[2022] EWHC 522 (Ch):

Case No: BL-2020-001467

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 March 2022

Before:

DEPUTY MASTER MCQUAIL

- -

Between:

(1) CATALYST INVESTMENT GROUP LIMITED
(now dissolved) **Claimants**
& others

- and -
(1) MAX LEWINSOHN
& others **Defendants**

- -

Mr William Buck (instructed by **Cooke, Young & Keidan LLP**) for the **Fifth Claimant**
Mr Rory Brown (instructed by **Brandsmiths**) for the **Defendants**
The other Claimants were not represented and did not appear

Hearing date: 25 January 2022

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Approved Judgment

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DEPUTY MASTER McQUAIL

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand down is deemed to be 15 March 2022 at 10.00 am

Deputy Master McQuail:

1. On 25 January 2022 I heard the adjourned application dated 9 September 2020 by which the defendants sought an order "under CPR 3.4(b) and/or CPR 3.4(c) to strike out the following claims for want of prosecution: HC08C30158 and HC08C03241."

2. That application was supported by a witness statement dated 8 September 2020 of Mr Adam Morallee of Brandsmiths who represent the defendants.

3. The application was first listed before me on 7 April 2021. On that occasion I gave an ex tempore judgment and made orders in relation to the two sets of proceedings. Shortly after that further documentation came to light and the application was listed before me again on 23 June 2021. I gave a reserved oral judgment on 10 August 2021 the contents of which I will not unnecessarily repeat.

4. I made an order dated 10 August 2021 in the HC 08C03158 (now BL-2020-001467) proceedings by which:

(i) the indefinite stay of the proceedings made by the consent order of Master Moncaster dated 10 May 2010 ("the 2010 Consent Order") was lifted;

(ii) my order of 7 April 2021 (made in ignorance of the stay) was set aside;

(iii) the injunction made by order of Lewison J dated 29 December 2008 as extended by a consent order of Blackburn J on 12 January 2009 was discharged;

(iv) directions were given for re-listing the application (so far as it concerns the HC 08C03158 (now BL-2020-001467) proceedings only) and a timetable for filing any further applications and evidence was set;

(v) I ordered that the defendants should pay the fifth claimant's costs of the three hearings that had taken place and of the fifth claimant's costs of responding to my directions of 13 May and of corresponding with the defendants' solicitors in relation to the discovery of the 2010 Consent Order.

5. Since the hearing on 7 April 2021 the following evidence has been filed:

(i) on behalf of the defendants, Mr Morallee filed a second witness statement dated 12 May 2021 and a third witness statement dated 5 November 2021 and the first defendant ("Mr Lewinsohn") filed witness statements dated 26 May 2021, 5 November 2021 and 17 January 2022; and

(ii) on behalf of the claimants, Mr Daniel Burbeary of Cooke, Young & Keidan LLP, solicitors for the fifth claimant filed witness statements dated 9 June 2021 and 8 October 2021.

Chronology of the Proceedings

6. The full history of the two sets of proceedings of which strike out was sought (and a third set of related proceedings) is not entirely certain. The chronology set out in the following paragraphs is evidenced by documents which were in the bundles before the court on 25 January 2022 and by the terms of the judgment of Barling J given on 16 November 2009.

7. Three sets of related proceedings were issued in late 2008 as follows:

(i) On 7 November 2008 Catalyst Investment Group Limited ("Catalyst") issued claim HC08C03158 against (1) Mr Lewinsohn and (2) Maximillian & Co (A Firm) ("M & Co");

(ii) On 17 November 2008 Catalyst and Tim Roberts ("Mr Roberts") issued claim HC0803421 against (1) Mr Lewinsohn and (2) M & Co;

(iii) On 17 December 2008 ARM Asset-Backed Securities SA ("ARM") issued claim HC08C03618 against (1) Mr Lewinsohn, and (2) M & Co.

