Neutral Citation Number: [2018] EWHC 25 (Ch)

Case No HC.2016.003568

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Court of Justice
Strand, London, WC2A 2LL
Date: 11 January 2018

Before:

MR. WILLIAM TROWER QC
(sitting as a Deputy Judge of the High Court)

Between:

HARBOUR CASTLE LIMITED

Claimant

-and-

DAVID WILSON HOMES LIMITED

Defendant

Mr Michael Brindle QC and Mr James McClelland (instructed by K&L Gates LLP)
for the Claimant

Mr Alan Gourgey QC and Mr Tom Hickman (instructed by DLA Piper UK LLP)
for the Defendant

Hearing date: 19 October 2017
Further Written Submissions: 30 November, 5 December and 7 December 2017

Approved Judgment

I direct that pursuant to CPD PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

Mr William Trower QC

Mr William Trower QC:

1. This is an application by David Wilson Homes Limited ("DWHL") to strike out proceedings brought against it by Harbour Castle Limited ("HCL") as an abuse of process. DWHL relies on CPR 3.4(2)(b) and/or the inherent jurisdiction of the court. The basis of the application is that the same claim has already been made in earlier proceedings between the same parties under Claim No HQ09X02499 ("the First Action"). The First Action had been commenced on 11 June 2009, and was struck out on 20 December 2012 for failure to comply with an unless order requiring the provision of security for costs.

2. DWHL contends that the unless order was intended to bring finality, and was not appealed. It submits that it would undermine and circumvent that order if HCL were to be permitted to pursue fresh proceedings raising an identical cause of action after the elapse of four years during the course of which DWHL reasonably thought that the dispute was at an end. In the alternative, DWHL seeks a stay of these proceedings under CPR 3.4(4) pending payment in full of the outstanding costs awarded to DWHL in the First Action.

3. The dispute between the parties arises out of an option agreement dated 26 October 2004 ("the Option Agreement") pursuant to which DWHL was granted an option by HCL ("the Call Option") to acquire two adjoining parcels of land at Park Mill Farm, Princes Risborough, Buckinghamshire ("the Property"). The Option Agreement was varied in a manner which I understand to be immaterial by deed dated 9 March 2006. Mr Phillip Jeans ("Mr Jeans") was also a party to the Option Agreement. In the Particulars of Claim in these proceedings Mr Jeans is described as the legal and beneficial owner of, and consultant to, HCL. There is also evidence that he is HCL's sole shareholder and, in the skeleton argument prepared for HCL on this application, he is described as its directing mind.

4. Under clause 4 of the Option Agreement, DWHL was required to use all reasonable endeavours to obtain what was described as Acceptable Planning Permission as soon as reasonably practicable. There were also a number of other covenants by which DWHL was obliged to maximize the open market value of the Property during the option period, which expired on 31 December 2010.

5. HCL's primary claim is that DWHL was in breach of the obligation to use reasonable endeavours to obtain planning permission, with the result that the time-limited window for obtaining that permission closed. It is then said that, if DWHL had used reasonable endeavours, it would have obtained planning permission and would have exercised the Call Option which would have entitled HCL to a purchase price under the Option Agreement of £27,500,000. It claims this amount by way of damages.

6. In the alternative, HCL claims approximately the same sum as damages for the loss in the increase of the market value of the Property caused by the failure to use reasonable endeavours to obtain planning permission. This measure of loss is the amount for which HCL says that it would have been able to sell the Property to a third party if planning permission had been obtained, but DWHL did not exercise the Call Option. In the further alternative, the claim is advanced as one for the loss of a real and substantial chance that planning permission would have been obtained. HCL pleads that these claims are substantiated by valuation reports from Savills dated 24 June and 8 July 2011.

7. HCL also seeks the consequential losses which it claims to have suffered as a result of its inability to make certain property investments which it would have made but for the breaches of contract committed by DWHL. The material on which HCL now relies to advance its claim for these consequential losses derives from an investment proposal or business plan commissioned from KPMG in August 2008 in support of an application by Mr Jeans for a new lending facility. This document is said to substantiate losses totalling £186.4 million in respect of Planned Investments which it is said would have been made by August 2009 at the latest, and further substantial losses running into many tens of millions of pounds arising out of its inability to make specific additional investments. This claim is also advanced in the alternative as one for the loss of a chance of making profits on those valuable property investments.

8. There is then a separate claim for £1,692,247.08 (the "Debt Claim") said to be payable under a later oral agreement (the "Oral Agreement") reached at a meeting attended by, amongst others Mr Jeans, on 20 August 2008. It is contended by HCL that under the Oral Agreement it was agreed that HCL would take day to day control of DWHL's obligations to obtain planning permission for the Property in consideration for which DWHL agreed to be responsible for HCL's costs of doing so until such time as agreement was reached by the parties for the release of DWHL from its obligations under the Option Agreement. Mr Jeans says that HCL undertook to take on these responsibilities because he was informed that DWHL did not have the resources or personnel to carry on with its efforts to obtain planning permission. Finally, there is a relatively small claim for £16,800, being costs incurred by HCL in assisting DWHL in its efforts to obtain planning permission during the period prior to the conclusion of the Oral Agreement.

9. DWHL contends that, save for the claim for consequential loss, these claims and the claims made in the First Action (anyway by the time it was struck out in December 2012) are identical in all material respects, and Mr Brindle QC for HCL accepted that this was the case. In these circumstances, the basis for the application to strike out these proceedings is said to be that "*the claim in materially identical terms has already been struck out in circumstances in which it would be unjust to allow the Claimant a further "bite of the cherry"*".

Legal principles

10. In *Johnson v Gore Wood & Co* [2002] 2 AC 1, 31B and 59H-60A both Lord Bingham and Lord Millett made clear that the burden of proving abuse lies on the party who alleges it, in this case DWHL. Mr Brindle submitted that it is a heavy burden and should only be exercised in the clearest cases. In support of this submission he referred to *Stuart v Goldberg Linde* [2008] 1 WLR 823 at [65], where Lloyd LJ said that "*a claim … must be clearly shown to be an abuse before it can be struck out*". I proceed on the basis that the court should not strike out these proceedings, unless DWHL has clearly shown that they are an abuse.

11. *Stuart v Goldberg Linde* is also authority for two further propositions relating to applications to strike out second actions as an abuse of process:

    11.1. Although the decision on whether or not to strike out is a discretionary one, the anterior question of whether or not the proceedings are an abuse, such as to justify the exercise of the jurisdiction to strike out, is not. This point was also made in *Aldi Stores Ltd v WSP Group Plc* [2008] 1 WLR 748 at [16] and *Aktas v Adepta* [2011] QB 894 at [53], where Rix LJ said: "*the finding of abuse was a judgment which was either right or wrong*".

    11.2. Where, as in the present case, the defendant does not contend that the claims have no real prospect of success, and the claimant does not contend that the defendant has no real prospect of defending them, the underlying merits are not relevant to the question of whether or not a second action is an abuse of process: *Stuart v Goldberg Linde* [2008] 1 WLR 823 at [57].

12. As to what constitutes an abuse of process, a number of authorities were cited. Both parties agreed that the following well-known passage from the speech of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536C is the right starting point, setting out as it does the leading statement of principle:

> *"My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied;…"*

13. *Hunter* was concerned with the circumstances in which the use of civil proceedings to mount a collateral attack on a final decision of a criminal court was an abuse of process, and the same conclusion has been reached where the second action amounted to a collateral attack on the final decision of a civil court (*Taylor Walton v Laing* [2007] EWCA Civ 1146). Such cases give rise to different considerations from the issues which

arises in the present proceedings, but the passage in Lord Diplock's speech has been treated as of general application. The task for the court is to determine whether there has been a misuse of procedure, which is either manifestly unfair to a party to litigation or, which would otherwise bring the administration of justice into disrepute amongst right-thinking people. If there has been, there will have been an abuse of process, and the court's jurisdiction to strike out is engaged.

14. One of the contexts in which a second action has been struck as abusive, even though it does not amount to a collateral attack on an earlier decision, is where earlier proceedings have been struck out for failure to obey a peremptory order made in circumstances in which no explanation was given for that failure. This is what occurred in *Janov v Morris* [1981] 1 WLR 1389, in which the first action had been struck out as a result of a failure to comply with an unless order to serve a summons for directions. There had been no application for an extension of time for service of the summons, there was no appeal and no explanation was given for the delay. In these circumstances, the point for the Court of Appeal was whether the second action was an abuse of process even though it was commenced within the limitation period.

15. It appears from both judgments that non-compliance with the peremptory order was conduct which justified a strike out of the second action, but part of the reason why the court took the view that the second action was itself an abuse was the plaintiff's failure to appeal the original peremptory order or to give any explanation as to why the original order was not complied with. Watkins LJ described (at p.1395H) this conduct as treating the court with intolerable contumely. Furthermore, the plaintiff's behaviour taken in the round left the court with inadequate assurance as to the way in which the plaintiff intended to conduct the second action: (per Dunn LJ at p.1395D).

16. The court's ability to strike out a second action by reason of the conduct of earlier proceedings was an issue to which the Court of Appeal returned in *Arbuthnot Latham Bank Limited v Trafalgar Holdings Limited* [1998] 1 WLR 1426, where it arose on an application in the first action. Lord Woolf MR referred (at p.1431G) to the principle that proceedings would not normally be dismissed on the grounds of inordinate and inexcusable delay if the limitation period had not expired, but went on to explain (at p.1432G) that, where there has been contumelious conduct by the plaintiff, or where the first proceedings are themselves an abuse of process, this principle would not necessarily apply: "*In such circumstances, the plaintiff may well find that if he brings fresh proceedings after the original proceedings are struck out they are stayed because of his conduct*".

