Ref. QB-2017-006170
[2024] EWHC 2124 (KB)

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

The Royal Courts of Justice
Strand
London

Before MASTER DAVISON

IN THE MATTER OF

WESTERN AVENUE PROPERTIES LIMITED and ANOTHER (Claimants)

-v-

SADHANA SONI and ANOTHER (Defendants)

MR M WARWICK KC, instructed by Judge Sykes Frixou, appeared on behalf of the Claimants
MR S HUNTER, instructed by Denning Sotomayor Limited, appeared on behalf of the Defendants

JUDGMENT
16 JULY 2024

MASTER DAVISON:

1. This is the claimant's application to strike out the counterclaim. There is a full and very helpful chronology of events at pages 2 to 4 of Mr Hunter's skeleton argument which, in the interests of economy, I will not recite. I will, however, give a short sketch of the claim and the counterclaim and of the relevant events.

2. The claim was to restrain the defendants from acting as solicitors for a particular client in breach, or alleged breach, of confidentiality obligations derived from the first defendant having acted as in-house solicitor for the claimant. The claimant applied for an interim injunction. That was granted by his Honour Judge Curran KC on 26 October 2017. In the meantime, the defendants had counterclaimed for non-payment of the first defendant's fees during her period of employment, or to use a neutral term, engagement.

3. The claimant sought security for costs of the counterclaim against the second defendant to whom the fees had been assigned and I made an order for security for costs on 27 July 2018. The order was in the sum of £40,000 and that was duly paid into court on 22 August 2018.

4. Then nothing at all happened for very nearly five years until on 6 June 2023, the defendants applied to strike out the claim based upon the principle in *Havering London Borough Council v Persons Unknown* [2021] EWHC 2648 (QB). That is noted in the White Book as authority for the following proposition: "A failure to progress a claim expeditiously following the grant of an interim injunction may well be found to be an abuse of process.".

5. That application was eventually listed for a hearing which was to take place on 11 December 2023 but was in fact dealt with on 7 December by consent. The parties agreed that the claim form and particulars of claim should be struck out, that the injunction granted by his Honour Judge Curran KC should be discharged, and that the claimants should pay the defendants' costs of the claim.

6. The order was silent as to the counterclaim but the defendants then asked for directions to be given in the counterclaim and for the hearing listed on 11 December to be used for that purpose. That brought a response from the claimants' solicitors in these terms:

> "I have just now received Miss Soni's emails. She has not communicated with me or progressed her counterclaim for some six years now." (It went on to say that it was the claimants' intention to apply to strike out the counterclaim.)

7. This correspondence came to me, indeed the first defendant's initial email was directly to me, and I responded to the correspondence in these terms:

> "The purpose, or certainly the primary purpose, of the hearing on Monday was the defendants' strike out application which has now been agreed. I will not the use hearing to make directions in the counterclaim which is a separate matter. I would invite the parties to take stock. It will be for Denning Sotomayor, the second defendant, to apply to list the counterclaim for a directions hearing, if so advised. If an application to strike out the counterclaim is also issued, that can be listed at the same time.".

8. In accordance with that direction the claimant did issue an application to strike out the counterclaim. The relief sought in box 3 of the application was in these terms:

> "The counterclaim shall be struck out pursuant to CPR rule 3.4(b) on the grounds that it is an abuse of process or alternatively, the counterclaim shall be dismissed for want of prosecution on the grounds that the defendant has failed to take any steps to progress the counterclaim since August 2018. Further, the defendant shall pay the claimants' costs of the counterclaim.".

9. The wording of box 3 was *mutatis mutandis* in the same terms as the defendants' earlier application to strike out the claim.

10. I can deal with the law economically because for present purposes it is sufficiently set out in two short passages from the commentary at 3.4.16 of volume 1 of the White Book:

> "In *Wearn v HNH International Holdings Limited* [2014] EWHC 3542 (Ch), Barling J, the case was struck out under CPR rule 3.4(2)(b) and rule 3.4(2)(c) for delay and non-compliance with court orders. The claim had been ongoing for almost 14 years and the claimant was largely responsible for the delay. The court recognised that the guiding principle was the delay alone, even if it was inordinate and inexcusable, could not be an abuse of process. However, abuse of process might arise when delay was combined with some other relevant factor.". And then a little further on: "In *Alfozan v Quastel Midgen LLP* [2022] EWHC 66 (Comm), HHJ Pearce, sitting as a High Court Judge, ruled that evidence or very long period of procedural inactivity by the claimant often gives rise to an inference that the claimant has no real intention of progressing the claim. However, that inference can be rebutted if there is a satisfactory explanation for the delay.".