8. The disputes between the parties to the three sets of proceedings had their origins in connection with Eneco Inc ("Eneco") a now defunct Utah corporation, certain promissory notes it had issued to lenders and the security interest it had granted in its interest in certain international patents ("the IP Rights").

9. HC0803421 and HC08C03618 were essentially mirror image declaratory proceedings to proceedings in Utah arising out of the liquidation of Eneco. By HC08CO3158 Catalyst claimed that Mr Lewinsohn and M & Co, which is his alter ego, had been in breach of contractual, fiduciary and trust duties by virtue of his position as collateral agent of certain of the promissory noteholders under a contractual agreement ("the Intercreditor Agreement") and sought relief including declarations that Catalyst was the rightful holder of certain of the promissory notes and had acquired certain of the IP Rights that had belonged to Eneco.

10. On 29 December 2008 Lewison J made an order at a without notice hearing in HC08C03158 granting permission to add Micropower Global Limited ("Micropower"), to which the IP Rights were being transferred by Mr Lewinsohn and

M & Co, as a defendant and injuncting the defendants from disposing of certain IP rights. Costs were reserved. On 12 January 2009 a consent order made by Blackburn J continued the injunction until the following week and reserved the costs of the adjournment. It seemed that the injunction remained in place until my order discharging it in August 2021 (Mr Morallee's evidence in his first witness statement was that the injunction remained in place until my order, although paragraph 40 of Barling J's judgment of 31 July 2009 suggests that the injunction had by then been replaced by undertakings). It is unclear whether the costs of the injunctive proceedings were ever determined or were reserved until a later occasion.

11. On 21 January 2009 Mr Lewinsohn and M & Co made applications to challenge jurisdiction under CPR 11 in each set of proceedings. On 13 February 2009 Micropower made its own application to challenge jurisdiction in HC08C03158. These applications were heard over four days in May 2009 by Barling J. On 31 July 2009 Barling J gave judgment dismissing the jurisdiction challenges in each of the three sets of proceedings. The determination of costs was adjourned to a later date. Defences were directed to be filed by 25 September 2009 and replies by 16 October 2009. In addition, the Judge ordered that ten further claimants, who had assigned the promissory notes to Catalyst, be added as parties to HC08C30158.

12. On 24 September 2009 the claimants received the defendants' notices conceding liability for the entirety of the claimants' claims made in HC0803421 and HC08C03618.

13. Re-amended particulars of claim in HC08C03158 are dated 5 October 2009 and the amended defence and M & Co's counterclaim in those proceedings are dated 30 October 2009. By the counterclaim M & Co claims against the claimants all its costs incurred as collateral agent including costs and legal expenses in Utah and England and an indemnity against liability for costs in the proceedings themselves. The counterclaim is made pursuant to the terms of the Intercreditor Agreement.

14. On 11 November 2009 M & Co issued an application for summary judgment on the counterclaim in HC08C03158; judgment was sought in the sum of "$US1,755,381 and £293,610 and in the form of an indemnity". On the same date the defendants issued an application for security for costs against the first, second, third, fourth, ninth and eleventh claimants in HC08C03158.

15. On 13 November 2009 Barling J heard argument about the costs of the failed jurisdiction challenges and the two conceded claims. Barling J gave judgment on 16 November 2009. It was ordered that:

> (i) the defendants pay ARM indemnity costs in HC08C03618 and make a payment on account;
>
> (ii) the defendants pay Catalyst and Mr Robert's costs in HC0803421 and pay £94,727 on account;
>
> (iii) the defendants pay Catalyst's costs of the jurisdiction challenge in HC0803158 and pay 50% of £249,502.62 on account.

16. A hearing, presumably of at least one of the defendants' applications for summary judgment on M & Co's counterclaim and the defendants' application for

security, was listed to be heard on 12 January 2010 before Master Moncaster. It seems that that hearing did not take place and a further hearing was listed for 10 April 2010. Again, it appears that that hearing did not take place and instead the 2010 Consent Order staying the proceedings indefinitely was made.