17. A little later in his judgment Lord Woolf MR put the same point slightly differently (at pp.1436G-1437B), concluding that wholesale disregard of the rules is capable of being an abuse of process and, where a first action has been struck out on those grounds, a second action will also be an abuse unless there is some special reason justifying it:

> *"the change in culture which is already taking place will enable courts to recognise for the future, more readily than heretofore, that a wholesale disregard of the rules is an abuse of process … The more ready recognition that wholesale failure, as such, to comply with the rules justifies an action being struck out, as long as it is just to do so, will … allow the striking out of actions whether or not the limitation period has expired …The question whether a fresh action can be commenced will then be a matter for the discretion of the court when considering any application to strike out that action, and any excuse given for the misconduct of the previous action… In exercising its discretion as to whether to strike out the second action, that court should start with the assumption that if a party has had one action struck out for abuse of process some special reason has to be identified to justify a second action being allowed to proceed.*"

18. The result in *Arbuthnot* was that the proceedings, which had been brought by a bank against its customer and two individual guarantors, were dismissed for want of prosecution even though the limitation period on at least one of the causes of action available to the bank had not expired. This was not, however, the end of the dispute, because the plaintiff had assigned its claim to Securum Finance Limited, which commenced a fresh action differing from *Arbuthnot* only by reason of the fact that the writ included a claim to enforce a legal charge given as security for the personal obligations of the guarantors. By the time the second action had been commenced, the claim under the guarantee was statute barred, but the claim under the covenant to pay in the legal charge was not, nor was the claim to enforce the charge by the appointment of a receiver and an order for foreclosure or sale. In both instances, a 12 year limitation period applied.

19. This gave rise to a further decision of the Court of Appeal (*Securum Finance Limited v Ashton* [2001] Ch 291), which refused to strike out the second action, concluding that a *Henderson v Henderson* ((1843) 3 Hare 100) argument to the effect that the bank should have sought to enforce the charge (as opposed to simply proceeding under the guarantee) in the first action was misconceived. However, this decision considered the position after the CPR had introduced the overriding objective. It establishes that, where a first action has been struck out for inordinate and inexcusable delay, the court's limited resources is a significant factor that might outweigh a claimant's wish to have a second bite at the cherry, even where the second action is commenced within the limitation period (per Chadwick LJ at [34]):

> "*For my part, I think that the time has come for this court to hold that the "change of culture" which has taken place in the last three years—and, in particular, the advent of the Civil Procedure Rules—has led to a position in which it is no longer open to a litigant whose action has been struck out on the grounds of inordinate and inexcusable delay to rely on the principle that a second action commenced within the limitation period will not be struck out save in exceptional cases. The position, now, is that the court must address the application to strike out the second action with the overriding objective of the Civil Procedure Rules in mind—and must consider whether the claimant's wish to have "a second bite at the cherry" outweighs the need to allot its own limited resources to other cases."*

and (at [52]) he dealt with the position that would have existed if the claim to payment had been the only claim pursued in the second action:

> "*In my view, for the reasons which I have sought to give, it is open to this court to strike out the claim for payment made in the present action. That is a claim which, in substance, is indistinguishable from the claim for payment made in the first action. If that claim stood alone it could be said with force that to seek to pursue it in a second action when it could and should have been pursued, properly and in compliance with the rules of court, in the first action is an abuse of process. It is an abuse because it is a misuse of the court's limited resources. Resources which could be used for the resolution of disputes between other parties will (if the second action proceeds) have to be used to allow the bank "a second bite at the cherry". That is an unnecessary and wasteful use of those resources. The bank ought to have made proper use of the opportunity provided by the first action to resolve its dispute in relation to the claim for payment.*"

20. The circumstances in which the court ought to strike out a second action as an abuse where the claimant is in breach of the rules and court orders made in the first action, was further considered by the Court of Appeal in *D Collins v CPS Fuels Ltd* [2002] CP Rep 6. In this case a personal injury claim made in earlier proceedings had been struck out for non-compliance with a peremptory order that was itself based on a number of failures to comply with other orders, and a more general failure to engage with the case management process, conduct which was described by the judge as inexcusable and for none of which had any good explanation been given. Instead of appealing that decision, the claimant issued fresh proceedings. The second action was then struck out as an abuse, a decision with which the Court of Appeal declined to interfere.

21. In dismissing the appeal against the order striking out the second action, the Court of Appeal accepted that the judge was entitled to conclude that the failures in the first action "*were inexcusable failures to comply with the rules and court orders*" (which Parker LJ described at [41] as being "*of the grossest kind*"). In those circumstances, the Court of Appeal agreed that the judge was entitled to approach the strike-out by asking himself whether or not "*special reasons*" had been advanced so as to make it just to allow the second action to proceed. The reference to special reasons was derived from the judgment of Lord Woolf MR in *Arbuthnot*, where this approach was commended if the conduct of the first action could properly be described as abusive. In the event he found no such reasons, a conclusion which the Court of Appeal accepted that he was entitled to reach.

22. In *Collins*, the judge had concluded that, although the relevant breaches in the first action were inexcusable, they were not intentional. Nonetheless, the Court of Appeal was still satisfied that the conduct of the first action was so deficient that a strike out of the second was justified. The case also contains some passages (in the judgment of Judge LJ at [50]) which highlight the need to be cautious in adopting an approach which requires the court

to find "special reasons" for allowing a second action to proceed where a first action has been struck out as an abuse:

> *"The answer to the questions which necessarily arise for answer is always fact-specific. In particular, semantic analysis of this or that factor, or any combination of factors, to see whether they should be regarded as "special", or "not quite special enough", or "good enough", or "not quite powerful enough", is unhelpful. Worse still if that method of analysis is thought to be lent what is only spurious weight by the citation of previous decisions reached by other courts in different cases, even if the citation is used merely by way of example or illustration*."

23. The need to look at all of the facts, and to be cautious about applying a "special reasons" approach, echoed what had been said shortly before in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 31B-F in the similar but different context of a case about *Henderson v Henderson* abuse:

> *"... there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances."*

24. This approach was further considered by the Court of Appeal in *Glauser International SA v Khan* [2002] CLC 958, in the context of a case in which a second action was sought to be struck out because of the claimant's conduct of the first action. In the event the Court of Appeal dismissed an appeal against the order striking out the second action, but allowed a late appeal against the original order striking out the first action.

25. In its submissions on *Glauser*, HCL drew attention to the fact that there was a clear distinction between the *Arbuthnot / Securum* cases where the abusive conduct of the first action which had led to the striking out of the second action was manifest, and the much less serious misconduct of the first action in *Glauser*, in relation to which the Court of Appeal concluded (at [26]) that "*the breach of the order could not therefore be described as abusive, whatever label may be attached to the incompetent conduct of the proceedings*

prior to the order". The relevant breach had been a failure to serve amended particulars within 28 days and the second action was commenced within 6 months of the strike out of the first action. In his submissions, Mr Brindle described the breach in the first action as a minor slip by the claimant, a characterisation with which I agree. It is therefore not surprising to find that the Court of Appeal adopted an approach to this breach, which was very different from the approach that it had adopted to the much more serious breaches considered in the *Arbuthnot* and *Securum* cases.

26. In discussing the applicable principles, Mance LJ pointed out that where a strike out of the first action carries with it the intention to bring finality to the dispute (which it normally will) a strike out of a second action will normally follow. He made clear (at [18]) that normally a court's process should only be engaged once in relation to a particular subject matter. There is, however, a distinction between "*situations where the intention is to end all proceedings and the situation where the intention is merely to dispose of the present claim*" (at [25]).

27. Mance LJ also said (at [30]) the following about the passage from the speech of Lord Bingham in *Johnson v Gore Wood* that I have just referred to:

> *"This approach has much to commend it in the present context; at least in situations where there is no background of flagrant misconduct or where the second action can be viewed as something other than a mere attempt to revive the claim in the first. The requirement for a 'special reason' is readily understandable where the second action does no more than seek to pursue a claim already brought in a first action which was itself so abusively conducted that inordinate and inexcusable delay occurred to the potential prejudice of the defendant and of any fair trial. The requirement is more elusive, both inherently and in relation to the 'balancing exercise' which the cases contemplate, in cases where those features are not present. In contrast, an approach paralleling that adopted in Johnson v Gore Wood remits the enquiry to the level of consideration of all the circumstances, with due weight being given to each, including of course the court's resources, and with a judgment being formed at the end of that exercise as to what justice requires overall."*

28. The circumstances in which the first action came to an end was a question to which the Court of Appeal returned in *Aktas v Adepta* [2011] QB 894, a case concerned with applications to strike out two personal injury actions, which had both been preceded by earlier personal injury proceedings which themselves had been set aside or struck out by reason of the negligent failure to serve a claim form in time. Much of Rix LJ's judgment was concerned with the significance of the court's ability to disapply the limitation period under section 33 of the Limitation Act 1980, but he did so in the context of an examination of the more general principles applicable to striking out second actions as an abuse.

