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Neutral Citation Number: [2024] EWHC 1103 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND AND WALES
CHANCERY DIVISION

No. HC-2015-0002189

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 5 April 2024

Before:

DEPUTY MASTER LINWOOD

B E T W E E N :

(1) RAJ WADHWANI
(2) RITA WADHWANI

Claimants

- and -

NATWEST MARKETS PLC
(FORMERLY THE ROYAL BANK OF SCOTLAND PLC)

Defendant

MRS J STEWART (instructed by Clyde & Co. LLP) appeared on behalf of the Claimants.

MR LAURIE BROCK (instructed by DLA Piper UK LLP) appeared on behalf of the Defendant at the hearing but not for judgment.

Hearing: 25th March 2024

JUDGMENT

(via Microsoft Teams)

DEPUTY MASTER LINWOOD:

- 1 Well over eight years ago, on 25 November 2015, Master Teverson approved a consent order by which time for filing and service of the defence in this claim was extended to twenty-eight days after the Claimants had filed and served their schedule of loss.

- 2 That was the last step in these proceedings until a flurry of applications:
 - (1) The Claimants applied on 22 December 2023 to lift the automatic stay of these proceedings they submit is in place pursuant to CPR 15.11. That application included a schedule of loss annexed to draft amended particulars of claim.
 - (2) The defendant applied on 2 February 2024 to strike out the claim under CPR 3.4(2)(c) and/or (b) or the court's inherent jurisdiction.
 - (3) The Claimants applied on 12 March 2024 to amend the claim form.
 - (4) The Claimants applied on 21 March 2024 for relief from sanctions and permission for short service on the basis that whether CPR 15.11 applies or the defendant's cross-application is determined, relief from sanctions is necessary on all the applications.

- 3 I refer in this judgment to Dr Wadhvani and his actions. His wife is the second claimant and is a party to the loans and swap agreements, but plays no other part in the proceedings and has not provided a witness statement. Dr Wadhvani made two statements, as has Mr Harvey for the Bank. Where necessary, I refer to their statements by the surname of the deponent and the number of the statement and paragraph number.

Background

- 4 This claim concerns an interest rate swap entered into by the Claimants in 2008 following negotiations in 2007. Dr Wadhvani is a dentist and the owner of an unincorporated group of dental practices in Cambridgeshire, Suffolk and North Hertfordshire known as “The Antwerp House Dental Group” or “AHG”. Dr Wadhvani says they entered into the swap due to the Bank’s breaches of FCA rules, and thereby suffered loss and damage as to, first, the payment made under the swap of approximately £678,000, loss of profits of approximately £982,000 and losses incurred in taking out short-term loans of about £24,000.
- 5 As this matter turns upon events which took place over the last seventeen or so years, I will first set out the detailed chronology, then turn to the issues, the law and my determination of the issues.
- 6 On 25 September 2007, Ms Sara Nasser and Ms Wendy Plummer met the Claimants at their home at 6.00 p.m., due to Dr Wadhvani’s work commitments. A detailed meeting note was made by the Bank.
- 7 On 15 May 2008, the Claimants entered into a base rate swap with a ten-year term. Then, in 2010, Mr Gordon Walker and Mr David Brewer, who had been involved in the negotiations and the agreement for the swap, left the Bank.
- 8 Dr Wadhvani considered that refurbishment of Antwerp House, the main surgery, would have been completed, but for the swap, by April 2012, but was not in fact completed until August 2014. Also in 2014, the Claimants entered the FCA review. In September 2014, Ms Nasser ceased working for the Bank.

9 On 9 July 2014, the Claimants received from the Bank its provisional determination, which stated:

“The explanation provided to you in respect of the features, benefits or risks of alternative products did not comply with the standards agreed with the FCA.”

And then:

“Potentially, early exit costs associated with your IRHP were not explained to you in accordance with the standards agreed with the FCA.”

10 That provisional determination included a without admission of liability offer of £64,797.92 on the basis that the Claimants would have, in any event, entered into a five-year vanilla swap. This did not cover the Claimants’ consequential losses, so they declined to accept the findings. The Claimants’ solicitors referred to the consequential losses of the Claimants in letters of 25 February 2015 and 9 March 2015.

11 On 3 June 2015, the claim form was issued protectively, followed by service of the particulars of claim on 30 September 2015. At paragraph 109 of the particulars of claim the Claimants claimed:

- (a) all the payments made under the swap as at the date of judgment;
- (b) damages to reflect the amount that the Bank may declare to be payable by them as at that date to terminate the swap; and
- (c) consequential losses, which include losses associated with the increased costs encountered by them in raising funds to expand and grow AHG as a result of the existence of the swap and the associated credit line.

- 12 On 31 October 2015, the Bank made its final offer under the FCA review. On 9 November 2015, DLA (the Bank’s solicitors) wrote to Slater & Gordon (the Claimants’ solicitors) stating that, in the particulars of claim, paragraph 109(c) (i) did not meet the requirements of CPR 16.4(1)(a); (ii) the Bank could not ascertain the true value of the claim, nor how the consequential loss alleged arose; and (iii) accordingly, the Bank could not properly complete the necessary procedural steps in advance of the CCMC, including a proper costs budget.
- 13 DLA therefore requested the Claimants’ schedule of loss as soon as possible, and that time for service of their defence be extended to twenty-eight days following service of same. They provided a draft consent order which Slater & Gordon agreed to, resulting in the order of Master Teverson of 25 November 2015.
- 14 Two months later, in January 2016, Inquesta, forensic accountants, were instructed to, as Dr Wadhvani put it, “evaluate the business accounts and projections to establish the direct financial loss to the business”. I call this the “Tier 1 Losses”. In August 2016, Inquesta asked for further information.
- 15 Eleven months after the consent order, DLA wrote to Slater & Gordon on 12 October 2016 and said:

“No Schedule of Loss has been filed and we have heard nothing from your clients since November 2015.

