

## Where to Keep Your Spare Claims

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**PRACTICES** International, Litigation, International Arbitration

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The Civil Procedure Rules give courts the power to strike out a statement of case on certain grounds, effectively allowing the other party's claim or defence to succeed without a trial. Grounds on which a court can strike out a statement of case include CPR 3.4(2)(b): if "*the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings*".

In the very recent case of *Morgan Sindall Construction and Infrastructure Ltd v Capita Property and Infrastructure (Structures) Ltd & Anor* [2023] EWHC 166 (TCC) a defendant sought to have a claim against it struck out under this rule, alleging that so-called "warehousing" of the claim by the claimant had rendered the claim an abuse of process.

"warehousing" is not a term of art, but a shorthand expression used to describe a situation where a claimant starts proceedings (often to preserve a claim in the face of an impending limitation period) but then does not pursue the claim.

### The relevant law

In the pre-CPR case *Grovit v Doctor* [1997] 1 WLR 640 the House of Lords upheld a decision to strike out a libel action because the claimant had failed to pursue it for two years. Lord Woolf said:

"This conduct on the part of the appellant constituted an abuse of process. The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. ... once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings."

Lord Woolf revisited the issue a few months later in *Arbutnot Latham Bank v Trafalgar Holdings Ltd* [1998] 1 WLR 1426. At 1437B he said:

"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."

“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.”

In another recent case *Alfozan v Quastel Midgen* [2022] EWHC (Comm) 66, HHJ Pearce sitting as a judge of the high court summed up what is now the law in this area as follows:

“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*).”

In the *Morgan Sindall* case, Eyre J adopted this, also observing at [30]:

“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.”

And at [35]-[36]:

“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.

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.”

## The underlying claims

C was a design and build contractor which was retained to build two new cricket stadia at Old Trafford. C retained D1 as consulting engineer. C subcontracted part of the design and build work to D2 (“**Sabre**”) a steelwork contractor. Sabre’s design allegedly proved defective, and C claimed to have spent around £10 million fixing these defects.

C brought a claim against Sabre and D1 seeking to recover these costs. Sabre did not contest the claim and C obtained default judgment against Sabre. Sabre, however, was insolvent so C

pursued a claim against Sabre's insurer under the Third Parties (Rights Against Insurers) Act 1930. The insurer denied liability, saying it had validly avoided Sabre's policy, putting C to proof of Sabre's liability and also claiming the liability under the policy was limited to £5 million. It was clear there was going to be a shortfall in recovery as against Sabre.

C thus also claimed against D1 that D1 had failed properly to review Sabre's design and/or to warn C in strong enough terms / quickly enough that it was defective. D1's defence is that it had, in fact, itself prepared a perfectly suitable design for C, but C had then instructed Sabre to change it in an attempt to 'value engineer' it (i.e. make it cheaper to execute) and that was the cause of all the problems. D1 also claims it did, in any case, warn C about the problems with Sabre's design.

### The delay

- **2011.** The alleged breaches by D1 occurred in 2011.
- **2014-2016.** In February 2014 C1 sent D1 a claim letter. There ensued correspondence, marked by long delays on the part of C1.
- **2017.** Proceedings were issued on 6 July 2017, nearly six years after the alleged breaches. In December 2017 C obtained default judgment against Sabre. C and D1 agreed a stay of the proceedings. D1 sought to express its agreement to that stay as being conditional upon C pursuing a claim against Sabre's insurer.
- **2018.** In February 2018 D1 proposed a mediation but C declined saying the position was not yet sufficiently clear. In April 2018 D1 served its defence. In May C began Part 8 proceedings against the insurer for disclosure of documents. In September 2018 the insurer provided the documents.
- **2019.** In 2019 there was a part 18 request by D1 for further information regarding C's Reply to D1's Defence, and some correspondence about a possible mediation and about the CMC but no mediation or CMC was fixed and none took place.
- **2020.** In November 2020 C launched a claim against the insurer.
- **2021.** On 17 December 2021 C proposed a tripartite mediation between C, D1 and the insurer. That was the first correspondence D1 had from C since March 2020.
- **2022.** In February 2022 the parties agreed there should be a mediation. In May 2022 the mediation was fixed for 1 September 2022. On 6 June 2022 C first wrote to the court seeking a date for a CMC. A CMC was fixed for 21 February 2023. The mediation did not result in a settlement. On 5 December 2022 D1 applied to strike out C's claim.

There were evidently long periods of delay and inaction by C. From the first notification of a potential claim to the CMC was ten years and five months. From the first notification of a potential claim to the conclusion of the pre-action protocol process was four years and three months. From issue to the first CMC was five years seven months.

### Eyre J's analysis

Eyre J had no difficulty in concluding that the action had been deliberately put on hold by C. He described C as having put the claim on hold to tread water while C pursued Aviva.