29. In particular, Mr Brindle relied on a passage in Rix LJ's judgment (at [44]) in which he held that there was nothing in the judgments in *Janov v Morris* to suggest that it is open to

strike out a case for abuse of process in the absence of intentional and contumelious default or inordinate and inexcusable delay. He also submitted that the Court of Appeal did not intend the abuse jurisdiction to extend beyond that category of conduct, citing (at [52]):

> "*The defendants relied heavily on the Arbuthnot Latham and Securum Finance cases. However, the question is whether the failure to serve in time is really comparable to a case where the first action has been struck out for want of prosecution and abuse of process. If Chadwick LJ intended his remarks to cover a much wider range of case in which the first action has lapsed, then that proposition will have to be made good. He was expressly referring to inordinate and inexcusable delay. In such a case the claimant is truly attempting a second bite at the cherry. In our case, the claimants have indeed invoked the court's jurisdiction, but without even serving the claim form it might be said that they had not managed even a single bite."*

and (at [90]):

> "*... all the cases make clear that for a matter to be an abuse of process, something more than a single negligent oversight in timely service is required: the various expressions which have been used are inordinate and inexcusable delay, intentional and contumelious default, or at least wholesale disregard of the rules.*"

30. Mr Gourgey QC, for DWHL, submitted that, as part of its consideration of all the circumstances, the court is required to look at a party's conduct both before and after the commencement of proceedings and to that end "*delay in commencing proceedings is a factor which can be taken into account in deciding whether the proceedings are abusive*", a proposition which he derived from *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 (per Lord Woolf MR at [35]). This case was concerned with the abuse that was said to arise when a claimant commenced private law proceedings for breach of contract with a more generous limitation period, when the more appropriate public law remedy of judicial review was no longer available through the lapse of time.

31. However, mere delay in the commencement of a second action does not make it abusive if it would not otherwise be so. In the immediately preceding passage, Lord Woolf had made clear that "*to commence proceedings within a limitation period is not in itself an abuse*", and in *Stuart v Goldberg Linde* [2008] 1 WLR 823 (at [58]) Lloyd LJ said that *mere* delay in initiating a second action is not an abuse, and he and Lord Clarke MR (at [85]) both considered that delay of itself is not relevant if the action is not otherwise an abuse.

The Course of the First Action

32. In the light of these principles, the course and conduct of the First Action are of significant relevance to the resolution of this application. The way in which it was conducted, the issues which arose in it and the circumstances in which it came to an end are at the root of DWHL's submission that the present proceedings are an abuse. Without an assessment of what occurred, it is not possible to consider all of the circumstances.

33. In his evidence, Mr Jeans says that HCL commenced the First Action in order to obtain a rapid recovery on the Debt Claim, i.e. the amount of the costs incurred by HCL in its efforts to obtain the planning permission which DWHL had agreed to use its best endeavours to obtain. Initially this was the only claim advanced by HCL and was then said to amount to £308,827.39, i.e. substantially less than either the Damages Claim for breach of the Option Agreement or the larger Debt Claim for £1,692,247.08 now claimed under the Oral Agreement in these proceedings. Mr Jeans says that HCL believed that it could obtain summary judgment in the First Action "*and issued proceedings on that basis because it needed cash to continue its planning efforts*".

34. In the event, HCL's belief that it could obtain summary judgment on the Debt Claim proved to be misplaced because its application was dismissed by Master Eyre on 22 October 2009, but HCL submits that this shows that it was concerned to obtain a prompt resolution of the dispute. The Master did, however, order a speedy trial which meant that the First Action then proceeded with some expedition, with disclosure taking place in November and December 2009 and the exchange of witness statements on 23 March 2010.

35. The First Action was listed for trial before Judge Seymour QC on 20 April 2010. However, at a conference with counsel held the evening before the trial, HCL (through Mr Jeans) dismissed its legal team. In the light of this development, Mr Jeans (acting in person) sought an adjournment at the opening of the trial. He informed the judge that the reason for the dismissal of HCL's solicitors and counsel was a major disagreement about the merits of the claim and its interrelationship with other very substantial claims which he wished HCL to bring against DWHL involving many millions of pounds.

36. I have not been provided with a full explanation of what occurred, apparently because to do so might involve the waiver of legal advice privilege, but Mr Jeans has said in his witness statement that "*It was initially considered that the First Action could be addressed without trespassing on the wider breach of contract claim. However, when I turned up at the conference I was informed that some of the later evidence touched upon the breach of contract, such that HCL could not allow the trial to proceed and risk the damages claim being considered without HCL's case being fully developed.*" DWHL contends that what Mr Jeans said at the hearing and the explanation which he now gives in his witness statement are different, because at the hearing he simply said that the decision to sack his legal team was taken because of strongly different views as to the merits of the claim. That may be so but, for present purposes, two points are relatively clear:

    36.1. HCL knew then that it had a claim for breach of contract arising out of essentially the same facts, which was wider than the Debt Claim, because Mr Jeans told Judge Seymour QC that HCL was "*in the process of issuing a larger claim for [DWHL's] substantial breaches under the Option Agreement*"; and

36.2. the adjournment of the trial was sought because HCL and Mr Jeans were concerned that the much larger damages claim for breach of the Option Agreement might be prejudiced if the Debt Claim proceeded without it.

37. In the event, Mr Jeans' application for an adjournment of the trial of the First Action was granted on terms that HCL's Particulars of Claim were struck out and the First Action would be dismissed if new Particulars were not served within 56 days. It was also ordered that, once the new Particulars had been served, the First Action be stayed until payment by HCL of the costs thrown away by the adjournment, such costs to be assessed if not agreed. Judge Seymour QC gave 8 weeks for service of the new Particulars of Claim after Mr Jeans had requested that length of time to ensure that everything was included in the new Particulars "*if we are having to put it all in one or that is the advice, then I may need longer than 4 weeks*". The judge acceded to this request on the basis that it would be what he described as "*a good thing rather than a bad thing*" for HCL to make whatever claims it wanted to make against DWHL in one action rather than in more than one action. The transcript of the hearing records that counsel for DWHL made clear that his client would contend that all claims should be advanced in the new Particulars of Claim, and that if there were to be any further attempt to keep some powder dry or one hand behind the back "*we shall be saying abuse of process and unjust harassment*".

38. In his witness statement in these proceedings, Mr Jeans says that he was unrepresented and was unaware at the time that what was said by counsel for DWHL had certain implications. However, it is clear that he must have known that the judge indicated that it would be a good thing for all claims to be advanced together, and it is also clear from correspondence at the beginning of June that HCL and Mr Jeans appreciated that DWHL was expecting it to bring forward all of its claims in a single action, and that therefore the appropriate way forward was to pursue in the same action claims in both debt and for breach of contract. It is also clear from the evidence I have referred to above that he knew that there was a risk to the Damages Claim if HCL did not develop the entirety of its case against DWHL at a single trial.

39. New Particulars of Claim were then served by HCL on 17 June 2010. In the evidence in these proceedings they were referred to as the Padfield Particulars, because they were prepared with some assistance from Mr Nicholas Padfield QC. In the Padfield Particulars, the claim under the Oral Agreement was still limited to £308,827.39, but a damages claim for breach of the Option Agreement in an unquantified figure stated to be "*not ascertainable, but … likely to exceed £50 million*" was made for the first time. This version of the Particulars of Claim did not identify loss of profit from an inability to make the Planned Investments as a recoverable head of damage. In his evidence in these proceedings, Mr Jeans has explained that at this stage, HCL had insufficient resources to fund the development of a properly formulated breach of contract claim. As he put it, the necessary work "*required a substantial investment of funds that HCL did not have*".

40. In his evidence in these proceedings, Mr Jeans has explained that his difficulties in formulating the case on behalf of HCL were exacerbated by the fact that he was instructing Mr Padfield on a direct access basis and that Mr Padfield became ill during the course of the process. He also explained that he was under enormous personal strain in managing the litigation whilst also seeking to attend to HCL's business, as he had to commute to and from the Isle of Man on a daily basis for what he said were reasons relating to the management of his tax affairs.

41. The Padfield Particulars were served after HCL had obtained, without notice, an order granting a short extension of the 56 days within which Judge Seymour QC had ordered that fresh Particulars of Claim should be served. In the correspondence which preceded the making of this order, Mr Jeans had indicated that HCL wanted a rather longer extension to ensure that HCL was able to bring all of its claims in a single action. There is a dispute between the parties as to the propriety of HCL's behaviour in obtaining the order without notice, but it was considered by Burnett J (at a later hearing to which I refer below), and the judge was satisfied that there was no impropriety in what occurred. Mr Gourgey did not submit that this was a conclusion which it would be appropriate for me to go behind.

42. The costs thrown away by the adjournment of the trial in April 2010 were not paid at this stage, and so the First Action remained stayed pursuant to the order made by Judge Seymour QC. Those costs were eventually assessed in the sum of £33,246.01 and were paid by HCL on 4 March 2011. The stay was then lifted. Burnett J reviewed the reasons for this delay in the course of the judgment to which I refer below. He was satisfied that the delay was not of HCL's making but rather of DWHL's in proposing what he described as "*an extravagant claim for costs*".

43. Mr Jeans has said in his evidence on this application that he now knows that the work required to get a properly pleaded and prepared claim for breach of the Option Agreement off the ground required a substantial investment of funds that HCL did not then have. He now thinks that he would have been better advised to withdraw the First Action after the hearing before Judge Seymour QC, and pay all of the costs of that action.

44. In the event, Mr Jeans decided to proceed and the day before payment was made of the costs thrown away, the solicitors then instructed by HCL indicated that the Padfield Particulars themselves required wholesale re-amendment. On 6 May 2011, HCL served a draft of the proposed re-amended Particulars of Claim, together with a request that DWHL consent to the grant of permission to re-amend. These draft Particulars were much longer than the Padfield Particulars and were served together with a number of appendices. The amount of the Debt Claim increased to £1,692,247.08 and the damages claim for breach of the Option Agreement was said to be very similar in amount to the sums (other than the claims for consequential loss) now claimed in these proceedings.