17. Thereafter there is no documentary evidence or certain witness evidence before the court of any step taken by any party in relation to the proceedings until the application of 8 September 2020 was made. Mr Brown told me on instructions that:

(i) the costs liabilities pursuant to Barling J's orders in November 2009 were paid by the defendants; and

(ii) a settlement in HC0803158 was reached with the eleventh claimant.

18. The defendants' application to strike out was made in apparent ignorance of the 2010 Consent Order and of the final disposal of the HC08C03618 proceedings in November 2009, as explained in my judgment of 10 August 2021.

19. All that is known about the costs in proceedings HC0803158 is that the defendants were ordered to pay Catalyst's costs of the jurisdiction challenge.

20. Mr Morallee's first witness statement stated that the costs of defending HC08C03158 and HC08C03241 totalled £854,314 and that interest at 8% on that sum amounted to £747,925.02. Mr Lewinsohn's third witness statement acknowledged that his record of historic costs relating to the two sets of proceedings were not complete. He explained the quantification of the costs claim advanced by Mr Morallee as follows:

(i) 25% of the sum of £499,216, namely £124,804, representing the total paid in cash and shares to Burbidge, Mitchell & Gross, Utah lawyers;

(ii) £570,390 representing the total paid in case and shares to Mark Taylor & Company, English lawyers; and

(iii) £159,120 representing 663 hours of M & Co's charges for legal matters to MicroPower.

A number of invoices are exhibited to Mr Lewisohn's statement, but as Mr Lewinsohn acknowledges there is no exact reconciliation between them and the figures claimed because of factors including missing invoices and exchange rate differences.

The basis of the application to strike out

21. The application notice refers to the application being made under CPR 3.4(b) and 3.4(c). I read that as intended to be made under CPR 3.4(2)(b) and 3.4(2)(c) which provide that the court may strike out a statement of case if it appears:

> "(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
> (c) that there has been a failure to comply with a rule, practice direction or court order."

22. The application to strike out states that it is made on the basis of a "want of prosecution." Mr Morallee's first witness statement stated in paragraph 63 that the HC08C03158 proceedings and the HC08C03618 proceedings "were issued in November 2008 and have, since 30 October 2009 when the Amended Defence and Counterclaim was served, become stagnant and fallen into a prolonged state of abeyance." He went on to say at paragraph that "the inactivity and warehousing amounts to an abuse of process" and added at paragraph 71 "it would seem almost not possible to have a fair trial in this action."

23. It is apparent from the terms of the application, Mr Morallee's first witness statement and the statements made to the court on 7 April 2021 by counsel for the defendants (not on that occasion Mr Brown) that the defendants' position was that any strike out was to be a strike out of the whole proceedings including the counterclaim. Counsel for the defendants at the April 2021 hearing and Mr Brown in his skeleton for the January 2022 hearing submitted that the counterclaim only operated in the event that the defendants lost on the claim and incurred liability to the claimants, so in the event the claim was to be dismissed or struck out no such liability would arise and the counterclaim would be redundant. He therefore says that it would not be right to make costs orders going each way on the claim and counterclaim as described in the notes in the White Book at the first paragraph of 44.2.14.

24. Mr Brown no longer relies on the warehousing claim, which seems to be right given the consensual halt that was brought to the proceedings in 2010.

25. Mr Brown does, however, maintain that the proceedings should be struck out given the delay that has occurred and the impossibility of a fair trial. He says that the cost consequence that follows is that Catalyst should be ordered to pay the defendants' costs of the entire proceedings and that the second to eleventh defendants should be ordered to be jointly and severally liable for those costs from 31 July 2009 when they were joined as parties. I acknowledge that I referred to that being the usual order at the 7 April 2021 hearing, in the context of what I then understood to be claims where there had been inordinate and inexcusable delay.

26. In his second witness statement Mr Burbeary confirmed that it was the fifth claimant's position that she seeks an order that HC08C03158 be dismissed with no order as to costs.