It is evident that your client does not intend to pursue this litigation. However, litigation cannot be left indefinitely and the matter must be resolved.

Against that background, we invite your client to discontinue its claim, on a drop hands basis with no order as to costs.”

16 In January 2017, DLA telephoned Slater & Gordon and asked when the schedule of loss would be provided. They were told shortly and, at most, in a few weeks, but nothing was heard.

17 An “initial draft report” was provided by Inquesta in, as Dr Wadhvani put it, around February 2017. Dr Wadhvani explained the delay thus:

“Part of the reason for this is due to the fact I work as a full-time clinician and around my very full clinical diary I spend strategic time during evenings and weekends developing the business and managing the practices and their operations. I do rely on hired book-keeping personnel and managers to data-mine our practice management system for patient numbers and financial data and some of the information requested by Inquesta was not readily accessible in the form they requested it. It therefore took some time to identify the relevant information from our practice management system to help Inquesta complete their analysis.”

18 Dr Wadhvani explains that Inquesta identified loss of profits to 2017, but he was looking at what was lost by investment of those profits in his growing business. At Wadhvani 1/15, he said:

“As an experienced clinical and business professional I have a detailed personal knowledge of my industry. There is a financial advantage to building a carefully acquired practice cluster, with strong geographical ties between sites with the associated inter-operability. Private equity investors have been known from my experience to pay a premium for the purchase of ‘commercial goodwill’ and this is based on 6-10x multiple on EBITDA of a group of practices. That multiple is enhanced further on acquisition of a practice cluster with geographically close sites.”

19 And then, at paragraph 16:

“Armed with this knowledge, I found it difficult to accept that my loss was limited simply to the value of loss of profits. It was my belief and contention that the loss we suffered needed to look beyond the value

of the lost profits, but should also take account of the benefit this additional profit would have provided in terms of the ability to fulfil the business objective and reinvest that additional profit in the acquisition and growth of further dental practices within the cluster.”

I will call this “Tier 2 Losses”.

- 20 On 26 January 2018, DLA wrote to Slater & Gordon referring to the lack of response to their letter of 12 October 2016 and their telephone call of January 2017, and requested a reply, by the latest, on 29 January 2018.
- 21 On 30 January 2018, Berrymans Lace Mawer (“BLM”), now acting for Dr Wadhvani, albeit the same solicitor, wrote to DLA enclosing notice of change of solicitor and stating they would take instructions and revert with a timetable for serving the schedule of loss. Nothing was received.
- 22 Then, on 4 May 2018, DLA wrote to BLM. They referred to a conversation on 29 January 2018 and a subsequent email exchange on 2 February 2018 and said they were expecting to receive the schedule of loss imminently. They then said:

“No Schedule of Loss has been filed and your clients have failed to take any steps in this litigation since November 2015.

Your clients have failed to provide any explanation for such excessive delay. Our client has invited the Claimants to discontinue their claim, on a drop hands basis with no order as to costs, on a number of occasions given your clients’ inactivity to date. However, your clients have failed to respond to such correspondence.

We request that you now provide us with your clients’ Schedule of Loss without any further delay and, at the latest, by 4.00 p.m. on 11 May 2018.”

23 For the first time, BLM replied directly to a communication from DLA on 11 May 2018.

They said:

“We enclose herewith a draft table showing the heads of loss that our clients intend to pursue, as well as detailed breakdowns for two of those heads. Our clients are in the process of assembling further instructions for their forensic accountant to consider and complete the attached table. Once these calculations have been carried out we will provide our clients’ fully particularised schedules of loss. We provide these herein on a without prejudice basis to show that matters are proceeding and that our client intends to pursue this claim.

We understand that our clients’ forensic accountant anticipates being in a position to complete the further calculations by the end of June 2018.”

24 The first page of the attached table contains a short description of each head of loss and the value of same over some eleven lines. It states:

(1) Interest arising from swap claim

Swap interest	453,698
Stopped cheque	10
	<hr/>
	453,708

(2) Loss of profits at Antwerp House 1,080,953

(3) Additional building costs at Antwerp House TBC

(4) Cost of short-term loans TBC

(5) Inability to develop Market Hill Aesthetics TBC

(6) Professional fees TBC

(7) Compensatory simple interest at 8 per cent, 362,768

(8) Tax liability arising on redress and consequential loss sums TBC

Total loss arising 1,897,429

25 Two further pages list a summary head 1, the swap cost, and the last page, head 2, being the calculation of loss of profits, which is calculated by extrapolating patient numbers from 2005 to 2009, to 2012 to 2016 and estimating the number of lost patients and, accordingly, loss of profit. On the face of the calculations, they do not appear especially complex and appear to be just Tier 1 Losses, with none of the figures representing Tier 2 Losses, and especially as appears at Wadhvani 1/16, additional profit from acquisition and growth of further dental practices.

26 Dr Wadhvani says, in 2018, AHG's head of finance went on long-term sick leave for most of 2018 and 2019 and eventually resigned in July 2020. Dr Wadhvani explained in paragraph 20 that:

“Throughout 2018, I was attempting to provide Inquesta and my solicitors with sufficient business information to complete a report on losses whilst also running and developing a busy dental practice group, and fulfilling my clinical responsibilities and teaching commitments within my group and to newly qualified Foundation Dentists outside of our group who are enrolled on Foundation Dentists outreach training programmes. There were meetings with Inquesta in August and September 2018.”