11. Here there is no real or satisfactory explanation for the delay. Mr Hunter submitted that the parties had treated the claim and the counterclaim as "on hold" or "paused". I think a much more likely explanation is that the claimants for their part had obtained what they needed by way of the interim injunction and the defendants for their part could not prosecute or pursue the counterclaim without the risk of provoking the claimants into action on the

claim and therefore, consciously or by default, decided to let sleeping dogs lie. To put that slightly differently it seems to me that the defendants had only a conditional intent to pursue the counterclaim, namely that it would be pursued if, and only if, the claim was revived.

12. Two points arise from that.

13. The first is that this situation falls squarely into the principle identified at paragraph 55 of the Court of Appeal's judgment in *Asturion Fondation v Alibrahim* [2020] EWCA Civ 32. At paragraph 55, Arnold J said this, having quoted a long passage form the judgment of Woolf L in *Arbuthnot Latham Bank Ltd v Trafalgar Holdings*, he said:

> "It is clear from what Lord Woolf MR said that it is likely to be an abuse of process for the claimant unilaterally to decide not to pursue a claim for a substantial period of time, even if the claimant remains intent on pursuing the claim at some future point."

14. Secondly, having adopted that stance, it seems to me that it is not really open to the defendants to apply the full rigour of the cases on abuse of process through delay to the claimants but not to themselves. It seems to me that there was force in the points made by Mr Warwick, King's Counsel, for the claimants in paragraphs 24 and 25 of his skeleton argument in which he said this:

> "So far as the facts of this case are concerned, the claimants respectfully adopt the language of the defendants' own solicitor, Miss Fitzgerald, at paragraph 26 of her statement.".

15. This was a reference to the statement of Mr Porter for the defendants' application to strike out the claim. She said as follows:

> "The court retains its inherent power to dismiss a claim for want of prosecution where a case has not been progressed even though there has been no specific breach of any rule or court order. The overring objective of the Civil Procedure Rules is that cases should be dealt with justly and at proportionate cost which includes the requirement that they should be dealt with expeditiously and fairly. In this case there has been inordinate and inexcusable delay. The claimants have entirely failed to progress their claim and it seems had no intention of doing so. I submit that as a result the claimants have failed to comply with their duty under CPR Rule 1.3 to help the court to further the overriding objective. In the circumstances, in the alternative, the claimants invite the court to dismiss the claim for want of prosecution.".

16. Mr Warwick went on in these terms:

> "One has only got to substitute the word 'counterclaim' for 'claim' to show that this is a proper case where the counterclaim should be dismissed for want of prosecution."

17. It seems to me there is also force in Mr Warwick's point that the defendants are "approbating and reprobating", that is to say they are castigating inaction on the part of the claimants but seeking to excuse exactly the same inaction on their own part. In general the law frowns upon such conduct and that has indeed the status of a legal principle - see *Express Newspapers Plc v News (UK) Limited* [1990] 1 WLR 1320 (Ch).

18. I think that the claimant has shown that the delay is of such a scale as compels the inference that the defendants were warehousing the counterclaim, ie, had no real intention, beyond the conditional intention I have mentioned, of pursuing it. I also agree that the defendants have been guilty of tactical manoeuvring in that they consciously did not bring forward their application for directions in the counterclaim until the claim was struck out.

19. It is true that the claimants too could have brought this up by cross-applying at an earlier stage to strike out the counterclaim, but that does not change or detract from the fact that the defendants in my view, and on the evidence I have before me, deliberately maintained a discreet silence on the counterclaim until the claim against them was done and dusted.

20. I think the delay here does amount to an abuse of process. The inference of tactical warehousing is not rebutted by the fact that the defendants paid the security for costs into court six years ago, nor by the fact that they applied to re-amend (again six years ago). Indeed, the latter point scarcely helps them because having made that application in April 2018, they ignored a perfectly reasonable request for further information made in July 2018 and never until now pursued the application to re-amend.

21. I do think that in the exercise of the discretion that I have, I should strike out the counterclaim. The defendants are in serious breach of the overriding objective. It seems to me that there is, or should be, parity with the treatment of the claimants' claim. The delay here is inordinate and inexcusable and (though not strictly relevant to the application) the claimants would be prejudiced by it. Prejudice is to be inferred from the scale of the delay and the nature of the counterclaim.

22. For all those reasons I will accede to the claimants' application and strike out the claim as I am requested to do.

23. In those circumstances, the other applications fall away.
