it wished to pursue."*

9. I take from that decision, as Cooke J said, that, in and of itself, having no present intention to proceed with a claim is not an abuse of process. However, it is an abuse of process to issue proceedings if the claimant has no known basis for doing so. That is variously formulated as not being able to identify the essence of the tort or breach of contract and, most particularly, described as the claimant not being able to do the minimum necessary to set out its claim or not being able to set out its claim in even the most rudimentary way.

10. In *USAF Nominee v Watkin Jones & Son*, in which I observe the claim was not struck out, Eyre J, having considered the *Nomura* case, started at [26] by saying this:

> *"I am satisfied that it is an abuse of process for a party to commence proceedings which that party does not intend to pursue and where the existence of a genuine claim depends on something turning up with the true reason for issuing proceedings being to forestall a limitation period. In those circumstances, a claimant is using the issuing of the claim as a way of gaining extra time for that notional something to turn up and thereby gaining an extension of a limitation period. That is abusive conduct. However, in my judgment, that case is very different from the situation in which a party believes that it has a claim and where the general nature of that claim can be stated, albeit the full details of the particulars of claim are not able to be finalised at the time of issue of the claim. In the latter situation, it would not be an abuse of process to issue proceedings provided there was a genuine intention to pursue those proceedings at least while the claimant is actively engaged in gathering material for particularisation and where the claimant believes that it will be able to do so within the time in which it would be required to provide particulars."*

11. Pausing there, the first part of that paragraph seems, if anything, slightly stronger than what Cooke J had said in *Nomura* in that it seems to contemplate that not intending to pursue proceedings alone may be sufficient reason to regard the proceedings as an abuse. But it seems to me that that should properly be read as meaning that it would be an abuse to start proceedings where the claimant really does not know if it has any claim at all and just wants to buy time to establish whether it does have a claim: that is, waiting to see if something turns up.

12. Mr Justice Eyre continued at [27]:

> *"It is important generally and in the circumstances of this case to keep in mind the distinction between abuse of the Nomura kind and a failure to comply with CPR Part 16.2. The latter failing can be a sign of the former abuse but it is not conclusive and the two failings are different."*

And at [28]:

> *"If there is abuse of the Nomura kind, then the proceedings are an abuse and are liable to be struck out, even if something does turn up which would warrant the bringing of proceedings and even if that something turns up shortly after proceedings have been issued. That is the consequence of the fact that the court has to consider whether the proceedings were abusive at the time they were issued."*

13. Later, at [60], he said this:

> *"The next point is that Mr Towse in his witness statement pointed to the scale of the investigations which the claimant is having to undertake because of the number of properties, and in particular of high-rise properties, for which it is responsible. He drew my attention to that in part to advance it as an explanation for the absence of more detailed particularisation of the claim. That, in my judgment, is of minimal if any relevance. If the claimant had no genuine belief that it had a current claim and no proper basis for issuing a claim, then just issuing proceedings to extend the limitation period in the hope that something would turn up and that it would have time to investigate the position more fully in respect of Jennens Court would not stop the proceedings being abusive. That would be so even if the reason was not some general inactivity on the part of the claimant but the other demands on the claimant's resources and the need to investigate other properties. Moreover, that is of minimal relevance because the key to the question of whether there is abuse is not the subjective motive of the claimant but the objective analysis or the effect of what is being done. The fact that a claimant does not regard its conduct as being abusive and believes that what it has done is legitimate is not an answer if, on an objective basis, the court were to find that the actions were abusive."*

14. Again, pausing there, it seems to me that those paragraphs reinforce the view that I have already expressed that what is key is not whether there is an intention, looked at subjectively or even objectively, to pursue proceedings, but rather that the key issue is whether the claimant is able to set out the minimum of, or the most rudimentary version of, the claim that it seeks to advance against the defendant.

15. These passages also indicate that the appropriate approach is to focus on the position at the time of the issue of the claim and not on what happens afterwards. That must be right in principle. If it is an abuse to issue proceedings at the time they are issued,

the abuse is not somehow remedied by subsequent events. However, all cases turn on their own facts and what happens afterwards may provide some relevant evidence as to what the position was at the time of the issue of the proceedings. There should not, therefore, be some cut-off at the point of the issue of proceedings in terms of the consideration of the surrounding evidence.

The facts

16. With that introduction as to the legal position, I turn to the facts of this case, and I start with the correspondence in 2018.

