

Dispute Resolution
Case Law Update
Rosling King LLP



Background

The Claimant, a Liechtenstein foundation, owned and managed a substantial property on behalf of members of the Saudi Royal family. In 2011, one of the Claimant's board members transferred the property to the Defendant, the widow of King Fahd of Saudi Arabia for no consideration. In April 2015, the Claimant issued proceedings to recover the property alleging that the transfer was invalid. Due to an oversight by the Court, there was no order for directions and no listing of the CMC. No steps were taken by the Claimant to further advance the proceedings or to list a CMC. In December 2015, the Defendant issued proceedings against the Claimant in Liechtenstein to remove the Claimant's board on the basis of breach of duty. There was no activity by either side between November 2016 and August 2017.

In August 2017, the Defendant invited the Claimant to discontinue the proceedings on the basis that it had abandoned its claim. This was refuted by the Claimant, attributing its delay in pursuing directions for trial to the ongoing Liechtenstein proceedings. In December 2017, the Defendant applied successfully to the Master to strike out the claim as a result of the delay. However, the Claimant appealed successfully against that decision. HHJ David Cooke held that *"whilst the Deputy Master had been entitled to find that the Claimant had taken a unilateral decision to place the claim on hold pending the resolution of the Liechtenstein proceedings, that decision was not in and of itself an abuse of process and (even if it was) was not sufficiently serious to warrant a strike out of the claim"*.

The Defendant then appealed against this judgment overturning the Master's decision to strike out the claim.

The Decision

The Court of Appeal dismissed the appeal. The Court held that a delay that might be described as "warehousing" would not always and necessarily be an abuse of process. The Court established that *"delay might amount to an abuse of process in circumstances short of a finding that the Claimant had permanently abandoned any intention to pursue proceedings, but that the Court would objectively examine all the circumstances in which the delay occurred, including the length of the delay, the degree of the Claimant's responsibility for it and the reasons given for it, and assess whether they amounted to an abuse of process, as distinct from "mere" delay"*.

An application to strike out a claim for abuse of process by warehousing fell into two stages: first, the Court should determine whether the claimant's conduct was an abuse; and if so, second, exercise its discretion as to whether to strike out the claim. This approach was supported by CPR r.3.4(2)(b), which provided that the Court "may" strike out a statement of case if it was "an abuse of the Court's process".

Applying the above test, the Court found that the Claimant's reason for not pursuing the claim was objectively reasonable, because the board's authority to bring the proceedings was under challenge by the Defendant in Liechtenstein. Whilst the Claimant should have applied for a stay whilst the position in Liechtenstein was resolved, the fact that it did not do so did not automatically result in an abuse of process. Even if the Judge had been wrong in that

conclusion, he had held that any abuse was of a relatively minor nature and did not justify the sanction of striking out.

Further, the Court of Appeal noted that there are other sanctions available which would have been more appropriate in the circumstances, such as costs sanctions. In light of the above, the Court of Appeal dismissed the appeal.

Commentary

The Court has clarified that to strike out a claim as an abuse of the Court's process, the Court must have regard to the claimant's intention and why it is that they have decided not to actively pursue the proceedings, as well as the length of the delay. Taking these factors into account, the Court should then consider whether or not the conduct of the claimant is abusive. It is clear from this decision that it is not the case that such conduct will always amount to an abuse.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.