27. There was some discussion at the hearing whether there was a distinction between proceedings that are struck out and proceedings that are dismissed and, in particular, whether the use of the term "dismissed" would connote that there had been a determination on the merits which precluded the bringing of a further claim.

28. Mr Buck referred to the Court of Appeal's decision in *LA Micro Group (UK) Ltd v LA Micro Group Inc* [2021] EWCA Civ 1429 in which Sir Christopher Floyd's judgment analysed an earlier decision of Miss Amanda Tipples QC and, having done so, concluded that her refusal to allow a claim to be brought at a late stage of earlier proceedings did not amount to a dismissal on the merits. Mr Buck said that this was an example of the court working out what had actually happened rather than having regard to the form of words used and thereby potentially elevating form over substance. In any event he pointed out that the form of order made by the court might record that the parties were in agreement that the proceedings should be brought to an end.

Delay

29. Unsurprisingly there is a dearth of authority on the approach to be taken and the costs consequences that should follow under the CPR where proceedings have been stayed by consent for more than a decade.

30. "Want of prosecution" was a description of inactivity in litigation more commonly used prior to the coming into force of the CPR, when it was easier than now to evade case management for a lengthy period. Many of the pre-CPR cases were reviewed in the case of *Aktas v Adepta* [2010] EWCA Civ 1170 and it is apparent from the terms of paragraphs 72 and 90 of Rix LJ's judgment that "want of prosecution" is a category of conduct amounting to abuse of process equivalent to "inordinate and inexcusable delay". It is apparent also from that judgment that a mere or short delay is not sufficient for abuse, there must be inordinate and inexcusable delay.

31. Mr Brown pointed out that if the delay in this case could not be described as inordinate it would be hard to imagine when delay could ever be so described.

32. Mr Buck relied particularly on the following passage of the *Asturion* case at paragraph 61 of Arnold LJ's judgment

> "In my judgment the decisions in *Grovit*, *Arbuthnot*, *Realkredit* and *Braunstein* show that a unilateral decision by a claimant not to pursue its claim for a substantial period of time, while maintaining an intention to pursue it at a later juncture may well constitute an abuse of process, but does not necessarily do so. It depends on the reason why the claimant decided to put the proceedings on hold, and on the strength of that reason, objectively considered, having regard to the length of the period in question. A claimant who wishes to obtain a stay of proceedings for a period of time should seek the defendant's consent, or failing that, apply to the court; but it is not the law that a failure to obtain the consent of the other party or the approval of the court to putting the claim on hold automatically renders the claimant's conduct abusive no matter how good its reason my be or the length of the delay."

33. Mr Buck submitted that this passage makes clear that a consensual agreement to stay proceedings cannot be characterised as abusive.

34. Mr Buck referred also to *Asiansky Television Plc v Bayer-Rosin* [2001] EWCA Civ 1792 and the following paragraphs in Clarke LJ's judgment :

> 47. I would also draw attention to one aspect of the CPR which has not, so far as I am aware, received consideration in the cases decided so far. Part 23 contains general rules about applications for court orders. Paragraph 2.7 of the Part 23 Practice Direction provides:
> Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it."
> 48. It s no longer appropriate for defendants to let sleeping dogs lie: cf. *Allen v McAlpinc (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 that 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".

35. Those paragraphs were referred to in the case of *Piero Aldo Quaradeghini Enzo Lino Quaradeegghini v Mischon De Reya Solicitors* [2019] EWHC 3523 by Phillip Marshall QC at paragraph 16 where he said:

> "The observation of Lord Woolf in *Groyit* that a party could apply for an "unless" order to prevent delays, but was under no obligation to do so, is also now subject to qualification under the current procedural regime. It is now incumbent on a party to apply for relief (including a peremptory order) as soon as reasonably practicable if they wish to seek such relief in respect of delay."