17. On 20 December 2018, Willmott Dixon wrote to KCA referring to discussions that had taken place between their representatives in October 2018 in connection with the brickwork on Bridport House. The letter acknowledged KCA's confirmation that they would be able to provide architectural support in resolving these issues and that there would be a further meeting. The letter said:

> *"However, as was explained at our meeting, there are a number of issues with the brickwork and the exact cause and extent of these issues is being investigated by us, the Employer and third party consultants. At this stage, it is not possible to determine the exact causes, however, in connection with your Deed of Appointment you were responsible for the design and specification of the external wall construction and details.*
>
> *There is therefore a possibility that these defects in the brickwork result in failings in your design…"*

The letter went on to advise KCA to notify their professional indemnity insurers.

18. That is a convenient point to observe, as Mr Bury emphasised, that KCA's appointment as designers for the design and build contract was one in which they undertook to provide a detailed and lengthy list of services in terms of design, which undoubtedly covered brickwork, and that they undertook the usual obligations to exercise reasonable care and skill. They also gave particular warranties in respect of compliance with the Building Regulations and an indemnity in respect of any breach of the building contract. I emphasise that, in saying that, I am not making any decision in respect of the meaning of the contract or any potential liability of KCA, but rather indicating the scope. as it would appear on the face of their appointment, of their design obligations.

19. That issue in relation to the brickwork having been raised, KCA responded on 17 January 2019. They started by saying that their insurance was not in place to cover poor workmanship on site and they referred to reports of poor workmanship on site. But KCA concluded by saying that that they were keen to work with Willmott Dixon and LBH to resolve these issues swiftly in everybody's interests. However, KCA also made a threat to pursue a claim for defamation if Willmott Dixon in any way suggested that KCA's work had been deficient on this project. They said that they would, in those circumstances, take appropriate steps to defend themselves and their reputation, including making such a claim for defamation. There was a little further correspondence, but otherwise there matters rested for a little while.

20. By a letter dated 29 March 2019, Devonshires, solicitors representing LBH, wrote to Willmott Dixon – they referred to a report of the architects, Bickerdike Allen, and said that they had subsequently instructed Mr McLean of Probyn Miers to inspect the property and provide comments in relation to Bickerdike Allen's proposals for cosmetic remedial works. The letter continued:

> *"Mr McLean attended Property on Friday 22 March, along with representatives from Bickerdike Allen and yourselves. ...*
>
> *However, Mr McLean's inspection has raised further urgent concerns which we need to raise with you and which may render our previous discussions redundant. Mr McLean's inspection has identified that the insulation at Bridport House (which is a tall building for the purposes of the Building Regulations) is a phenolic foam which is not a material of limited combustibility. It is, therefore, not in accordance with the requirements of Approved Document B. Further, there appear to be inadequacies in the cavity barriers at Bridport House.*
>
> *Our client's primary concern is the safety of its residents. We have, therefore, instructed a fire engineer to attend..."*

The letter went on to indicate that LBH would expect proposals to protect the safety of residents and to ask for documentary information from Willmott Dixon.

21. On 3 April 2019, Willmott Dixon then wrote to KCA referring to a recent discussion with Willmott Dixon's representative in which it was said that Mr Karakusevic had declined an invitation to attend a meeting to discuss the various issues that had been raised by LBH in respect of the external wall construction. Willmott Dixon pointed out that, in addition to what had been raised in December 2018, new issues concerning combustible materials used within the external wall construction had now been raised and that, following an inspection by independent experts, Willmott Dixon was:

> *"... of the impression that the insulation within the external wall is a phenolic foam which is not classified as a material of limited combustibility."*

Additionally, they said that KCA would be aware that the structural frame and inner wall panels of the external walls of the building consisted of cross-laminated timbers. Further, they passed on to KCA the request for documentary information which had been made by LBH.

22. The response to that letter from KCA was made on 9 April 2019. KCA said that they would not be sending files, drawings, specifications or records to Willmott Dixon and that their drawings and notes showed the correct insulation, firestopping and wall build up. KCA dismissed the concerns regarding the use of combustible materials and alleged poor workmanship and monitoring on the part of Willmott Dixon. They reiterated their position that, if they heard anyone blaming them for failings in Bridport House, they would not hesitate to start defamation proceedings. There was a

response from Willmott Dixon on 11 April 2019 and a further letter on 30 April 2019, but there matters then again rested for some time.