27 In late 2018, Dr Wadhvani widened his expert evidence by asking the head of medical valuation at Christies to assist with what he described as “a more appropriate model”. In other words, Dr Wadhvani was expanding the scope of the then report and expertise to look to recover Tier 2 Losses, but several months later – the date is not provided – Christies said they were conflicted. All this, Dr Wadhvani says, took twelve months before Christies said they could no longer advise.

- 28 Meanwhile, the final payment under the swap was made. On 24 July 2018, DLA wrote to BLM notifying them of the change of name of the Bank and that they would write under separate cover regarding the claim, but no such letter was sent. After another substantial delay, Dr Wadhvani identified Pinders as experts, who, as he put it, “may help establish an indicative loss of goodwill”. This report required a detailed valuation of “all of our 8 ... and very quickly thereafter 10 practices”. That required reviews of accounts and site visits, plus multiple interviews with the head of finance.
- 29 The Covid pandemic then closed all dental practices from late March 2020. Dr Wadhvani said as to this, at paragraph 25:

“As a result, the process of preparing a report with Pinders was consciously paused in March 2020 due to the Covid pandemic. During the various Covid lockdowns of 2020-2021, it was impossible to have a sensible and continuous conversation with Pinders and secure valuation of our 8 dental practices to construct a report that can support my contention on loss.”

- 30 And then, at paragraph 30:

“I recommenced work on the RBS claim in February 2021, alongside Mr Ferris, and our new accountants, under the stewardship of Mr Simon De Lacy Adams, with Lovewell Blake Accountants.”

- 31 Over that year, in September 2020, a new head of finance was appointed. Then, in January 2021, a new firm of accountants were instructed, as Lloyds had raised concerns as to the reliability of the accounts and, in addition, there were regulatory concerns about the accountant who then had been in post. The new accountant, Simon De Lacy Adams, had to rework accounting data from 2008. This took him 1½ years, from January 2021 to July 2022.

32 On 7 July 2022, Clyde & Co., in place of BLM, wrote to DLA enclosing notice of change. Neither the schedule of loss nor the position in the claim was mentioned in their letter. Dr Wadhvani says he worked with his accountants and Pinders for the period 2021 to 2023.

33 Importantly, in Wadhvani 1 at paragraph 33, he said:

“While we have pursued the quantification of our additional commercial goodwill loss with Pinders, and despite the extent of work over the past 2 years with Pinders I have now determined it will not advance my claim easily, due to the need to demonstrate foreseeability of my commercial loss. Whereas I am profoundly disappointed about the challenge in demonstrating what I believe to be the larger part of my commercial loss, and accepting legal advice, I am mindful to avoid the prospect of prolonging further the current stay and engaging in inefficient litigation. Development of my practice since 2017 has been significantly and adversely impacted by the swap, however, I have determined that the evidence I can produce to prove the further losses were reasonably foreseeable would be too challenging to establish within a reasonable time frame and I have therefore limited my schedule of loss to that identified by Inquesta.”

34 Dr Wadhvani then explains that he had been able, on the above basis, to particularise his losses of profit through an updated schedule from Inquesta. He does not say when he received that schedule from Inquesta, which I find a rather surprising omission. In any event, it is attached as annex 1 to the draft amended particulars of claim which were served with this application in December 2023. The heads of loss are just four:

- (1) Payments under the swap of £678,349.
- (2) Loss of profits of £982,765.
- (3) Costs of short-term loans of £24,446.
- (4) Adjustment of tax consequences TBC.

- 35 Clearly, the latter schedule differs little from that provided in draft on 11 May 2018 by BLM, both as to heads of claim and amounts. The payments made under the swap are £453,000 approximately or £678,000, with loss of profits at £1,080,000 or £982,000, the totals being, in May 2018, £1.897 million and, 5½ years later, in December 2023, £1.684 million.
- 36 Dr Wadhvani explained that whilst he had spent some six or seven years particularising his Tier 2 Losses, he now considered it not possible within a reasonable timeframe, so the schedule of losses backed what was originally identified by Inquesta, as submitted by them in around February 2017.

Dr Wadhvani's personal position

- 37 I was particularly struck by the phenomenal workload Dr Wadhvani was under during that eight-year period, and so now set it out separately to the chronological history. I have mentioned some of that burden upon him above but, as to Covid, I especially have in mind Wadhvani 2, at paragraphs 23 to 37. Certain of his evidence stands out and I quote selectively from those paragraphs. Dr Wadhvani describes how:

“From 6 March 2020 we were living every day in the wake of a massive and rapid hourly reorganisation of health services to support the Covid effort and we simply did not have the mental bandwidth to consider the legal obligations in relation to my claim.

As part of the rapid reorganisation selected practices were asked to become Urgent Dental Care Centres. These had enhanced cross-infection controls and saw patients with dental emergencies in order to shield hospitals.

In supporting the Covid effort, my usual role changed and I was required to dedicate all my time to developing safety and cross-infection control protocols (standard operating procedures that were evidence-based) for my staff and patients. I had to develop a complex rota of approximately 35 dentists who would operate as clinical triagers in various practices of the Antwerp Dental Group, and organised a rota to participate in the Urgent Dental Care Centre to help patients in face to face work. My 50 or so support staff were also

subject to a complex schedule of working and becoming furloughed across three teams to support our work as triagers and the Urgent Dental Care Centre.

It must not be forgotten that the original Wuhan strain of Covid-19 was considered to be deadly and infectious, and dentistry was considered to be a very high risk profession with an alleged risk to life. There was no readily available PPE to support cross-infection with the supposedly deadly Wuhan strain, and any dentist working at our Urgent Dental Care Centre would be working in the mouth, close to the site of transmission in the throat.