On the question of whether putting the claim on hold in this way was an abuse Eyre J weighed up factors pointing each way. C's periods of inaction were lengthy and there was more than one such period ("*the length of time for which an action is put on hold is highly relevant to whether doing so is an abuse*"). Eyre J thought it germane that C had acted unilaterally – not seeking formal or express consent from D1 or a court order to regularise the position. The claim against D1 was different to the claim against Sabre and the insurer. Eyre J accepted the claim against D1 was "*ambitious*" and

saw some force in the argument that C had chosen to pursue the potentially cheaper claim against Sabre and the insurer keeping the more expensive professional negligence claim against D1 as a fallback position. Eyre J also noted that, if the claim was struck out, D1 was likely to have a limitation defence.

In terms of factors pointing the other way, Eyre J identified the following:

- a. It was commercially sensible to pursue the claims against D1 and the insurer together because they did cover some common ground. D1 had itself urged C to pursue the claim against the insurer, and had consented to the original stay for that purpose.
- b. There was eventually a tripartite mediation. Some of the delay in reaching that point was down to the insurer's uncooperativeness.
- c. D1 could itself have sought a CMC. Eyre J accepted this should only have "limited weight" (why should a defendant hasten the claim against them?) but does seem to have given it *some weight*.
- d. *"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"*.
- e. A CMC was imminent. Again Eyre J described this as a factor on 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"*.

Eyre J's conclusion was:

"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."

The question of what sanction would have been appropriate thus did not arise. But Eyre J said:

"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."

More significantly, it is because of the delay on the part of the First Defendant in making this application."

### Analysis

The decision seems rather magnanimous and illustrates the difficulty one faces when advising a client how to deal with a languid opponent. Those advising a D1 evidently walk a tightrope. They face an unlooked for claim, which C has chosen to commence and then not to pursue. The longer the delay goes on, the stronger the argument that the delay amounts to an abuse and should be struck out. And yet, delay too long before seeking to have the claim struck out, and the delay begins to count against you, not the apathetic claimant. The fact D1 participated in a mediation when offered seems to have counted against them too – when the claim came back to life they should, it seems, have complained that the claim was an abuse at that point, rather than first trying to resolve the matter amicably by mediation, waiting until after the mediation had failed before making the application. D1 is also criticised, albeit mildly, for not itself having sought a CMC, and tried to hurry along the claim that was being made against - which seems a counterintuitive critique.

D1 must have thought, going into this application, that they had a pretty good chance of getting rid of this decade old claim (a claim which the judge accepted was “*ambitious*” – often a euphemism for a misconceived try-on). Yet the end result was a failed application, an order to pay nearly £100,000 in costs and probably a similar amount of costs incurred itself.

It is not obvious why the court set so much store by its having been sensible / commercial for C to have tried to coordinate the action against D1 and the action against the insurer. It is undoubtedly true that, given the overlap, litigating the claims together is more efficient. But the idea that the insurer’s failure to engage with the claim against it excuses C’s delay in pursuing D1 seems suspect. Why is that D1’s problem? Surely, if the insurer does not accept liability within a reasonable time, it is incumbent on C to pursue the insurer **and** D1 more quickly, not to warehouse the claim against D1.

One view might be that warehousing is relatively victimless – the end result, if the defendant is liable, is that justice is served later than would otherwise have been the case. At first glance, this is to the defendant’s advantage – D1 has the benefit of going longer before paying than if C had pursued the claim more diligently. That is only true, however, if: (i) the court can be persuaded not to award interest for the period of the claimant’s delay; and (ii) the defendant hasn’t otherwise been prejudiced by the delay – i.e. no crucial witness has died, no key fact forgotten, no salient evidence lost. And it is often overlooked that even while a warehoused claim lies dormant it is generally inflicting *some* kind of cost on D. D has to consider the claim each year in its accounts and write letters about it to its auditors. Someone has to keep an eye on the matter and be ready to deal with it if it is resurrected. Long gaps in the correspondence magnify costs because advisors asked about the matter are constantly having to refresh their memory regarding what the case is about and what has happened. Documents and records which could otherwise have been safely disposed of once limitation expired must be retained indefinitely. In a sense, it is the defendant who is paying the rent on the claimant’s warehouse.

What is the best way to deal with the issue? These strike out actions are evidently risky, expensive and hard to predict so it is important to advise the client about that. With hindsight, one might say that D1 would have been better off not agreeing the original stay, and not agreeing to the mediation, but that will not have been obvious at the time. D1 could also have laid something more of a paper trail – writing to C regularly to chide them for not progressing the claim and threatening to apply to strike it out, to try to make D1 appear less complicit. What difference any of these things might have made is not clear, though.

One strategy which probably does improve the defendant’s position would be to avoid making the strike out application on an ‘all or nothing’ basis. Rather than just applying to strike out the claim,

apply for some other relief in the alternative which a court might be prepared to award, even if they are not prepared to go so far as to strike out the whole claim. The obvious alternative is to apply, in the alternative, for an order striking out C's claim to interest for the period of delay. A defendant who fails to get the claim struck out altogether might have the consolation of winning on that alternative application, and potentially avoiding having to pay C's costs. On the other hand, presenting a judge with a more palatable middle ground position rather than a dichotomy might make them less likely than they otherwise would have been to grasp the nettle and take the conclusive step of striking out a claim.