23. By a letter dated 11 November 2019, Simmons & Simmons, then acting for Willmott Dixon, wrote to KCA and referred to previous letters in December 2018 and April 2019. They said:

> *"In those letters, WPHV has outlined a number of alleged issues with the design of the Development which have been raised with WPHV by LBH. These include (by way of illustration only) alleged issues in relation to matters such as the brickwork; and the specification of phenolic-board insulation (the Kingspan "K12" product) in the external wall, and of high pressure laminate panels on the roof parapets. For your information, we enclose a copy of a publicly available PRP Report relating to the Development dated July 2019 which outlines various issues said to have been identified by PRP as at that date."*

24. Simmons and Simmons said that they understood KCA's position to be to deny liability but that they were giving KCA an opportunity to decide whether they wished to be involved in any further investigations or negotiations. The PRP Report referred to was attached and provided brief descriptions of defects in brickwork, insulation, cavity barriers, windows, copper clad bay windows, glass reinforced concrete panels, plasterboard, internal linings and other items.

25. So far as I was taken to the correspondence in the course of the application, there appears to have been no response to that letter. As between Willmott Dixon and KCA, matters rested there until 12 May 2020, when Simmons & Simmons wrote to Beale & Co. (representing KCA). They referred to previous correspondence, again including the matters I have already referred to. They expressly said that this letter was not intended to raise a formal pre-action claim against KCA but that they wished to give KCA an opportunity to provide information or comment on anything that they considered would assist in the defence of LBH's allegations:

> *"… bearing in mind that it is, of course, equally in KCA's interest that WPHV is able to successfully defend the claim made by LBH and thus avoid any claim being passed down by WPHV to KCA."*

They also passed on a request for further documents. That letter annexed a letter from Devonshires, on behalf of LBH, to Simmons & Simmons. That letter was dated 17 April 2020 and was a Pre-Action Protocol Letter of Claim against Willmott Dixon. It contained a level of detail as to the nature of the allegations that were made against Willmott Dixon in respect of the fire safety issues.

26. As between Willmott Dixon and KCA, matters again rested there until 2021. Summarising, in 2021, there were some issues raised by LBH in relation to further defects. There was an opportunity to inspect, which was passed on to KCA, who again did not wish to engage. Then matters rested again until November 2022.

27. On 24 November 2022, Devonshires wrote to Willmott Dixon referring to previous correspondence and asking for various information. They concluded by saying that they had some drawings in relation to fire strategy, but only some, and asked for cooperation in that respect. That was followed by a letter on 12 December 2022 from Devonshires to Willmott Dixon, which said that they were now instructed that the following defects had been identified at the property, some of which would be available to be viewed when they were on site. Those defects were set out in that letter. I do not propose to quote them but they are a series of defects which had largely been identified, and referred to, in the previous correspondence. Those exchanges did not involve KCA.

28. Before I come to what happened in 2023, there was a submission made by Ms McCarthy that that correspondence demonstrated that there was, in effect, a gap of nearly three years in which there was no correspondence between Willmott Dixon and KCA since the first intimation of a claim relating to fire safety matters. It will be apparent from what I have said that that is not entirely correct but is largely correct. Mr Bury's response to that was to say that it was hardly surprising, given that KCA's approach was that it did not wish to engage with any provision of information or participation in investigations and had taken the rather remarkable stance that it would sue for defamation if anyone suggested that they might be to blame for any defects.

29. The relevance, however, of that seems to me principally to be to the overarching question of whether, by the end of this process and before the Claim Form was issued, Willmott Dixon knew the essence of its claim, had grounds to make a claim and was able to do the minimum necessary to set out its claim, even in the most rudimentary way. It is relevant to that issue if it informs what the position was at the time the Claim Form was issued in the general terms in which it was.

30. That brings me to 2023. On 12 June 2023, Willmott Dixon wrote again to KCA. By that time, the evidence is that LBH had already started to carry out remedial works at its own cost and that, in the course of carrying out those remedial works, it had either discovered further defects or discovered more about the defects already alleged. Willmott Dixon's letter to KCA of 12 June said this:

> *"We refer to previous correspondence relating to the above project during 2018 to 2020 between KCA and Willmott Partnership Homes Limited, now WPHV Limited ("WPHV").*
>
> *In this correspondence, WPHV drew your attention to issues that had been identified by London Borough of Hackney in relation to the design of the Project including that relating to the brickwork and external façade design. …*
>
> *We write now to provide a further update. LBH has commenced the remedial works to the façade including addressing the design issues with the brickwork and external façade. Investigations into the issues with the CLT frame are progressing in parallel and the cause of those issues is yet to be identified. Most recently LBH has indicated that there may be issues with internal firestopping and fire protection, drylining and the mechanical and electrical installation. You*

> *will be aware that our letter of 3 December 2021 specifically requested information on drylining products and whilst you declined to provide that information, we would reiterate that it is undoubtedly in the interests of all parties for you to reconsider your position on that point."*

The letter went on to say that LBH had indicated that an updated Letter of Claim would be issued in June or July of that year.