During the Covid pandemic, it was my personal responsibility to keep people employed and safe. The absence of available PPE meant I had to personally devise safety mechanisms for staff. Whereas most supply chains were closed, I used Amazon to find ponchos and my team wore waterproof clothing with industrial gas masks to perform dental work.”

Talking as to the Wuhan strain generally:

“This created a huge anxiety and mental wellness burden I had to manage. It is not an exaggeration that many of my staff were terrified to participate in our Urgent Dental Care Centre. Three of my dentists refused to cooperate with the scheme.”

And then:

“My time was completely dominated by this activity. I cannot think of another profession where aerosols had to be generated to treat patients in mouths which were close to the site of transmission, and therefore posing significant risk. The point here is that there were no operating standards for Covid. I had to commit extensive time to professional research and published for my own group evidence-based standard operating procedures to work for rapid deployment.”

And then finally:

“Across my practices, there were around 100,000 registered patients, most of whom would not have received care in 2020. My strategic work involved setting up systems and work environments to support around thirty-five dentists and fifteen hygienists, return to work safety, while also undertaking in-person management of my own caseload of 600 NHS children in orthodontic braces and several hundred other adults who were receiving various types of advanced care.”

38 Dr Wadhvani then, at paragraphs 40 to 48 in Wadhvani 2, describes his work commitments. As he put it:

“It was and is only myself who can personally resolve cash deficits in the business by fee generating clinical work as my drawings can be limited and funds left in the business.

It is readily demonstrable that our business would run out of cash if I did not commit the inordinate amount of time described above. This clinical time was needed a long time before the recent extensive capitalisation projects of 2022-2023 described below.

In other words, I am not a business with a practice portfolio I manage from a desk, I am a wet fingered clinical dentist who operates an inordinately long clinical week.

This involves clinical practice for whole days, even the weekends. I work clinical hours which are well in excess of all my 45-50 associate dentists and hygienists. The viability of the business has been maintained by an intense full-time clinical schedule for fee generation over 6 days a week and often involving evenings. Most evenings around my clinical diary involve additional strategic work irrespective of how late my clinical diary completes.”

39 Dr Wadhvani then sets out his reliance upon other professionals and the difficulties he faced with change of personnel and their own problems. In addition to the above, Dr Wadhvani was, over these years, studying for his Masters in orthodontics. I especially noted the conclusion to his second statement where he states:

“A profound obligation rested on me to proceed with the claim but my ability to do so was curtailed by financial requirements to keep the group solvent which was for many years affected by what I say was the Bank’s own wrongdoing.”

40 Having said that, Dr Wadhvani did maintain that the Bank were frustrated by but acquiesced to the delay. That, in the light of the communications I have described in the

chronology, does not bear examination. There was no acquiescence by the Bank or their solicitors. They pushed for the schedule of loss on a regular basis. No concession or agreement to delay was made.

41 Dr Wadhvani also summarises the delay as being the fault of:

(1) not being able to find sufficient time personally; plus

(2) the need to establish the correct loss; with

(3) the correct experts.

I have set out, however, that (2) and (3) have been abandoned and the claim in the proposed draft form is based on the Tier 1 Losses with the original expert.

The Issues

42 In view of the various applications, I proposed to counsel certain issues for my determination which have been agreed. These are:

(1) Is there currently an automatic stay in this claim pursuant to CPR 15.11?

(2) If so, should that stay be lifted by the satisfaction of the *Denton* test?

(3) If not, should the claim be struck out:

(a) under CPR 3.4(2)(c) (breach of a rule); and/or

(b) under CPR 3.4(2)(b) (abuse of process); and/or

(c) under the court's inherent jurisdiction for prejudicial delay.

43 I am particularly grateful to counsel for their detailed but succinct skeleton arguments, their oral submissions and the pragmatic approach they both took to the evidence, the law and the

issues. Mr Brock submitted that, as to the Claimants' application to amend, if the Claimants' application succeeds and his fails, he will not oppose it. Mrs Stewart made appropriate concessions as to the *Denton* test.

The Law

44 I will summarise the law and the procedure fairly briefly as there is no difference between counsel save as to issue 1, and that is a question of interpretation of the CPR. CPR 15.11 provides:

“(1) Where—

- (a) at least 6 months have expired since the end of the period for filing a defence specified in rule 15.4.
- (b) no defendant has served or filed an admission or filed a defence or counterclaim; and
- (c) no party has entered or applied for judgment under Part 12 (default judgment), or Part 24 (summary judgment); and
- (d) no defendant has applied to strike out all or part of the claim form or particulars of claim,

the claim shall be stayed.

(2) Any party may apply under Part 23 for the stay to be lifted. The application must include an explanation for the delay in proceeding with or responding to the claim.”

45 CPR 15.4 states:

“(1) The general rule is that the period for filing a defence is—

- (a) 14 days after service of the particulars of claim; or
- (b) if the defendant files an acknowledgement of service under Part 10, 28 days after the service of the particulars of claim.”

46 The procedural position and the question of relief from sanction was considered by Foxton J in *Bank of America Europe DAC v CITTA Metropolitana Di Milano* [2022] EWHC 1544 (Comm). At paragraph 5 he said:

“The clear purpose of CPR 15.11 is to avoid there being claims which continue in being but are not being progressed nor otherwise subject to judicial case management.”

47 Then, at paragraph 16:

“The automatic stay of a claimant’s claim following from its failure to ensure that the case remained subject to judicial management would, as a matter of ordinary language, be described as a ‘sanction’. Such a claimant loses the unfettered right to pursue its claim, and must instead obtain the exercise of a court’s discretion in its favour, which might be refused or granted unfavourable terms. As Jonathan Parker LJ observed of the PD51 stay in *Aurdergon* in the passage quoted at [11] above, ‘there can be no doubt that, in ordinary parlance, the automatic stay ... may aptly be described as a sanction’.”