36. In the following paragraph the deputy Judge expressed the view that it would be a relatively rare case in which the court would strike out proceedings for abuse of process based on delay in the first instance and would generally only do so after an "unless order" had been sought, obtained and breached.

37. Mr Brown submitted that the *Asturion* case is consistent with the *Aktas* case in equating inordinate delay with abuse.

Costs Consequences

38. Mr Brown suggested that once the fifth claimant was in agreement that the proceedings must be disposed of the right concept to consider was discontinuance and the terms of CPR 38 and, in particular, the usual costs consequence of discontinuance as set out at CPR 38.6. As he pointed out, if a claimant were to avoid that usual consequence he or she would usually need to show a change of circumstances to which he had not contributed, that is at point (5) of the principles set out by Moore-Bick LJ in *Brookes v HSBC Bank Plc* [2011] EWCA Civ 354. He submitted that the fifth claimant had adduced no evidence, that would take the case out of the general rule on this basis if discontinuance had been sought.

39. Addressing the question of the court's general discretion as to costs Mr Brown reminded me of the terms of CPR 44.2 and the regard the Court is to have to whether a party has succeeded and to the conduct of the parties including the manner in which a party has pursued or defended its case. Mr Brown contended that the relevant conduct in this case was the delay. He submitted that the stay was an excuse for a period of inactivity but not for more than ten years of delay. As to success he contended that as claimants have not obtained judgment and the interim injunction has been discharged the claimants were not successful on the claim and, as the counterclaim simply falls away, there should be no costs order in the claimants favour in respect of the counterclaim.

40. Mr Brown reminded also that at paragraph 44.2.18 of the White Book the notes make clear that 44.2(4)(b) provides the basis upon which the court may order an

unsuccessful party to pay the costs of the successful party even if success is not complete.

41. Mr Brown says there will be no trial, no issues will be tested, the claim is being abandoned. He says it is an oversimplification to say both the claimants and the defendants have lost. These proceedings do not comprise a classical claim and counterclaim with allegations going both ways; the counterclaim is for an indemnity or reimbursement under a contract.

42. Mr Brown referred me to the notes at 44.5.1 in the White Book referring to *Chaplair Ltd v Kumari* [2015] EWCA Civ 798 which considered the law where costs are payable pursuant to the terms of a contract. The Court of Appeal explained that any order for the payment of costs is always discretionary under section 51 of the Senior Courts Act 1981, but where there is a contractual right to costs that discretion would normally be exercised to reflect the contractual right.

43. Mr Buck emphasised that the Court has a discretion as to costs under CPR 44.2 and while the general rule is that the unsuccessful party pays the costs, the court may make a different order with regard to all the circumstances.

44. Mr Buck pointed out that there has been no notice of discontinuance. The present situation arises because there has been a consensual stay for in excess of eleven years and both parties agree no fair trial is possible. He says there could be an analogy with discontinuance but there would still be a discretion

45. Mr Buck also says that it would be wrong to simply assume that the counterclaim gives rise to a contractual liability for costs where the fifth claimant has not conceded that to be the position and where, as Barling J noted in his costs judgment on 16 November 2009, the counterclaim battle was not a straightforward one. The stage for filing any defence to the counterclaim or even filing evidence in opposition to the application for summary judgment on the counterclaim was never, so far as is known, ever reached.

46. Mr Buck submits that on the basis of what is known about the chronology of the proceedings it is not possible to say who was the winner and who the loser and therefore for the Court to make anything other than no order as to costs is practically impossible.

47. Mr Buck also made submissions about the difficulty of assessing the costs where it is not apparent that all the material necessary to enable a costs judge to carry out an assessment is available. Even a cursory examination of the invoices exhibited by Mr Lewisohn shows that they cannot necessarily be characterised as being in respect of costs that would be properly recoverable by the defendants as costs of defending the HC0803158 proceedings some for example relate to the HC080342 and some to the failed jurisdiction challenges.