45. A claim for consequential loss was still not advanced although the claim now made in these proceedings is based on opportunities that are said to have been lost approximately 2 years earlier (i.e. by August 2009 at the latest). In his evidence in these proceedings, Mr Jeans has said that, at the time of the Padfield Particulars, when it appears that HCL was not fully represented, he did not understand the legal principles for recovering consequential loss in the form of foregone investment opportunities.

46. This does not explain the failure to include such a claim in the draft re-amended Particulars served in May 2011, by which time HCL had been represented for some time by an experienced firm of City solicitors, DMH Stallard. Mr Jeans says that, at this stage as well, he did not know about "*the legal doctrine of lost chance or properly understand the ability to claim damages for foregone business opportunities*", and says that the first time that he was aware that a loss of chance claim could be sustained legally was during discussions with HCL's present solicitors, K&L Gates, in October 2016 after which the KPMG report came to light when he looked back at older material in his files. He accepts, however, that the more important reason for not including a claim in the First Action was that the state of the market between 2010 and 2012 meant that it would have been difficult if not impossible to advance such claims because the market did not begin to rise above pre-recession levels until 2013 or later. He says that he should not now be criticised for failing to include a claim for losses which had not then fully crystallised.

47. DWHL refused to consent to the re-amendment and cross-applied to strike out the First Action on the grounds that the Padfield Particulars did not comply with the order made by Judge Seymour QC in April 2010. HCL characterises this step as an attempt to exploit an alleged procedural defect in order to stifle a claim which had by then been adequately pleaded. In the alternative DWHL sought payment of all of the costs of the proceedings to date, and also the provision of security for costs before the HCL claim be permitted to proceed. This application, together with HCL's application to re-amend which had been issued on 16 May 2011, came on for hearing before Judge Seymour QC on 22 July 2011, when HCL was represented by leading and junior counsel. Judge Seymour QC found for DWHL, and declared that the Padfield Particulars did not constitute "new Particulars of Claim" within the meaning of the April 2010 Order, with the consequence that the First Action stood dismissed. Judge Seymour QC also made an order for HCL to pay £150,000 on account of costs within 14 days, an order which was complied with.

48. Subject to one point, I was not taken to the evidence on the applications which came before Judge Seymour QC on 22 July 2011, but DWHL's solicitor, Mr Neil Bowker of DLA, said that they were heavily contested and included the submission of several witness statements and two valuation reports. This is consistent with comments made by Burnett J in a judgment given on 21 September 2012, in which he said that DWHL's costs of these applications amounted to £111,000 and HCL's costs were £161,000. The one point to which I was referred was HCL's evidence (given by its solicitor) that it was then

bringing forward all of its claims. Referring to the transcript of the hearing in April 2010, she said "*It is clear from the transcript that all parties were agreed that [HCL] must plead all and any claims it wished to bring against [DWHL] regardless of whether or not they had been pleaded in the original Particulars of* Claim". DWHL submits that, if there is anything in the claims for consequential loss now pleaded in these proceedings, that representation was untrue.

49. The order striking out the First Action was reversed by the Court of Appeal on 18 April 2012 after a hearing at which HCL was again represented by leading and junior counsel. The grounds of the Court of Appeal's decision were that, whatever its deficiencies as a document, the Padfield Particulars complied with the April 2010 Order. Although it follows from this that HCL succeeded on the appeal, DWHL drew attention to Hallett LJ's comments on the unsatisfactory nature of the various version of the Particulars of Claim, and the fact that the Court of Appeal refused HCL's application for costs, directing that the costs both below and on the appeal be costs in the claim. As Mummery LJ explained this was the right order to make having regard to HCL's conduct of the litigation at first instance. The Court of Appeal also ordered that the £150,000 which had already been paid by HCL pursuant to Judge Seymour QC's order of 22 July 2011, be paid into a joint account to stand as security for DWHL's costs of the First Action. It is apparent from evidence on later applications that the parties' costs of the appeal were £197,000.

50. Meanwhile, in order to protect its position in the light of the order made by Judge Seymour QC on 22 July 2011, HCL had commenced what has been described in the evidence as the Duplicate Action. This mirrored the claims made in the First Action. Following HCL's successful appeal, DWHL sought to strike out the Duplicate Action as an abuse of process. Shortly after that strike out application was made, HCL served notice of discontinuance of the Duplicate Action.

51. The evidence from Mr Jeans in these proceedings gives a detailed explanation of the difficulties which were faced by HCL in progressing the First Action during the period between the original adjournment of the trial in April 2010 and the decision of the Court of Appeal in April 2012. He expressed particular concern that the parties were not operating on a level playing field, and he pointed out that HCL was required to find substantial sums of money to fund the litigation (both legal costs and fees to planning professionals), while he expended enormous amounts of management time on the dispute. He says that the reason why HCL had difficulty in funding the First Action was because it was impoverished by the acts and omissions of DWHL of which it made complaint in the First Action.

52. One of the orders made by the Court of Appeal on 18 April 2012 was that HCL's applications for permission to amend its Particulars of Claim be heard by a High Court Judge on a date to be fixed. With the assistance of Nabarro LLP, which had been recently

instructed because of their expertise in property litigation, further amendments were made to the draft re-amended Particulars of Claim. The application to re-amend, together with an application by DWHL for security for costs, then came on for hearing before Burnett J on 21 September 2012. DWHL submitted that permission to amend should only be granted on condition that the costs to June 2011 be paid by HCL in any event, and that the sum of £4.2 million relating to DWHL's counterclaim (proposed but not yet pleaded) be paid into court. By the time of the hearing, the competing positions of the parties on the security for costs application were that DWHL sought security of £1,695,000 in addition to the £150,000 already ordered by the Court of Appeal, while HCL offered £900,000 to include that £150,000.

53. In the event, permission to amend was granted without the imposition of any conditions. In reaching that conclusion (as to which see *Harbour Castle Limited v David Wilson Homes Limited* [2012] EWHC 3082 (QB)), Burnett J held that ordering the payment of £4.2 million into court as a condition of granting permission to amend would be inappropriate, in part because it would be likely to have the effect of denying HCL the opportunity of pursuing its claim. He also concluded that, up to that stage in the First Action, the case was not one in which HCL could be said to be dragging its feet. He concluded that such delays as there had been since the adjournment of the trial and the service of the Padfield Particulars were not of HCL's making, but were caused either by DWHL's extravagant claim for costs or for other reasons which could not be laid at the door of HCL. He was also satisfied that HCL had given every intention of wishing to pursue the claim expeditiously.

54. Burnett J also considered HCL's conduct of the First Action more generally. He did so in order to determine whether HCL had exercised a want of good faith in the context of an argument about whether the good faith test referred to in *Olataruwa v Abiloye* [2003] 1 WLR 275 (at [25]) had been satisfied *"... - good faith for this purpose consisting of a will to litigate a genuine claim or defence as economically and expeditiously as reasonably possible in accordance with the overriding objective*". He reached the clear conclusion that the First Action was not a case in which there had been any breach of orders and was "*not a case in which to use language found in the old rules, the claimant has behaved in a contumelious way*".

55. As to the application for security for costs, the dispute was as to quantum. The principle that it was appropriate for HCL to provide DWHL with reasonable security for its costs of the First Action had been accepted by HCL's solicitors in a letter dated 1 June 2012. In the event, Burnett J ordered HCL to provide security of £1,150,000 in four instalments, the first of which was for £201,000 to be provided in 28 days. The total amount ordered was to be provided in addition to the £150,000 already ordered by the Court of Appeal. The result therefore was £400,000 more than the amount offered by HCL and £545,000 less than the amount sought by DWHL. The form of the security was to be either payment

into court or the provision of an unconditional guarantee from a first-class bank. The order made on 21 September was eventually sealed on 9 October.

56. HCL made no submission that the First Action was a case in which its claim would be stifled if security were to be ordered in any amount in excess of the figure it had offered. Indeed, HCL's evidence made clear that it was prepared to provide the first instalment of security within 28 days. The amount offered as the first instalment was £90,000, in addition to the £150,000 already held on joint account pursuant to the order of the Court of Appeal. Furthermore, in the course of his judgment, Burnett J recorded (at [28]) that there had been no suggestion by HCL that, if security in excess of the amount already offered were to be ordered, it could not be provided. This was to be contrasted with his refusal to order payment into court of £4.2 million as a condition of granting permission to amend, as to which Burnett J said (at [43]):

> "*It is one thing to require an impecunious company to provide security for costs, which, in reality, requires its backers to produce money or a bank guarantee. It is quite another to require such a company to pay into court an enormous sum of money which everyone knows it does not have.*"

57. Mr Jeans says that he was extremely relieved by Burnett J's judgment and fully intended to proceed with the First Action at that time, and to enable HCL to provide the security ordered. This is consistent with it being no part of HCL's case that the obligation to provide the security ordered by Burnett J would stifle the claim. To that end, he added the request for the provision of a bank guarantee to the refinancing negotiations which were already being conducted between HSBC and three of his companies including HCL. It seems that HSBC were looking at the provision of this facility in conjunction with what Mr Jeans' advisors, PwC, described as "*your overall banking position with HSBC*".

58. Although it is now clear that the request for a guarantee to be provided by HSBC was intimately connected with a more general refinancing, this does not seem to have been explained to DWHL. Quite the contrary, on 23 October, Nabarro said that "*HCL will be in a position to discharge its obligations pursuant to the order once the respective approval processes are completed. We will keep you advised of progress*." There was no indication that there was any real doubt that this approval would be given, anyway in respect of this element of the negotiations.