48 And then, at paragraph 23:

“The *Denton* test is sufficiently flexible to take account of those features of CPR 15.11 which distinguish it from the more conventional case where a rule or practice direction requires a party to take a particular step by a particular date and it fails to do so: the fact that it is a combination of the failure of *both* parties to take a particular step which brings the automatic stay into operation, and the difficult choice which a claimant who has brought proceedings in order to anticipate a claim which a defendant has intimated but not commenced may face if the defendant chooses not to engage in those proceedings. For that reason, the question of whether the *Denton* test applies under CPR 15.11(2) may well be one of those procedural points destined to live out its litigation life in a limbo of obiter observations.”

49 Mrs Stewart submits that the imposition of an automatic stay after six months where the Claimants did not file and serve their schedule of loss and thereby there has been no judicial

case management requires the party to make an application to lift, which is within the purposes of CPR 15.11. Foxton J considered the *Denton* test should apply by analogy.

50 Mr Brock submits that CPR 15.11 is not engaged but, if it is, the application should be dismissed. However, that would leave the automatic stay in place indefinitely. A strike out application (issue 3(a)) is that, by CPR 1.3, the Claimants had “to help the court further the overriding objective” which meant: (a) dealing with the proceedings expeditiously; and (b) ensuring the fair allocation of the court’s resources to this claim. This is accepted by Dr Wadhvani, acknowledging the profound obligation upon him as I have set out at paragraph 39 above.

51 Mr Brock cited *The Owners and/or Bailees of the Cargo of the Ship Panamax Star v The Owners of the Ship Auk* [2013] EWHC 4076 (Admlty) where the defendant applied to strike out pursuant to CPR 3.4(2)(c), relying on an alleged breach of CPR 1.3 and 1.1(d). At paragraph 51, Hamblen J, as he then was, said:

“The Claimant further submits that CPR 1.3 is too general a rule to form a proper basis for an application to strike out. I do not agree. It all depends on the circumstances. Where the breach of the rule is as serious and stark as a failure to take steps in the action for over seven years, it may well form a proper basis for a strike out.”

52 Mrs Stewart accepts that the Claimants are in breach of CPR 1.3. Accordingly, the Claimants need relief from sanction under the *Denton* test as they do if she is correct as to the application of CPR 15.11.

53 Mr Brock submits that the abuse he relies upon to establish abuse of process under CPR 3.4(2)(b) is warehousing. He cited *Asturion Fondation v Alibrahim* [2020] EWCA Civ 32 at [44] and *Morgan Sindall Construction and Infrastructure Limited v Capita Property*

and Infrastructure (Structures) Limited & Anor [2023] EWHC 166 (TCC) at [10] where

Eyre J said:

“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 has deliberately not been pursued.”

54 There is no difference in substance, however, between Mrs Stewart and Mr Brock in their summary of the law relating to warehousing. Both referred me also to paragraphs 14 to 30 of *Morgan Sindall* and the two-stage process in *Asturion* at paragraph 64:

(1) Is the conduct an abuse of process?

(2) If it is, is it proportionate to strike out or, in other words, should the court exercise its discretion in the claimant’s favour?

Stage 1

55 Eyre J in *Morgan Sindall*, at paragraph 32, set out the matters the court must consider in deciding if there was abuse by analysing the intention underlying the delay and the failure to progress it. The relevant intention is subjective. Incompetence manifesting itself in delay or inactivity is not guilty of abuse in this respect.

56 The claimant’s intention must be looked at from the totality of the evidence and all the circumstances, without making undue assumptions. The dividing line between putting proceedings on hold – amounting to warehousing – and failing to progress properly may be

a narrow one. Mere denial by a claimant is not in itself sufficient. (See *Morgan Sindall* at [34]-[36]).

57 An inference on the part of the claimant not to proceed or put the claim on hold can arise. (See *Asturion* at [71]). This can include inactivity by the claimant. The length of the delay is highly relevant – see *Morgan Sindall* at [85] where Eyre J said:

“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.”

58 The Covid pandemic in *Morgan Sindall* was found not to be “a major factor given the scale of the claim and the resources of the claimant’s solicitors” ([80]). But I think this must be a fact-sensitive consideration in that the requirements and effects could differ substantially according to the particular circumstances of the individual. Here, I accept that the dentistry profession, as Dr Wadhvani has put it, “suffered in unique ways compared to almost every other profession” for the obvious reason of rife transmissibility of a virus whose effects could be fatal and for which, for some considerable time, there was no vaccine.

59 *Alfozan v Quastel Midgen* [2022] EWHC 66 (Comm) was extensively cited in *Morgan Sindall* at [14]-[22]. At paragraph 9 of *Alfozan*, HHJ Pearce, sitting as a Judge of the High Court, said:

“It is not in dispute that the commencement of litigation with no intention to bring matters to a conclusion can amount to an abuse of process. A claimant’s inactivity may demonstrate the lack of intention to pursue the claim. Once it is possible to show that the intention to pursue does not exist, it is not necessary for the defendant to show that it is no longer possible to have a fair trial or that the defendant has otherwise suffered prejudice – see *Grovit v Doctor* ... As Lord Woolf put it at p.647G-H of his judgment in that case, ‘the courts exist to enable parties to have their disputes resolved.’”

Stage 2

60 When considering whether it is proportionate to strike out the claim, the court must consider the other powers it has to avoid unnecessary delay (*Alfozan* at [13]) such as costs sanctions and the making of unless orders, in which respect also see *Quaradeghini v Mishcon de Reya* [2019] EWHC 3523 at [17]. The key point is the need to test the lack of any intention to prosecute the claim.