48. Mr Brown's response to these submissions about difficulties with an assessment was that they do not go to the principle what costs order should be made and would be matters for a judge assessing the costs, although he acknowledged that they might make the ordering of any payment on account difficult.

49. Mr Buck went on to submit that it is entirely unclear whether and what discussions between the parties may have occurred after the 2010 Consent Order. Counsel for the defendants at the 7 April 2021 hearing conceded that the position was unknown and, apart from Mr Brown's confirmation that the costs orders made by Barling J were paid and there was a settlement with the eleventh claimant, nothing in the evidence sheds any further light.

Analysis and Conclusions

50. The parties consensually agreed to put these proceedings on hold in May 2010. There has been no trial and no issues in either the claim or the counterclaim have been tested let alone determined. The parties are now agreed that by reason of the time that has elapsed there can be no fair trial of the claim or the counterclaim and that the proceedings must be brought to an end.

51. The form of the 2010 Consent Order meant that there was no onus on either party to restore the proceedings. In my judgment the converse is that neither party can now accuse the other of being the cause of the delay or characterise the delay on the part of the other side as inordinate and inexcusable. I accept Mr Buck's submission that the passage to which he referred me in the *Asturion* case confirms that an agreed stay avoids the possibility of any abuse and, although in the present case the delay has been inordinate, it is excusable because it was consented to and ordered by the court. The passages to which I have referred in the *Asiansky* case and the *Quaradeghini* case makes clear that the defendants would not have been entitled to simply let time pass

and then accuse the claimants of prejudicial delay even if there had been no consensual stay.

52. Either side could have woken the sleeping dogs at any time after a month had passed from the making of the 2010 Consent Order by requesting the stay be lifted and making an application whether for an unless order or otherwise or, in the case of the defendants, restoring their applications for summary judgment and security for costs. The summary judgment and security applications of the defendants would almost inevitably have been the first procedural matters to be dealt with had either side sought to lift the stay, which makes the defendants' complaint of delay in the proceedings on the part of the claimants even less meritorious.

53. I am unable to conclude that the defendants have made out any case that the claimants' proceedings should be struck out either for want of prosecution or under either limb of CPR 3.4(2)(b) or (c) because no abuse of process, whether inordinate and inexcusable delay or otherwise, and no failure to comply with any rule, practice direction or order has been established.

54. The parties are agreed that no fair trial is possible and therefore that the whole of the proceedings must be finally disposed of.

55. In the interests of dealing justly and at proportionate cost with the proceedings I will make an order which brings these proceedings to a final conclusion and records that both parties are agreed that that should occur. To do anything else would not accord with the overriding objective.

56. Just as I do not accept that a case for striking out has been made out by the defendants, I do not accept that the fifth claimant's position, in agreeing that the proceedings must be disposed of, is analogous with that of a party who serves a notice of discontinuance so that the usual rule in CPR 38.6 follow. The circumstances here are not of a unilateral decision by a claimant to bring litigation to an end, rather there has been a long consensual delay which has meant that in the view of both parties a fair trial of claim and counterclaim is impossible.

57. I do not give any weight to Mr Buck's submissions about the difficulty of the assessment of the costs. As Mr Brown submitted, such difficulties should not affect what costs order I should make as a matter of principle.

58. The matter of the costs is for me in the exercise of my discretion under CPR 44.2, without the fetter of any "usual rule" following a strike out or under CPR 38.6. I am also not assisted by the existence of the contractual provisions of the Intercreditor Agreement which are the subject of the untried counterclaim, whether or not it could have had any separate existence to the claim. I am not in a position to determine who has succeeded or failed on either the claim or the counterclaim and I have already discussed why I do not regard the delay as conduct for which either side can blame the other.

59. It is my conclusion that as a matter of my discretion the right order is that there should be no order as to the costs of the claim or the counterclaim in HC0803158.

60. This judgment will be handed down remotely at 10am on 15 March 2022 without attendance. Consequential matters will either be dealt with by written submissions or heard on a date to be fixed.