59. By this stage a dispute had arisen as to the precise date on which the 28 day period for provision of the first instalment of security started to run. In the events that occurred, the first instalment of the security was not provided within 28 days from the date the order was made, nor was it provided within 28 days from the date that the order was sealed (the latter being the time period within which HCL accepted that it was required to comply). The explanation for the failure to provide security was that HCL was taking steps to procure a bank guarantee, an ATE policy and a deed of indemnity, but that bank approval had not been obtained.

60. On 8 November 2012, in the light of HCL's non-compliance with the order made by Burnett J, DWHL applied for an unless order. Mr Jeans criticises DWHL for taking this course, but, as HCL had neither provided the security within 28 days of the date the order was made (or even sealed), nor sought an extension of time for compliance, I have difficulty in seeing how DWHL can be criticised for taking an over-hasty step; all the more so as it was as long ago as 1 June 2012 that HCL's solicitors had accepted that it was appropriate in principle for HCL to provide reasonable security.

61. On 14 November, almost a month after the time at which it was in breach of Burnett J's order, HCL responded to the application for an unless order by seeking an extension of time for the provision of security until 9 January 2013. The skeleton argument prepared in support of the 56 day extension sought by HCL submitted that it was likely that the First Action would be stifled if it was not given the time that it sought, but there was no submission that it could not be provided at all. The following day, Master Marsh made orders declaring that HCL had been in breach of paragraph 1 of Burnett J's order since 19 October (and that the First Action had accordingly been stayed since that date), but extending time for provision of the first instalment of security until 20 December 2012.

62. In giving HCL more time, but refusing the extension to 9 January sought by HCL, Master Marsh made express reference to the findings made by Burnett J, i.e. that this was not a case in which HCL had been dragging its feet and it was not case of contumelious conduct. He further held, when looking at the requirements of what was then CPR 3.9(1)(c), that the failure to comply with Burnett J's order was not intentional. However, Master Marsh also expressed himself to be satisfied that HCL can have been in no doubt after the hearing before Burnett J that £201,000 had to be provided shortly, and criticised the paucity of the evidence from HCL, and in particular the absence of any evidence from Mr Jeans. He referred to the absence of any real explanation as to the position on security, whether on 1 June when the offer in principle was first made by HCL, or at the time of the hearing before Burnett J, or at the various meetings which had been held with HSBC:

> "*Even taking into account the understandable concern the claimant has about confidentiality, it does appear to me that the claimant has failed to provide an adequate explanation as to how it is the claimant has not been in a position to comply with the order. I am simply left with a statement from Mr Green that the process could take another eight weeks.*"

63. Master Marsh bolstered his order extending time for the provision of £201,000 security with an order that, unless the order for security for costs was complied with by 5pm on 20 December 2012, HCL's claim in the First Action be struck out. The part of his judgment in which he explained his reasons for making an unless order contains the following:

> "*There has been a full review at this, what is now, quite lengthy hearing of all the circumstances of the case. The claimant has come to the court seeking an indulgence. The evidence has not been satisfactory but the ultimate effect of the extension I have*

> *granted will be to take the period, which was directed by the judge (as proposed by counsel for the claimant) very far beyond what which was originally envisaged.*
>
> *It is a realistic period, in my judgment. It is an ample period for the question of whether or not the bank is going to provide funding to be decided. The defendant is entitled to a degree of finality on this issue – that is the issue of security - which has been outstanding now since at least May and it may have been earlier this year. By 20 December, the issue of security will have been in play, first in correspondence and then in an application for a period of eight months. It is proper, in my judgment, to attach an unless requirement to the order and I therefore propose to do so.*"

Master Marsh also made an order that HCL was to pay DWHL's costs of the applications, and summarily assessed those costs in the amount of £13,800.

64. Initially, on 3 December, HCL sought permission to appeal Master Marsh's order, but it did not seek an extension of time for compliance with the 20 December deadline, and it made no application for relief from sanctions, whether on the basis that it was now clear that the requirement to provide security would stifle the claim, or otherwise. Mr Jeans exhibited an e mail exchange with HSBC to his most recent witness statement which disclosed that on the same day Mr Jeans had confirmed to HSBC that, in a meeting with them on 30 November, he had taken the issue of security for costs "off the table" by stating that he would bear the future litigation costs. He said that he would do this as part of the overall negotiations with HSBC both on the Property and in relation to another matter.

65. The order which HCL sought in its appellant's notice was an extension of the time for provision of the security ordered by Burnett J from 20 December (as ordered by Master Marsh) to 9 January 2013 (as originally sought by HCL in its 14 November application). While HCL's grounds of appeal criticised Master Marsh for directing that the security be provided by 20 December rather than 9 January, there was no challenge to the principle that security in the amount ordered by Burnett J was appropriate.

66. In the event the security was not provided by 20 December and accordingly the First Action was struck out. It is now apparent from Mr Jeans' evidence that the reason that HCL failed to comply with the terms of the unless order was that HCL and HSBC were unable to reach terms on which HSBC might provide a suitable guarantee. Mr Jeans referred to the negotiations that he had with HSBC as "*frantic*", but said that HCL was faced with a situation in which their new banking relationship manager was charged with reducing HSBC's property market exposure, which "*... added additional pressure and ultimately, it proved impossible to finalise the guarantee on terms that did not endanger other business assets*".

67. Mr Jeans then went on to give the following explanation for not applying for relief from sanctions and not pursuing its appeal of the order made by Master Marsh:

> "*By early January 2013, I had come to the reluctant conclusion that it was time to let go the efforts to sustain the First Action because I had to focus on the financial position of HCL and another company which I beneficially owned, GBGB Limited "GBGB"). Because of the renegotiation of all banking facilities HSBC were clearly using the First Action as leverage and it was unfortunate that the need for security came at that particular time. The sums required for security were an additional burden when HSBC was keen to reduce lending and had I succeeded in obtaining security it would have put my personal resources under immense pressure in the years that followed. I reluctantly accepted that I had to let the litigation go. … No application for relief from sanction was made because of my decision to focus on saving the business of both HCL and GBGB at that time."*

68. This evidence was corroborated to some extent by Jason Green, who is now the CFO of Mr Jeans' group of companies but, at the time of the refinancing negotiations with HSBC, was a corporate finance partner at PwC instructed by HCL. He confirmed that a refinancing was not achievable in 2012. His evidence was that the difficulties with the relationship with HSBC dated back to 2008/9 because HSBC no longer wished to support strategic land companies. His recollection, like that of Mr Jeans, was that HSBC refused to allow Mr Jeans to "ring fence" any recoveries from the claim against DWHL so that any monies that Mr Jeans might contribute to fund the security would be at risk. He remembered that HSBC's attitude hardened during the last 3 months of 2012, which is consistent with Mr Jeans' evidence that he originally had a ring-fencing arrangement with HSBC, but this was withdrawn by HSBC after the hearing before Burnett J.

69. DWHL submits that there is still no evidence that it was impossible for HCL to find the £201,000. It appears from Mr Jeans' evidence that the negotiations he had with HSBC did not simply relate to HCL. He explained that since 2008, HSBC had the benefit of cross-collateralisation from other companies, and his negotiations therefore had to address lending across several companies.

70. On 9 January 2013, Nabarro confirmed that HCL had withdrawn its application for permission to appeal Master Marsh's order and acknowledged that its claim had been struck out. It was Mr Bowker's evidence that the explanations for not providing security that I have set out above were not given to DWHL at the time. As I read Mr Jeans' evidence he accepts that this was the case, but seeks to justify it on the basis that the information was confidential and, if DWHL had known of HCL's financial difficulties at the time, HCL's position going forward would have been damaged.

71. In his evidence for DWHL, Mr Bowker points out that, whatever the position in relation to the negotiations with HSBC, a letter from HCL's accountants dated 25 August 2017 demonstrates that Mr Jeans has been able to find the means of lending money to HCL (in fact in excess of £20 million) when he has chosen to do so. It seems that Mr Jeans was the source of the substantial amounts spent by HCL in funding the costs of the First Action, although DWHL did not know about this at the time. Mr Gourgey submits that this

evidence clearly shows that HCL took a deliberate commercial decision not to comply with the order for security for costs, when it was not impossible for it to do so, because there were other business considerations which it regarded as more important.

72. There was then correspondence about the costs consequences of what had occurred. On 13 March 2013, Deputy Master Matthews made an order that HCL make an interim payment of £200,000 in respect of the costs of the First Action, of which £150,082 was paid shortly thereafter, by way of transfer out of the monies which were held on joint account in accordance with the order made by the Court of Appeal. In addition to the £49,918 outstanding from the interim payment ordered by Deputy Master Matthews, the costs order made by Master Marsh in November 2012 (totalling £13,800) was still outstanding. Deputy Master Matthews then made a further order summarily assessing the costs of the hearing before him in the sum of £8,000. These three amounts totalling £71,718 were eventually paid, but only more than four years later and after DWHL had issued and served this application, making complaint amongst other things about HCL's non-payment.

73. DWHL took no further steps to have the costs of the action assessed, on the basis that to do so would amount to throwing good money after bad – as Mr Bowker put it: "*there seemed to be no realistic prospect of recovering those costs from HCL*", but it estimated that they totalled approximately £520,000 (including as I understand it the c.£70,000 for which unsatisfied orders had already been made). Mr Jeans does not accept that this was DWHL's true motivation for taking no steps to have its costs assessed, considering rather that it could and should have done so at that stage, given the prospective value of HCL's assets in the event that planning permission were in the future to be granted. HCL did not, however, offer to make an interim payment.