61 In *Alfozan*, at paragraph 16, HHJ Pearce said:

“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. As Lord Woolf noted in the passage from *Arbutnot Latham v Trafalgar* cited above, the investigation of why a party has not prosecuted the claim is itself a drain on the court’s resources. It would be inconsistent with the overriding objective to disregard the diversion of resources that arises when the court needs to investigate a party’s procedural failings in particular if the evidence suggests a continuing reluctance by that party to comply with the norms of litigation. I accept that the power to strike out is a long-stop jurisdiction, only to be invoked where other powers appear insufficient to achieve the purpose of progressing the claim, but where the court is satisfied that a claimant has no intention at all to progress the litigation I would not see the doctrine of proportionality or the need to consider alternative less draconian orders first as necessarily a bar to striking out the claim.”

62 And then, in the following paragraph, [17]:

“The court must also bear in mind that the obligation is on all parties to progress litigation, not simply the claimant. As Clarke LJ put it in *Asiansky Television plc v Bayer-Rosin* [2001] EWCA Civ 1792:

‘[48] It is no longer appropriate for defendants to let sleeping dogs lie: cf *Allen v McAlpine (Sir Alfred) & Sons* [1968] 2 QB 229. Thus a defendant cannot let time go by without taking action and then later rely upon the subsequent delay as amounting to prejudice and say the prejudice caused by the delay is entirely the fault of the claimant. Such an approach would in my judgment be contrary to the ethos underlying the CPR, quite apart from being contrary to paragraph 2.7 of the Part 23 Practice Direction. One

of the principles underlying the CPR is co-operation between the parties.”

63 As to that, Mr Brock submits that the first is primarily relevant to stage 2 and carries little weight at stage 1 if the inference of warehousing is found (see *Alfozan* at [39]). Secondly, the bar is not a high one, in that limited correspondence, which Mr Brock considers is met here, was regarded as sufficient in *Grovit* and, in *Solland*, the defendant sent no chasing correspondence at all.

64 In *Alfozan*, at paragraph 39, after stating the claimant’s allegation that the second defendant would not have applied for a CMC had little weight. HHJ Pearce said:

“But in this case, the Second Defendant has done anything other than acquiesced. It has sought to drive matters forward, arguably doing more than might be expected of the reasonable party in its position to press the Claimant to progress the claim. In those circumstances it would be indeed harsh to penalise the Second Defendant for not incurring greater cost so as to provoke action in a Claimant who appears to have no desire to progress matters.”

65 Pre-action delay is relevant, including the near expiry of the limitation period - see *Morgan Sindall* at [37]-[39], where it was said such delay compounded the delay during proceedings which meant a greater risk of the administration of justice being hindered and prejudice being caused to the defendant. It can also be relevant to the question of sanction if abuse is found.

Issue 1 - Is there currently an automatic stay in this claim pursuant to CPR 15.11?

66 Mrs Stewart submits there is, notwithstanding the present circumstances are novel, in that they are not on all-fours with the authorities where the rule has been found to operate. She adds that interpretation is consistent with the literal rule.

- 67 In my judgment, CPR 15.11 is not engaged as none of the conditions in (1)-(4) apply here. In particular, six months have not expired since the end of the period for filing a defence, as that period will not commence until twenty-eight days after the schedule of loss is filed and served.
- 68 In other words, the order of Master Teverson removes the procedural position from CPR 15.11. I do not consider the fact that six months have elapsed since twenty-eight days have expired after the Bank entered its acknowledgement of service to assist Mrs Stewart in her argument as whilst that is stated to be the general rule in CPR 15.4(1), as, again, the order of Master Teverson supersedes the procedural position which would otherwise apply.
- 69 Further, a stay for service of the defence pending receipt of evidence by the defendant is not unusual in that it may be agreed, for example, pending provision of documents pleaded in the particulars of claim which are not provided on initial disclosure or a pleaded expert's report. What is unusual and exceptional is the eight-year delay here.

Issue 2 - If so, should that stay be lifted by satisfaction of the *Denton* test?

- 70 I will determine this issue as: (a) I may be found to have erred in my conclusion as to issue 1; and (b) determination of this test is necessary in any event as the Claimants accept relief from sanction is necessary if I find them in breach of a rule (issue 3(a)) or abuse of process (issue 3(b)).
- 71 The Claimants accept, first, that the breach is serious and significant, and, secondly, that the reasons they advance for this extraordinary delay do not amount to good reasons for the breach. Rightly, Dr Wadhvani (at Wadhvani 1/38) says the reasons for the delay:

“... are not sufficient to constitute a ‘good’ reason for the delay ...”

72 I therefore turn to all the circumstances of the case. Mrs Stewart emphasised in her submissions that the Claimants will suffer substantial prejudice if their claim does not proceed, pointed to numerous statutory breaches as appeared in the FCA review and the substantial losses they have incurred due to the Bank’s actions and breaches.

73 However, the Bank, she submits, will suffer little or no prejudice in circumstances where:

- (1) the trial will turn on evidence which was collated years ago and preserved by the Bank, consisting of correspondence, file notes and transcripts of telephone calls;
- (2) there is no evidence of documents going missing or being unavailable over the years;
- (3) the Bank does not need to reply upon employees who have left the Bank’s employment, who number three in all - one, Ms Nasser, left in 2014 and Messrs Brewer and Walker before the claim was issued;
- (4) the authorities indicate as to evidence in commercial claims the preference for or reliance upon contemporaneous written documentation or records as opposed to oral recollection;
- (5) Dr Wadhvani says at Wadhvani 2/10 that the claim rests very heavily on the Bank’s own documents and requires “very little, or no interpretation or recollection by me”;
- (6) the failure to provide the schedule of loss has not affected any directions hearing or trial dates, nor has it impacted adversely on the Bank’s knowledge of what case it has to meet, which, at all times, it has known; and

(7) the actual losses are now accurately established.

