"Warehousing" of Claims and Abuse of Process

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It is not uncommon for parties to issue proceedings shortly before the expiration of a limitation period in order to preserve their cause of action. However, the recent case of *Alfozan v Quastel Midgen LLP* demonstrates that commencing proceedings and failing to do any more than the bare minimum in order to keep those proceedings alive may amount to an abuse of process and give grounds for the defendant to strike out the claim.

In *Alfozan v Quastel Midgen LLP* [2022] EWHC 66 (Comm), a claim was issued by Mr Alfozan, a Saudi Arabian businessman with a real estate company in London, who alleged that the two Defendants conspired to defraud him.

On 21 December 2018, shortly before the expiry of the applicable limitation period, Mr Alfozan commenced proceedings against both defendants without first engaging in any pre-action correspondence. Both the First and Second Defendants applied to strike out the claim. The claim against the First Defendant, a former employee of the Claimant, was struck out on 21 May 2021 by Miss Julia Dias QC on the grounds that the proceedings were an abuse of process due to the inaction of the Claimant following the commencement of the proceedings.

The Second Defendant, a law firm that acted for the Claimant in the purchase of a series of properties, issued the application to strike out on 21 May 2021, also on the basis that the claim brought against it by the Claimant was an abuse of process.

At the time the Second Defendant's strike out application was made, the proceedings were more than two years old, but little progress had been made. This was due to a number of factors:

- The Claimant waited until the end of the period during which the Claim Form was valid in order to serve it;

- The Claimant's pleadings were deficient, and although the Claimant agreed that amendments to the Particulars of Claim were needed, the Claimant took approximately 17 months to send amended particulars to the Defendants;

- Following the service of the Defendants' respective Defences (the Second Defendant's was served in 2019, and the First Defendant's in July 2020), the Claimant made no attempts to arrange a CMC.

The only real progress which had been made came in October 2020, when the Claimant agreed to give security for costs.

However, the Claimant then took four months to respond to the Second Defendant's strike out application. The Claimant's witness statement was dated 24 November 2021, well outside of the 14 day time limit for the service of responsive evidence.

In the remainder of this briefing we consider the Second Defendant's strike out application.

Simple Delay or "Warehousing"? In considering whether the claim against the Second Defendant was an abuse of process, Pearce J referred to the judgement regarding the strike out of the First Defendant's claim. Although both applications concerned an action commenced by the same Claimant and turned on similar facts, Pearce J emphasised that "*each case must turn on its own facts*". Notwithstanding this, the previous behaviour of the Claimant should still be taken into account for the purposes of context:

> *"A party who shows a pattern of abusing the process of the court is more likely to be one against whom the ultimate power of strike out is exercised because of their tendency to waste the time and resources of others on litigation which is not being properly conducted".*

The Second Defendant's application for strike out asserted that the claim was an abuse of process because the Claimant commenced proceedings without any intention of pursuing them, at least in the short to medium term. A mere delay in serving a claim after commencement does not in itself constitute an abuse of process, though a claimant's inactivity may demonstrate the lack of intention to pursue a claim. However, an abuse of process may arise where the claimant's behaviour goes beyond mere delay and amounts to "warehousing".

To identify whether the Claimant was in fact "warehousing", Pearce J referred to Lord Woolf's definition of "warehousing" in *Arbuthnot Latham v Trafalgar* [1998] 1 WLR 1426—to "*warehouse proceedings until it is convenient to pursue them*". "Warehousing" can therefore apply to situations where the claimant has no intention for the time being to pursue the claim and simply wishes to preserve a cause of action even though they intend to pursue the claim in future.

In deciding whether to strike out the claim for abuse of process in the form of "warehousing", Pearce J relied on the two-stage analysis in *Asturion Foundation v*

Alibrahim [2021] 1 WLR 617—first, whether the behaviour is an abuse of process and second, whether it is proportionate to strike out on this basis.

Abuse of Process. "Warehousing" a claim may amount to an abuse of process if the party commences a claim and does not pursue it for a substantial period of time. This is the case even if the claimant is intent on pursuing the claim at some later time (*Asturion Fondation v Alibrahim*) or in fact decides to pursue it (*Solland International Limited v Clifford Harris* [2015] EWHC 3295).

The Claimant, in seeking to avoid strike out, argued that the Second Defendant could have applied for a Case Management Conference pursuant to paragraph 7.4 of CPR PD59. Pearce J said this point had "*little weight*", since it is difficult to see why it was incumbent on the Defendant to incur costs to force the Claimant to change his approach in "warehousing" the claim.

In considering whether the proceedings were an abuse of process, Pearce J looked at the steps taken by each party in chronological order. He noted that it was a "*striking feature of the chronology…that the Claimant has throughout done little more than the minimum necessary to keep the claim alive*."

Pearce J held that this bare minimum approach did not demonstrate genuine intent to progress the litigation. The recurring failure to pursue the claim with any diligence was ultimately deemed to be an abuse of process.

Proportionality. According to CPR 3.4(2)(c), "*The court may strike out a statement of case if it appears to the court... that there has been a failure to comply with a rule, practice direction or court order*".

In considering whether to exercise the court's discretion to strike out the claim, Pearce J considered the following matters:

- The Second Defendant's assertion that as the claim against the First Defendant had already been struck out, the Second Defendant would be unlikely to secure the First Defendant's cooperation in defence of the claim or in the alternative be unable to contribute to proceedings against the First Defendant. The First Defendant was, on the case advanced by the Claimant, "by far the more culpable" party and was alleged to have conspired to harm the Claimant. The Second Defendant, by contrast, was only alleged to have failed to protect the Claimant from that harm. Accordingly, the Claimant's warehousing of his claim against the First Defendant, which resulted in that claim being struck out, had caused the Second Defendant prejudice—the Second Defendant was deprived of any defence which might have been run by the First Defendant in respect of the alleged conspiracy.

- The fact that the Claimant had been found to have engaged in warehousing of his claim against the First Defendant showed a pattern of abusing the process of the court. This tendency to waste the time and resources of others in litigation which is not being properly conducted pointed in favour of strike out.

Pearce J noted that although the Claimant had agreed to provide security for costs, which on one view demonstrated an intention to pursue the claim, an agreement to provide security was not, in of itself, sufficient to justify dismissing the application for strike out: the Claimant had failed to pursue the claim with any diligence notwithstanding the provision of security. Likewise, the (very late) provision of an amended Particular of Claim, though an indication of a desire to pursue the claim, was not sufficient to prevent strike out.

Pearce J considered "*whether the creative use of other case management powers could provide an adequate test of the Claimant's true willingness to litigate and/or adequate protection for the Second Defendant and other court users if it does not*". He noted, however, that he had no confidence that the making of unless orders or similar would change the Claimant's attitude to the litigation.

Accordingly, Pearce J was satisfied that the Claimant's abuse of process by warehousing the claim should result in an order that the claim be struck out.

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This case serves as a helpful reminder that Claimants must be careful to avoid bringing claims where they are not intent on pursuing them with some diligence. A more sensible approach where the expiry of the applicable limitation period is an issue may be to consider issuing a protective claim form, thereby preserving the cause of action, and seeking to agree a stay of the proceedings in order to permit the parties time to seek to negotiate a resolution. Issuing a claim and simply doing the bare minimum to progress the proceedings is a high risk strategy and as this case demonstrates, is one that could lead to losing the claim altogether.

Please do not hesitate to contact us with any questions.

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