74. More than four years then passed until 12 April 2017, when the present proceedings, which had been issued on 12 December 2016 exactly 4 months earlier, were served on DWHL. During the period between 2013 (when the correspondence relating to the strike out and consequential costs order came to an end) and service of the present proceedings, there was no correspondence between the parties relating to the dispute. It is Mr Jeans' evidence that he was able to commence these proceedings once he had refinanced in around July 2016. There is no explanation as to what this means, as to where the money came from or as to whether he himself or particular legal entities (and if so which) were the beneficiaries of or participants in this refinancing.

75. HCL did not comply with the terms of the *Practice Direction – Pre-action Conduct and Protocols* prior to service of these proceedings. HCL contended that there were reasons why it had taken this approach, but initially its solicitors did not identify what they were. In his evidence, Mr Jeans has now explained that the reason was that "*HCL did not have the necessary information to formulate its claim until it was on the heels of limitation*." It is difficult to accept that explanation in the light of the fact that the case advanced in these

proceedings is accepted by both parties to be materially the same as the case advanced in the First Action, the sole difference being the claim for consequential loss which, as I have already mentioned, is based on evidence that had been available to HCL for many years.

76. There is one aspect of the way in which HCL puts its case in these proceedings to which DWHL draws particular attention. HCL pleads that on 1 April 2010, i.e. before the hearing before Judge Seymour QC in the First Action, it sold the Property to another associated company (Harbour Castle 2 Limited ("HCL2")) for £16 million, and that it will accordingly give credit in these proceedings for that sum. Mr Jeans says in his evidence that the purpose of the transfer "*did not operate to change the legal position within HCL or its obligations under the Option Agreement*" and that it was a necessary action to allow him to return to the UK, whilst still retaining the benefit of HCL's domicile in the Isle of Man. It was his evidence that he himself had moved to the Isle of Man in 2006 to assist in the management of his tax affairs, but that it was desirable for him to return to the UK in 2010 because of the physical demands which constant travel to and from the island placed on his health.

77. Neither the sale nor the reasons for it were disclosed to the court or DWHL at any stage prior to the service of the Particulars of Claim in these proceedings. DWHL says that HCL's case on this issue is completely inconsistent with the case that it advanced by way of defence to a number of applications for security for costs made against it by DWHL in the First Action. In July 2011, August 2012, September 2012 and November 2012, HCL represented through skeleton arguments, witness statements and a notice of appeal that the Property continued to be its own asset, available to secure payment of any adverse costs orders made against it in the First Action. It says that, in these circumstances, it is not surprising that it is clear from Burnett J's judgment dated 21 September 2012 that he determined the application for security for costs before him on the basis that HCL owned the Property, a basis to which he made specific reference in his judgment.

78. DWHL submits that all of this material was false because the real asset was a debt due to HCL from HCL2 payable in consideration for the sale of the Property; a very different asset from the Property itself. Furthermore, DWHL says that the transfer was not just contrary to representations made to the court in the First Action that the Property was still owned by HCL, it also shows that the First Action was advanced on a false and inflated basis, and that the sale would have put HCL in repudiatory breach of the Option Agreement thereby releasing DWHL from any further obligations under it. The inflated basis of the claim is said to have arisen because HCL's claim for damages gave no credit for the sale to HCL2, and a number of the claimed expenses (totalling £400,000) were incurred after the date of that sale.

79. HCL denies that any of these complaints are well founded. It is Mr Jeans' evidence on this application that the 2010 transfer was only a transfer of the beneficial interest, and, to

begin with, he also maintained that HCL was still the holder of the legal title, a statement which he made by way of answer to DWHL's complaint about the inflated nature of the expenses element of the claim. He then changed his evidence on this last point, after entries at the Land Registry were put in evidence by DWHL demonstrating that the legal interest was in fact transferred by HCL to HCL2 on 6 July 2016. Mr Jeans has now apologised for that error in his evidence, but seeks to minimise the significance of this rather confusing story on the precise ownership structure of the Property on the basis that, since HCL2 was wholly owned by HCL "*its assets would be available to meet HCL's liabilities*".

DWHL's Submissions

80. In these circumstances, DWHL seeks to strike out these proceedings as an abuse of process. It contends that allowing them to proceed would amount to undue harassment, would represent an undue use of court resources and would undermine the finality intended to be brought about by the orders made in the First Action. It submits that HCL has given no adequate explanation for its conduct, or for the delay in taking steps to preserve its claims. Mr Gourgey did not contend that the First Action had been struck out for abuse of process with the consequence that a second action is an abuse in the absence of special circumstances. The way he put his case was to submit that, as the First Action was struck out for breach of a peremptory order, and as HCL's general conduct has in a number of respects been inexcusable, special reason is required if these proceedings are not to be treated as an abuse, and no such reasons have been shown. In particular, he relied on eleven factors, a number of which overlap.

81. The first factor is that HCL's conduct of the First Action was unsatisfactory and included several serious breaches, including deliberate breaches, of court orders. As to general conduct, it relies on the circumstances in which the trial was adjourned in April 2010 and the subsequent service of the inadequate Padfield Particulars. As to breaches of court orders, it relies on the breaches of Burnett J's September 2012 order, Master Marsh's November 2012 unless order and the three costs orders which were made against HCL (and which were only discharged after DWHL's strike out application was issued). Mr Gourgey points out that breach of an unless order is, by its very nature, serious and significant, and relied on *Britsh Gas Trading Ltd v Oak Cash & Carry Ltd* [2016] 1 WLR 4530 at [38] to [41] in support of that submission.

82. Mr Gourgey also stressed that HCL's breach of the order for security was deliberate, and made as part of a deliberate commercial decision not to pursue the First Action. He points out that this was done against the background of a course of prior conduct when substantial security had been offered. He contends that nowhere does Mr Jeans say in his evidence that he did not have the funds available to provide the security, and characterises the breach as deliberate in the sense that Mr Jeans (HCL's sole legal and beneficial owner

and directing mind) chose not to allow HCL to comply with the order. He said that it is clear that commercially it did not suit Mr Jeans to cause HCL to comply with the order, which amounted to deliberate and contumelious conduct.

83. In his submissions, Mr Gourgey developed an argument to the effect that, if these proceedings were permitted to proceed, it would drive a coach and horses through the principles applicable to the circumstances in which the court grants relief from sanctions (and referred to *Denton v T H White Ltd* [2014] 1 WLR 3926). He submitted that it is relevant for me to consider whether an application for relief from sanctions would have succeeded had it been made. He submits that it is plain that it would not have done so. He also says that the very fact that it was not made at the time (i.e. in 2012 or 2013) also supports his case.

84. The second factor is that all parties and the court intended that HCL should bring forward all of its claims in the First Action so as to avoid unfair harassment of DWHL and a disproportionate use of the court's resources. DWHL relies on what was said at the time of the adjournment in April 2010 in support of its case that HCL then intended that the totality of its complaints against DWHL would be included in the First Action, representations that were still being repeated in evidence by HCL's solicitors over a year later. It also relies on the fact that the court made it clear during the course of the First Action that HCL should bring forward all of its claims and granted it many opportunities to do so. In that context, it submits that second, third and fourth bites of the cherry were given to HCL by Judge Seymour QC on 20 April 2010, by Burnett J on 21 September 2012 and by Master Marsh on 15 November 2012 when the court granted HCL permission to amend its claims and granted extensions of time for the provision of security. In each case, if those indulgences had not been granted, the First Action would have been struck out.

85. The third factor is that it is clear that the court sought to case manage the First Action in order to provide finality for DWHL in its dispute with HCL. This is apparent from the relief which was granted by Judge Seymour QC at the hearing in April 2010, and the fact that Master Marsh said that DWHL was entitled to "*a degree of finality on this issue*" when he made the unless order in November 2012. It is submitted that to allow the present proceedings to go ahead would undermine the effect of the unless order made in the First Action, and the requirement (ignored by HCL) to seek relief from sanctions if it wished to reinstate the case following breach of that order. DWHL submits that HCL should have sought relief from sanctions if it found itself unable to comply with the unless order (and cited *Eaglesham v Ministry of Defence* [2016] EWHC 3011 (QB) at [46]), because it is well known that non-compliance carries the risk of being shut out for good.

86. The fourth factor relied on by DWHL is that the First Action was commenced in June 2009, and was not struck out until December 2012. DWHL points out that very substantial time and resources were devoted to the First Action by both DWHL and the court over a

period of more than 3 years and points to the evidence that its own solicitors had spent more than 2,400 hours on the case. He also relied on the fact that at the hearing before Burnett J in September 2012, the judge expressed himself to be satisfied that the parties had fully explored the circumstances surrounding the Oral Agreement, including the dealings between HCL and DWHL, and full disclosure on that issue.

87. Accordingly, DWHL submits that there is no analogy with cases which have been reissued after an earlier strike out of proceedings at a stage before the resources of the court (or those of the defendant) have been significantly engaged. In making this submission, HCL did not contend that the delay was all down to HCL. The point it made was the simple fact that extensive court time and resources have already been expended on the dispute. It is also right to record that issues relating only to the claim for damages for breach of the Option Agreement had not been explored in such detail during the course of the First Action.

88. The fifth factor relied on by DWHL is that HCL misled the court in the First Action by not disclosing the sale of the Property by HCL to HCL2, which HCL now says took place on 1 April 2010, i.e. shortly before the date on which the trial was originally listed before Judge Seymour QC. I have already described what happened in paragraphs 76 to 79 above.

89. The sixth factor is that there has been a very significant delay between the time at which the First Action was struck out and the commencement of these proceedings. DWHL relies both on the fact that unjustified delay is a factor which can be taken into account when considering whether proceedings commenced within the limitation period are abusive (*Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 (at [35])), and on the fact that that, if HCL were only now to be applying for relief from sanctions rather than starting a second action, such an application would be hopeless on the grounds of delay alone (*British Gas Trading Limited v Oak Cash & Carry Ltd* [2016] 1 WLR 4530 (at [58] to [61])).