74 Mrs Stewart also relies upon the combination of factors she submits were outside Dr Wadhvani's control: his very long working day, exacerbated by cashflow problems arising from the swap, the lack of availability of core personnel, the discovery that, as far as accountants were concerned, one such employee could not be relied upon, the need to rework years and years of accounts and the impact of the Covid pandemic.

75 I do not consider it just or appropriate to grant relief from sanctions in the circumstances of this case for these reasons:

(1) I consider most of the matters, save Covid, to which I will turn later, which occasioned these substantial delays, were within Dr Wadhvani's control, in particular:

- (a) His extremely heavy workload which delayed his direct involvement in and control of the expert evidence and thereby production of the schedule of resulted from his decision to prioritise his practice over this litigation.
- (b) Likewise, the lack of available personnel was within his control.
- (c) It was his decision to pursue the Tier 2 Losses. That is wholly understandable in that he wished to maximise his claim, but he failed to progress it.
- (d) Resultingly, the schedule of loss, in short, is back to where it started.
- (e) It was his decision to search for alternative experts to opine on the Tier 2 Losses.

(2) CPR 39.1A states the need, at (a) for litigation to be conducted efficiently and at proportionate cost. In no sense have these proceedings been conducted efficiently. Dr Wadhvani allowed the litigation to become moribund. His lawyers promised at times the schedule, but these promises were never met. The delays, and therefore impact

upon the efficient conduct, were egregious, especially as the negotiations took place some sixteen or seventeen years ago.

- (3) Likewise, Dr Wadhvani has not met the need for compliance with rules, practice directions and orders set out in CPR 3.9(2)(b). He admits in Wadhvani 2/62 that:

“A profound obligation rested on [him] to proceed with the claim ...”

His conduct was therefore not in accordance with the overriding objective.

- (4) The claim is unusually and exceptionally stale, especially as currently a six-day trial would not be heard even if listed now i.e. by 3 May 2024 (which could not, in any event happen) until about April - July 2025. Once the CCMC has happened and all directions complied with, it is unlikely that the trial would take place until another twelve months later, namely in April - July 2026. That would be up to eleven years after issue and almost twenty years since the start of the negotiations.
- (5) Responsibility for the above lies with Dr Wadhvani and not the Bank. The Bank, via DLA, did chase for the schedule of loss but to no avail. There is, in my judgment, no onus upon a defendant in this position to consistently remind the claimant, nor, for that matter, issue an application to force matters on.
- (6) A claimant in the position of Dr Wadhvani whose claim has been issued at or towards the end of the limitation period has a particular obligation to ensure litigation progresses with reasonable dispatch to a conclusion. The opposite has happened here.

(7) I do not think that the prejudice that the Bank has suffered is outweighed by that the Claimants will suffer, as whilst the documentary evidence has been retained, there is an issue as to oral evidence concerning the meeting note of 25 September 2007 and the matters pleaded in the particulars of claim at paragraphs 33(d), (f), (i) and (h). The meeting note does not extend to those pleaded allegations. The oral evidence of Dr Wadhvani and the Bank's employees or ex-employees will be essential for the court to properly determine those issues. There is therefore prejudice to the Bank due to the Claimants' delay. Further, there is the real risk that the greater the time since the Bank's employees have left, the harder it will be for the Bank to obtain their cooperation.

(8) In all the above circumstances, I do not think it disproportionate to refuse relief. The Bank will suffer prejudice. The prejudice the Claimants will suffer is substantial, but they are the authors of it.

76 As to the Covid pandemic, in my judgment, that accounted for a maximum of one year of the delay, but that does not affect my overall conclusion. I therefore refuse the Claimants' application for relief from sanction.

Issue 3(a) - Should the claim be struck out under CPR 3.4(2)(c) (breach of a rule)

77 Mrs Stewart accepts that there is breach of CPR 1 on the part of the Claimants in that there is a duty upon them to assist the court in pursuing the overriding objective (CPR 1.3, which is to be read with CPR 1.1(2)(d), dealt with expeditiously and fairly, (e) allotting an appropriate share of the court's resources, and (f) enforcing compliance with the rules, practice directions and orders).

78 In *The Auk*, at paragraph 51, Hamblen J said:

“The Claimant further submits that CPR 1.3 is too general a rule to form a proper basis for an application to strike out. I do not agree. It all depends on the circumstances. Where the breach of the rule is as serious and stark as a failure to take steps in the action for over seven years it may well form a proper basis for a strike out.”

I also note the summary of the authorities as to delay as appears at paragraph 37 of that authority.

79 The effect is that the Claimants accept they require relief from sanctions. The position is therefore the same under issue 2 and, for like reasons, I refuse to grant relief.

80 I would add that the stark reality is that it has taken some eight years for the Claimants to produce a short eight-page schedule that goes no further than what was known in 2015. The reasons advanced by Dr Wadhvani do not bear examination in the sense that they are personal to him and could have been varied or removed or accelerated, as the case may be, by him.

81 The position, in my judgment, is analogous to paragraph 41 of the *Mitchell* decision cited in *Denton* at paragraph 12, in that the Claimants had to choose between advancing and maintaining their business or the claim. They cannot ascribe that choice, which resulted in the substantial delays, to the Bank or rely upon it as an excuse. It was within Dr Wadhvani’s gift to restructure or so structure his business or employ such accountants or experts as was necessary. As was stated in *Mitchell*, taking on too much work which cannot be coped with due to lack of fee-earners or other resources is not a good reason for non-compliance.