31. On 12 June, KCA, by Mr Karakusevic, responded to that letter. He said:

> *"Unfortunately, your team and consultants admitted full responsibility for installing the shelf angles, brickwork and movement joints poorly, ie not tightening the shelf angles and faking the movement joints throughout. They also admitted to not installing the Fire Stops correctly and not following the insulation specifications amongst many other issues.*
>
> *Any subsequent damage to the building and any repairs and corrective action will be resting fully on WD's shoulders. Recently I have heard from several other client groups that similar errors and poor workmanship by WD are leading to major claims from Housing Associations, this would suggest that there was a toxic culture in the organisation at the time.*
>
> *WD should finally take responsibility for this era, learn from their mistakes and move on and build with integrity and pride."*

32. That was followed by a letter on 23 June 2023 from Pinsent Masons, now representing Willmott Dixon, to KCA. Essentially, that repeated the position that LBH had identified defects and was intending to pursue claims against Willmott Dixon to recover its losses and that Willmott Dixon might consequently pursue a claim against KCA for any losses which it incurred. I note, and I will come back to, the fact that that was expressed in terms that Willmott Dixon might pursue a claim against KCA for any losses that it incurred. The letter suggested that it would be appropriate for KCA and Willmott Dixon to enter into a standstill agreement while the parties investigated the allegations in more detail, determined the extent of remedial works, and assessed quantum.

33. There was a follow-up to that request for a standstill agreement on 4 July 2023. In short, the initial response from KCA was to decline to enter into a standstill agreement and, subsequently, by its solicitors, to indicate that the intention was to be reasonable and to provide Willmott Dixon with an opportunity properly to explain its position.

34. What Willmott Dixon was, therefore, invited to do, in an email dated 11 July 2023, was to provide "full particularisation of the allegations that your client proposes to present against our client", which it was said Willmott Dixon was required to do as part of any Pre-Action Protocol Letter of Claim. The email went on to ask various questions and, in effect, to require the provision of a detailed particularisation of the

claim potentially being made against KCA and substantial evidence in relation to that claim. It is certainly arguable that that went well beyond what is required by the Protocol.

35. In any event, that, quite simply, did not happen. The standstill agreement requested was also not entered into and, at the end of August, for the reasons I have already indicated, the claim was issued in the general terms in which it was. Then on 15 September 2023, LBH itself issued a claim against Willmott Dixon.

36. Both Willmott Dixon and LBH made applications to the court to stay the proceedings, Stays were granted in both sets of proceedings and, in the case of Willmott Dixon, that had the effect of staying the proceedings, to all intents and purposes, for a further year.

The parties' arguments

37. Having set out that background in some degree of detail, as I was taken to it in the course of argument by both Ms McCarthy and Mr Bury, I turn to summarise the submissions that they accordingly made.

38. Ms McCarthy says that what can be seen from the exchanges between Willmott Dixon and KCA is that it remained the case up until the time that the claim was issued that Willmott Dixon could not say that they intended to pursue proceedings against KCA. They did not know that proceedings would be pursued against them by LBH since no proceedings had been issued, and all their correspondence with KCA was couched in terms of a contingent claim that they might make if a claim was made against them. Secondly, she submits that it can be seen from the correspondence that Willmott Dixon did not know the essence of the claim that they intended to make. They could not set out the claim, even in the most rudimentary way, and they simply did not do so.

39. As I have already said, it seems to me that it is the latter of those things that is really material as a matter of principle. But, having regard to the former point – that is the intention to commence proceedings – the submission that is made is not one that I can accept.