90. The seventh factor is that there is no adequate explanation for the timing of the new action. DWHL points out that there is no information or documentation provided about the refinancing which Mr Jeans says was completed in July 2016 and enabled him to proceed with the present action. It says that the truth is that Mr Jeans was conscious that the limitation period was likely to be expiring on 31 December 2016, and that any refinancing was completed with a view to HCL being able to commence these proceedings in time, rather than the other way around. DWHL also relies on the fact that HCL waited until the very end of the four-month period for producing its Particulars. It says that the way in which HCL has delayed is not the action of a claimant who is seeking to pursue a claim expeditiously. To that extent Burnett J's conclusion that "*This is not a case in which, by its conduct, [HCL] can be said to be dragging its feet*" no longer holds true.

91. The eighth factor is what DWHL characterises as a flagrant disregard of paragraphs 3 and 6 of the *Practice Direction – Pre-action Conduct and Protocols*, for which no adequate explanation has been provided. They complain that one explanation proffered by Mr Jeans, namely that he had no idea that a pre-action protocol was required, is disingenuous because HCL had by then instructed new solicitors (K&L Gates, who were instructed in October 2016). DWHL also submits that the excuse that his resources were being used to concentrate on preparing the Particulars of Claim is no excuse because it involved putting his own commercial priorities before the court's rules, and shows that the failure was deliberate.

92. The ninth factor relied on by DWHL is that it will suffer real prejudice if the present proceedings are allowed to continue. In particular, it submits that it has already incurred costs in excess of £500,000 in relation to the First Action most of which have not been paid. It says that it is only since this application was issued that HCL has paid the assessed costs that I referred to in paragraph 72 above (although even then without interest), and has still not made any offer to pay the unassessed costs nor has it made any payment on account of those unassessed costs. It submits that it has also suffered the loss and inconvenience of wasted management time spent in providing disclosure and preparing witness statements for the adjourned trial, much of which will have to be duplicated for these proceedings.

93. DWHL also says that it will suffer particular problems by reason of the four and half years which have elapsed since the First Action was struck out at which stage it assumed that it had seen the back of HCL's claims. Its internal Strategic Land Department has been disbanded as part of the reorganisation of its business, something which has severely compromised its ability to investigate the factual matters underpinning HCL's claim. Furthermore, each of the three witnesses of fact who provided statements for DWHL for use at the trial of the First Action has left its employment and their current whereabouts are apparently unknown. Their original statements are limited to the Debt Claim and do not address the damages claim for breach of the Option Agreement at all. DWHL says that it was reasonable for it not to make any long-term arrangements to take evidence from them in the light of the strike out.

94. The tenth factor is that Mr Jeans' evidence as to the reasons why the First Action was not pursued is said to be highly unsatisfactory. DWHL submits (citing *Britsh Gas Trading Ltd v Oak Cash & Carry Ltd* [2016] 1 WLR 4530 (at [45] to [48]) that, if HCL had applied for relief from sanctions, it would have had to demonstrate good reason for the default in compliance with the unless order made by Master Marsh, which is something that HCL has not done. In particular Mr Jeans has not provided a full and candid account of HCL's circumstances and his decision to "*let go*" the First Action. DWHL submits that the evidence at the hearing before Master Marsh when he made the November unless order was also inadequate, but the position is now, if anything, worse. DWHL submits that the

reason for this is that, although it appears from accounts that HCL has filed in the Isle of Man that it had raised very substantial sums of money (approximately £5 million) during the course of 2012, it is wholly unclear what became of the major part of that, and more particularly why no part of it was available to be used as security for costs. HCL has explained that the major part of the increase in HCL's indebtedness related to a previous financial year, and was in fact indebtedness due to DWHL which itself gave rise to the counterclaim referred to in paragraph 52 above. But on any view more than £1 million, relating to interest and finance charges and other costs relating to planning matters, was incurred during 2012.

95. The eleventh factor relied on by DWHL is a general complaint about the unsatisfactory nature of Mr Jeans' evidence, with particular reference to the suggestion that HCL was prejudiced in the First Action by a lack of funds and legal representation. DWHL points to a number of facts which are inconsistent with this being the true situation. In particular it points to a number of exchanges between Mr Jeans and Judge Seymour QC at the hearing in April 2010 during which Mr Jeans either indicated that HCL was in funds to pay the costs throw away by the adjournment and to instruct new lawyers to assist with the reformulation of HCL's case, or indicated that any difficulties he anticipated depended on the time required to bring new lawyers up to speed, rather than any shortage of funds.

96. DWHL also relies on the fact that HCL's claim to impecuniosity is inconsistent with the fact that during the course of the First Action, HCL was always in a position to pay the costs when it regarded it as being in its interests to do so. This is plainly the case, given the amounts of money which the evidence discloses that HCL spent on the First Action. It is also consistent with the fact that HCL took the costly and expensive course of changing solicitors to Nabarro in 2012, and that Burnett J expressly recorded in September 2012 that there was no suggestion that security beyond the amount offered by HCL could not be provided.

97. The other evidence which DWHL contends to be unsatisfactory is the approach which HCL has adopted to the failure to remedy the breach of the November 2012 unless order. What it means by this is that there has been no attempt by HCL to offer the security that it previously failed to provide in the First Action, and the evidence that the security is no longer necessary is wholly inadequate. On this last point DWHL submits that Mr Jeans has not said that he personally will pay all of the costs of these proceedings, while the evidence of HCL's own ability to pay any adverse costs order is highly unsatisfactory. It is submitted that this gives rise to a fundamental difficulty, because HCL remains an Isle of Man company in respect of which there continues to be doubt as to its ability to satisfy any adverse costs orders that might be made in these proceedings. If, as everybody accepted at the time of the hearing before Burnett J, security for costs was appropriate as a matter of principle, there is no evidence as to why that should no longer be the case.

98. In any event, DWHL submits that there is considerable confusion as to the true financial position of HCL, given that HCL2 (which as I have described above is now the legal owner of the Property) has granted charges over the Property in favour of certain Lendinvest companies which were not mentioned by Mr Jeans when he stated in his first witness statement in these proceedings that "*the full value of the equity in the property is free and unencumbered and could be called upon by HCL*". The evidence is that these charges stand as security for indebtedness totalling approximately £12 million. Mr Gourgey said that this was significantly misleading. (I should add that initially DWHL had alleged that there was a failure to disclose security to Secure Trust Bank, but this allegation was not persisted with when it transpired that this security is no longer in place.)

99. In addition to what it contends to be inadequacies in the evidence on the extent of HCL's obligations, DWHL complains about the nature and quality of the evidence on the value of HCL's assets. It submits that the extracts from a red book valuation of the Property produced by Savills are inadequate. It also reiterates that, because the Property is now owned by HCL2, the true value of HCL's asset is in fact the value of its shares in HCL2, which is not necessarily the same thing as the value of the Property.

100. In one sense, the two evidential inadequacies relied on by DWHL in this eleventh and final factor illustrates one of the tensions which can arise where security for costs is sought against a claimant which is both resident abroad such as to satisfy the condition in CPR 25.13(2)(a) and is said to be an impecunious company so as to satisfy the condition in CPR 25.13(2)(c). In order to satisfy condition (c) there must be reason to believe that the company will be unable to pay costs if ordered to do so, but a company in that position may then be able to establish that any order for security will stifle the proceedings. This is a point to which I will return when considering the relevance of the recent decision of the Supreme Court in *Goldtrail Travel Ltd (in liquidation) v Onur Air Tasimacilik AS* [2017] 1 WLR 3014 to which my attention was drawn (and on which the parties filed supplementary written arguments) after the conclusion of the hearing.

HCL's Submissions

101. HCL takes issue with many of the complaints made by DWHL. In general terms, it disagrees with much of the detail of DWHL's criticism of its conduct of the First Action. In his submissions Mr Brindle stressed that this application is about abuse of process, and, taken as a whole, HCL's conduct does not amount to a reprehensible use of the procedures of the court. In particular he submits that the mere fact that there has been a breach of a peremptory order in the First Action does not amount to an abuse of process, nor does it mean that these proceedings are also abusive. He said that it was important for the court to look at the position in the round, and then to determine whether, given the nature and

quality of what occurred, pursuit of these proceedings would amount to an abuse of process.

102. In making his submission that it was important to look at matters in the round, and that a full circumstantial enquiry was required, Mr Brindle identified a number of relevant factors. In the present case they included the seriousness of the default leading to the strike out of the First Action, the explanation for that default, the prejudice that might be suffered by HCL, whether these proceedings might be said to amount to unjust harassment of DWHL, whether shutting out the claim might be regarded as a windfall for DWHL, whether the extent of any prejudice to DWHL is such that it might be denied a fair trial and the extent to which the court's resources have already been taxed in the First Action.

103. As a general submission, HCL relies on its own impecuniosity as an explanation for such deficiencies as may have occurred in the conduct of the First Action and, in the first instance, as the reason why the First Action was originally formulated only as the Debt Claim. It accepts that some of what Mr Jeans told Judge Seymour QC in April 2010 could have been better expressed, but it submits that the explanations which it now gives for seeking an adjournment of the trial at that stage were legitimate and understandable.