Issue 3(b) - Should the claim be struck out under CPR 3.4(2)(b) (abuse of process)

82 This issue concerns warehousing, which describes “a range of conduct where an action is deliberately not being pursued.” Importantly, this does not just apply where the claimant either (a) never intended to proceed with the litigation or (b) later decided to abandon it. It can apply where a claimant, in effect, puts the claim to one side or on hold for a period of time even if they always intended to pursue it in the fullness of time.

83 As to stage 1, in my judgment, the conduct of the Claimants does amount to an abuse of process for these reasons:

(1) There are numerous unexplained and significant delays, for example:

(a) As to experts – Inquesta were not instructed until January 2016, seven months after the claim form was issued and four months after the particulars of claim were served, and that very late and surprising starting point is unusual, as litigation under the CPR is supposedly front-loaded.

(b) That shows a degree of reluctance by the Claimants to expend time and money and accords with Slater & Gordon, by their letter of 9 March 2015, saying that the Claimants would not go to the expense of setting out their losses without an admission of liability.

(c) A draft report was only provided in February 2017 but, at various unspecified points in 2018, Dr Wadhvani was, in his words “attempting” to provide sufficient information to them.

- (d) The specialist valuers for the Tier 2 Losses, Christies, were only approached, again at some unspecified date, in late 2018. It took months (again unspecified) for them to say they were conflicted.
- (e) It then took well over a year, to February 2020, to “identify” Pinders as the third expert. They were not instructed then but “paused” due to the pandemic. But that only arose in March 2020. Further, the pandemic did not prevent them being instructed and provided with the documents they would need, and no assertion to the contrary is made.
- (f) Then a further three years passed with no substantial explanation as to why it took so long to produce the schedule.
- (2) Dr Wadhvani was, as I have set out at paragraphs 37 to 39 above, subject to an incredible workload, but I must place responsibility for that at his door. He made in my judgment a conscious decision to put the preparation of the expert evidence, and therefore progress of this claim, to one side. It is notable that, on the face of the evidence, there appears to be a substantial reluctance to engage the necessary expertise from early 2015, even after the claim form was issued in June 2015.
- (3) As to the impact of the Covid pandemic, whilst I have acknowledged above the particularly difficult position dentists and Dr Wadhvani were in, and noting that Pinders would have, but for the pandemic, carried out site visits, I consider more could have been done, as other professions and businesses surmounted the obstacles to keep going under those acceptably difficult circumstances.

- (4) The overall period of delay is extraordinarily long at over seven years, even if I erred very much on the side of generosity to the Claimants and allow a full year for the impact of the pandemic.
- (5) The reasons put forward are not good ones. Dr Wadhvani's decision to prioritise his business, whilst understandable, does not assist him.
- (6) The Claimants' solicitors gave assurances as to production of the schedule, but these were not met, as I have mentioned above.
- (7) The Claimants spent six or seven years on a wholly unnecessary and now abandoned attempt to substantiate the Tier 2 Losses. In other words, the Claimants are back where they were eight years ago, but the Bank has been prejudiced over that time by that delay.
- (8) The claim was issued at the end of the limitation period.

84 I now turn to stage 2: is it proportionate to strike out the claim? An alternative would be to make various unless orders to ensure the Claimants comply in the future, but I am struck by how far off the trial would be, possibly up to two years from now. I also note that, in that respect, the Claimants are not properly prepared in that, before me, is also an application to amend the claim form to delete certain causes of action, namely rescission, restitution and misrepresentation. That is a serious matter and indicates a lack of proper preparation and intention and militates against exercising discretion in their favour.

85 If, say, one or two years had passed since issue, I would likely have taken a different approach, but almost nine years have gone by. In those and the above circumstances, I do

not think I should exercise my discretion by making various unless orders. It would not be proportionate to do so in view of the egregious delay which obtains here, plus the fact again the claim was issued at the end of the limitation period and requires amendments to the claim form to proceed.

86 I now turn to prejudice. The following matters, which I have explained above, are relevant:

- (1) The availability of all the necessary documents.
- (2) The departure from the Bank's employment of all save one of the relevant employees before the claim was issued.
- (3) The need for oral evidence as to the September 2007 meeting in view of the matters pleaded which goes beyond the Bank's detailed note.
- (4) Dr Wadhvani's assertion this claim does not depend on his oral evidence or contemporaneous recollections.

87 In my judgment there is prejudice to the Bank which is not offset or outweighed by the availability of the documents as:

- (a) It must be difficult to involve former employees the greater the time that elapses since their employment, and, here, that time is exceptionally long.
- (b) The need for oral evidence on the September 2007 meeting, plus Dr Wadhvani's evidence as to causation. Those memories can only diminish as time passes.

(c) It is also not necessary for me to identify what would or could not be recalled, nor carry out a balancing exercise as to what events may suffer from lack of recall and to what extent.

88 Whilst there is considerable financial prejudice to the Claimants if this claim is struck out, as I have explained, Dr Wadhvani is responsible for his workload and prioritisation of that over this claim.

89 Finally, DLA did remind the Claimants' solicitors on several occasions, in 2017 and 2018, of their need to serve the schedule of loss. It was incumbent upon the Claimants to progress the claim, but they failed to update DLA or the court and failed to meet their own assurances as to production of the schedule of loss.

90 In all the above circumstances, I consider it just and proportionate to exercise my discretion to strike out the claim. There can be no relief from sanction for the reasons I have already given. I will not consider issue 3(c), namely the third alternative ground (the court's inherent jurisdiction) in view of my decisions in favour of the Bank on issues 3(a) and 3(b).

CERTIFICATE

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

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