40. As Mr Bury has said, it is quite clear that LBH, a local authority, was carrying out remedial works to defects which it plainly laid at the door of Willmott Dixon and which were matters that could be said to be design defects. It might, of course, be the case that there is a contrary argument that they were workmanship defects, not design defects, but a claim in respect of design defects was one that was clearly going to be made by LBH at some point. It is, in my view, unrealistic to interpret the correspondence that refers to a claim that might then be made against KCA to recover any losses that Willmott Dixon incurred by reason of its liability to LBH as meaning that there was no intention to pursue the claim, rather than as simply capturing the point that, if there was no liability to LBH, there would be nothing to pass on to KCA. The language used in inter-solicitor correspondence was, as Mr Bury put it, entirely conventional and reflected the fact that Willmott Dixon was passing on what was being said to it by LBH rather than itself positively asserting that there were design defects in the building, not least because, if it positively asserted that in open correspondence, it would be asserting that it was itself in breach of contract.

41. So far as the second element and, in my view, the more important element of the argument is concerned – that is whether Willmott Dixon knew that it had grounds to bring the claim and knew the essence of the claim – it seems to me that it quite clearly did.

42. The claim remained, and remains to this day, somewhat unparticularised. That is because the employer, LBH, had not yet concluded its own investigations or remedial works, which themselves would have necessitated opening up, and had not fully articulated the claim to be passed on. But the essence of the claim was known. It was a claim that would be one for damages for breach of contract. The relevant parts of the contract were obvious, that is the obligations to exercise reasonable care and skill, together with the warranties which were given in respect of compliance with the Building Regulations and the indemnity in respect of breaches of the Design and Build Contract. The nature of the defects had been set out, most particularly in respect of fire safety defects, but more generally in respect of other matters.

43. It is, in my judgment, unrealistic to suggest that it was abusive to commence proceedings on that basis. It is not entirely satisfactory that the Claim Form was expressed in the very general terms that it was, but, if it is read in context as referring to the defects that had been alleged by LBH and as seeking to pass on to KCA the claims made by LBH against Willmott Dixon, there was, in my view, sufficient in the preceding correspondence for KCA to know the generality or the essence of the claim that was made against it, which it would then properly expect to be particularised in the Particulars of Claim.

44. Some reliance was placed on the fact that, when Willmott Dixon sought the stay of proceedings, which it did in December 2023, it did so on the basis that the lack of particularity in LBH's position meant that it could not understand the claim against it, but again, in my judgment, that has to be understood in context. Willmott Dixon was not saying, and the court would not have understood it to be saying, that it had absolutely no idea what the nature of the claim against it was and/or that LBH was just waiting for something to turn up, but rather that LBH's claim was one that was not sufficiently particularised for Willmott Dixon to be able to serve fully particularised Particulars of Claim on the three defendants to this action.

45. To that extent, Willmott Dixon was waiting for something to turn up, but it knew what was going to turn up or should turn up in relatively short measure, and that was a properly particularised claim from LBH. That process was delayed by the stay that was then sought by LBH, but, as Mr Bury submitted, the end result of that should be that everything happens in a proper and logical order, with LBH particularising its claim against Willmott Dixon, which Willmott Dixon is then in a position to pass on to KCA.

46. I do not accept that the upshot of that is that Willmott Dixon has abused the court's process to buy itself an additional year to see, as it was put in *Nomura* and *USAF*, whether something turns up. The reality of the situation is that Willmott Dixon knew that a claim was going to be made against it, and, indeed, the fact that LBH's Claim Form was issued just two weeks later supports that position. That is not relying on post-issue events to excuse an abuse of process. It is relying on the post-issue events to demonstrate, or to reinforce, that Willmott Dixon's position at the time it issued proceedings was not one of seeking to abuse, or in fact abusing, the court's procedure.

47. The position further was that Willmott Dixon knew the nature of the claim that would be made against it and the nature of the claim that it would be passing on. Whether one expresses that as the essence of the claim or the minimum necessary, it knew what the relevant contract was, what the clauses it would be alleging a breach of were, and what the broad nature, at least, of those breaches was. There is, to my mind, nothing abusive in starting those proceedings and seeking to protect the limitation position, as indeed is often the case, and then taking the benefit of the time that follows in order to regularise the position so far as the claim up the line is concerned.

48. For those reasons, I will dismiss the application to strike out. I do not think that I need to be concerned with the alternative position in relation to setting aside the order made in December, save that there may be some submissions to be made on time to respond to the Pre-Action Protocol Letter that has now been served and the consequences that follow from that. I will hear further submissions on that if necessary.

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(This Judgment has been approved by Mrs Justice Jefford.)

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