

Claim Warehousing: *Morgan Sindall Construction and Infrastructure Ltd v Capita Property and Infrastructure (Structures) Ltd & Anor [2023] EWHC 166 (TCC)*

3 March 2023

INTRODUCTION

The High Court of Justice (the “Court”) has recently handed down its judgement in *Morgan Sindall Construction and Infrastructure Ltd v Capita Property and Infrastructure (Structures) Ltd & Anor [2023] EWHC 166*, which considers the distinction between, and consequences of: (i) unavoidable delays in a claim; and (ii) deliberate delays in a claim. In *Morgan Sindall*, the defendant accused the claimant of deliberately “warehousing” its claim—in other words, abusing the legal process by commencing litigation with no real intention of pursuing the claim, as evidenced by continuously putting the claim off.

Debevoise & Plimpton has previously considered the issue of warehousing and abuse of process in a blog article discussing [“Alfozan v Quastel Midgen LLP \[2022\] EWHC 66 \(Comm\)”](#)—a High Court decision where a professional negligence claim was struck out due to the claimant’s deliberate inactivity and lethargy towards moving the claim forward.

The key takeaways arising in that article still apply in the present case. Both cases show that to avoid significant consequences due to delay, claimants must ensure to do “*more than the minimum to keep a claim alive*” (See *Alfozan v Quastel Midgen LLP [2022] EWHC 66 (Comm)* at paragraph 36). Claimants should ensure they will be able to properly pursue their claim in a timely manner. Where delay is unavoidable, claimants should have a reasonable explanation for the delay—as was the case in *Morgan Sindall*.

SUMMARY OF THE FACTS

In July 2017, the claimant, Morgan Sindall Construction (the “Claimant”) issued proceedings against two defendants—Capita Property Ltd (“D1”) and Sabre Structures Ltd (“D2”). The Claimant also issued separate (but related) proceedings against the insurer of D2, Aviva (“D2 Insurer”). In November 2017, the Claimant and D1 agreed to stay the proceedings between them. In December 2017, the stay was approved, and there was default judgement against D2. Between 2018 and 2022, the Claimant and D1

negotiated, arranging a three-way mediation with the remaining parties and/or a CMC to resolve the proceedings. When the mediation failed and a CMC date was put in place, D1 applied for strikeout, arguing that the Claimant had abused the legal process by engaging in a three-year stalling exercise in order to avoid actually pursuing and resolving the claim. The Claimant argued that the delay was caused by the fact that D2's Insurer, Aviva, was involved and therefore, the Claimant wanted to streamline the legal process by running the claims concurrently and/or pursuing mediation with all of the relevant parties before continuing further.

The court held in favour of the Claimant and refused the D1's strikeout application, finding:

"... 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."

COMPARING MORGAN SINDALL TO ALFOZAN

- **The Rules:** Both cases distinguish between intentionally warehousing a claim and unintentionally or clumsily delaying the legal process. Whilst both acts abuse the legal process, *intentional* delay justifies strikeout. The Court in *Morgan Sindall* agreed that *"it is right to say that 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...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."*
- **The Test for Abuse of Process:** In deciding whether to strike out for abuse of process, the courts in both *Morgan Sindall* and *Alfozan* applied the two-stage test from *Alibrahim v Asturion Fondation* [2020] EWCA Civ 32. The court must determine (1) the subjective intent for the delay and therefore (2) whether the delay amounts to abuse of process in the form of strikeout worthy warehousing or the lesser offence of simple delay. In other words, a successful strikeout application must prove there

was subjective intent to deliberately stall the legal process. Delays that are unavoidable due to incompetence or are explained by a valid reason are unlikely to be struck out and, therefore, the bar for establishing that strikeout is necessary is a high one.

- **The Decision:** Although the court in *Morgan Sindall* acknowledged that the Claimant had deliberately delayed proceedings, it accepted the Claimant's argument that the intention underlying the delay arose out of a rational desire to combine the proceedings with its claim against another defendant and/or arrange for tripartite mediation with a view to resolving the proceedings. The fact that the reason for the delay was related to increasing the efficiency of the proceedings was evidence of the lesser offence of unintentionally delaying the proceedings, *not* warehousing the proceedings. The Claimant's overall conduct, though slow, showed intention to engage in the legal process and properly pursue its claim. Indeed, D1 had accepted and agreed with the Claimant's approach in correspondence. It would be disproportionate to strike out a claim that was being properly pursued and, in any case, D1 undermined its strikeout application by delaying to file it promptly—"a party who alleges this kind of abuse must act promptly...a party cannot allow the action to continue and then at some later time seek to strike out for this form of abuse". By comparison, the claim in *Alfozan* was struck out because the claimant continuously did "little more than the minimum necessary to keep the claim alive"—the claimant: issued and served its claim and strikeout application evidence shortly before the relevant deadlines; and took 17 months to supply draft amended particulars of claim after admitting they needed amending.

Morgan Sindall and *Alfozan* confirm that parties should, as always, pursue litigation in the most time-efficient manner to avoid the risk of successful strikeout applications. However, where there are genuine reasons for delay, a party should always show continued engagement with the legal process (*i.e.*, continued correspondence with other the parties; being amenable to compromise; seeking to resolve the proceedings; making any relevant applications to the court, etc.) to demonstrate that they are prosecuting their claim.

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Please do not hesitate to contact us with any questions.

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