104. It accepts that, once the adjournment had been granted, it struggled to present the enlarged amended claim in a satisfactory manner, but contends that it remained short of funds and submits that DWHL did everything it could to delay the trial of the First Action and avoid a substantive determination of the issues. It gives a number of examples of this conduct by DWHL, including the delays caused by DWHL's extravagant claim for costs criticised by Burnett J, the ultimately unsuccessful application to strike out the First Action on the grounds that the Padfield Particulars did not comply with the order made by Judge Seymour QC and DWHL's application for the payment of £4.2 million into court as a condition of being allowed to re-amend its Particulars of Claim at a time when DWHL had not yet pleaded a counterclaim for that sum.

105. It also says that, in significant part, the difficulties faced by HCL in seeking to prosecute the First Action were the result of the financial prejudice inflicted by DWHL's breaches of contract, being the same breaches for which HCL was seeking redress in the First Action. Indeed, it goes further and submits that it would be wrong in principle if it were to be shut out from vindicating claims now that it has put itself in funds, given that the loss of the First Action was caused by its own impecuniosity which was itself caused by DWHL's breach.

106. A number of the factors relied on by DWHL relate to events which occurred before the judgment delivered by Burnett J on 21 September 2012. In those circumstances, HCL places reliance on the conclusions reached by Burnett J in so far as they establish that its conduct up to that point in time was not deserving of criticism. HCL places particular reliance on the passages in Burnett J's judgment that I have referred to in paragraphs 53

and 54 above. It also relies on those parts of his judgment which it says support a submission that DWHL was then seeking to use its application for the payment of £4.2 million into court to circumvent a careful scrutiny of the merits of the claim, a circumventing tactic which it accuses DWHL of continuing to pursue. It relies on the fact that DWHL now accepts that it cannot reopen Burnett J's conclusions that, as at 21 September 2012, HCL had not behaved in a contumelious manner and was not guilty of delay or of prosecuting the First Action in bad faith. (I should add that Mr Gourgey made clear in his oral submissions that DWHL does not rely in this application on any delay by HCL in prosecuting the First Action.)

107. HCL places particular reliance on the fact that, between the time that Burnett J reached the conclusions that he did and the striking out of the action in December 2012, the only material developments were the failure of HCL to put up the security ordered and the consequential unless order made by Master Marsh. It points out that Master Marsh accepted that the failure to comply with the order made by Burnett J was not intentional and seems to have adopted without demur the characterisation of HCL's conduct as not demonstrating a want of good faith. It then submits that this all shows that its conduct in the First Action cannot be said to be contumelious in the sense described in the authorities which I referred to earlier in this judgment.

108. HCL submits that the explanation which it has now given for its breach of the orders made by Burnett J and Master Marsh means that this case does not fall into the same category as cases such as *Janov v Morris*, where no explanation was given. It submits that the explanation it has given is detailed and cogent. In summary, it says that it did not provide security in December 2012 for the simple reason that it was unable to do so. It says that this was not a disregard of the court's orders still less an act of contumely on its part, and it points to the considerable efforts which it had made to obtain the necessary funds in a hostile lending environment. It submits that the breach of the court's orders was at the lower end of seriousness identified by Mance LJ in *Glauser*.

109. HCL also contends that DWHL is wrong to characterise these proceedings as any form of circumvention of the unless order made by Master Marsh, in the light of the fact that it neither appealed the order nor sought relief from sanctions. It says that it would have been futile to do so, given that it had simply found itself unable to obtain security, and relies on the evidence from Mr Jeans, referred to in paragraphs 66 and 67 above, as justifying this conduct. In a post-hearing note (referred to further below), HCL submits that it would have been no answer for DWHL to say that HCL could have applied to have the order set aside because it would have failed on the basis that the court would have been satisfied that Mr Jeans could have put it in funds had he chosen to do so (a conclusion, which HCL now says would have been unjustified in the light of the decision in *Goldtrail Travel Ltd (in liquidation) v Onur Air Tasimacilik AS* [2017] 1 WLR 3014, a point to which I shall return below).

110. HCL accepts that the interests of other litigants and the use of court time must obviously be brought into account in determining whether these proceedings ought to be struck out as an abuse of process, but submits that the resources expended to date have been relatively limited, particularly when set against the complexity and value of its claims. It points in particular to the fact that a significant amount of time was taken up in the First Action by what it characterises as "*wasteful procedural gambits pursued by DWHL*". Furthermore, it submits that DWHL's characterisation of the First Action having proceeded all the way to trial is apt to mislead, because that was only the Debt Claim, and the First Action never approached a trial on the damages claim for breach of the Option Agreement. That aspect of the case did not even get to the close of pleadings because DWHL did not serve a defence.

111. In any event HCL contends that it is never enough simply to say that the court's resources are being taxed twice. What is required is a proper evaluation of the extent to which they were taxed in the First Action bearing in mind that the time required for these proceedings may be time that would have been used by the First Action if it had not been struck out. It also submits that the very nature of this dispute, which is a substantial piece of commercial litigation, means that it is to be expected that it will take up a significant amount of court time. It also says that, across its entire course, the First Action took up five days of hearing time, which it submits means that the court's resources actually engaged by the First Action "*were, whilst significant, relatively modest*". It also relies on the fact that some of the time taken up by the court (such as the hearing before the Court of Appeal) could be put down to matters for which DWHL, but not HCL, was responsible.

112. HCL also submits that the prejudice if its claim is struck out is very great. It points out that, even excluding consequential losses, the damages it claims for breach of the Option Agreement amount to between £21.8 million and £27.5 million, while, together with the claims to consequential loss, the damages claimed amount to a figure of over £200 million. On the other side of the equation it denies that the proceedings can be characterised as unjust harassment, most particularly because the claim is not brought for collateral or improper purposes.

113. HCL submits that it has only now been able to plead the claims for consequential loss because they had not crystalised at the time that it launched the First Action. It submits that, to the extent that DWHL relies on this omission as a relevant criticism of its conduct of the First Action that is misplaced. It does not, however, submit that the absence of any claim for consequential loss in the First Action means that the established principles applicable to striking out second actions are not applicable for that reason alone. I can understand why no such submission is made. In my view, the fact that a claim for consequential loss is made for the first time in these proceedings, together with the reasons given for that fact, is just one of the many circumstances which I am required to weigh in the balance when determining whether these proceedings are an abuse of process.

114. As to the prejudice which DWHL claims that it will suffer if these proceedings are allowed to continue, HCL submits that the concerns are overstated. It says that the costs of the First Action that were unpaid at the commencement of these proceedings have now been paid, and submits that the evidence is that HCL stands ready to pay the remainder once they have been assessed and will pay a suitable sum into court pending assessment. It does not accept that there will have been any material wastage of management time as the same questions remain in issue, and so the time already spent can be "folded back" into the current proceedings.

115. HCL submits that it has now given a proper explanation for the delay which has occurred since the strike out of the First Action. Although the explanation of the 3½ year time period between January 2013 and July 2016 is contained in a single statement in Mr Jeans' witness statement "*I refinanced in around July 2016 so HCL was not properly funded to proceed until after that time*", HCL contends that this is sufficient for these purposes. HCL also contends that the more detailed description of what has occurred since July 2016 is a justifiable explanation for the additional nine-month delay between refinancing and service of these proceedings. HCL submits that the need to deal with what were described as urgent business issues, the instruction of its new solicitors (K&L Gates) in October 2016 and the issue of proceedings in December 2016 to protect against imminent expiry of the limitation period is sufficient to justify its admitted non-compliance with the *Practice Direction – Pre-action Conduct and Protocols.* It justifies the further delay between December and April before service of the claim form on DWHL on the basis that the necessary information supporting the claim for consequential loss was not available until the end of March 2017.

116. As to the consequences of the further delay, and in particular the prejudice asserted by DWHL in relation to the unavailability of witnesses, HCL points out that it is not argued by DWHL that its right to a fair trial would be infringed if these proceedings were to be allowed to proceed. HCL relies on the fact that two of the three witnesses were no longer employed by DWHL at the time that the First Action would have come to trial if HCL had put up the security for costs it was ordered to provide. It also adduces evidence that they are still easy to locate and working in the property industry, and questions why DWHL has not put into place standard procedures to retain the continued assistance of former employees.

117. HCL also submitted that DWHL was wrong to draw a parallel between the present case and the *Denton* jurisdiction. Mr Brindle said that it is not possible to read across the *Denton* principles on when relief from sanctions ought to be granted, into the authorities on abuse of process. He submits that, merely because relief from sanctions might not have been granted in December 2012 so as to prevent a strike out of the First Action at that stage, does not answer the question of whether or not it is appropriate to characterise the present proceedings as an abuse. HCL accepts that the consequence of its failure to seek

relief from sanctions is that the First Action is lost and that it is then burdened with the costs of those proceedings, but it also submits that, if DWHL were to be correct on this point, second actions would always be precluded and that is not the law. HCL makes the same submission in relation to its failure to appeal either the decision of Burnett J or that of Master Marsh.

The Goldtrail Case

118. After the conclusion of the hearing, HCL drew my attention to the decision of the Supreme Court in *Goldtrail Travel Ltd (in liquidation) v Onur Air Tasimacilik AS* [2017] 1 WLR 3014, on which the parties then made further written submissions. The issue in *Goldtrail* was the correct approach where the Court of Appeal is asked to direct that payment of a sum into court should be imposed as a condition of any appeal and (a) the appellant contends that the appeal will be stifled if it has to make the payment, but (b) the respondent relies on the appellant's relationship with a wealthy third party as an answer to that contention.

119. Although Lord Clarke and Lord Carnwath disagreed on their application to the facts of the case, all of the judges agreed on the broad principles. As I understand it, those principles are as follows:

119.1. There is a qualitative difference between an order requiring payment of the judgment sum into court as a condition for an appeal, and an order for the provision of security for costs of an appeal, but both are equally capable of having a stifling effect and, on that issue, there is no distinction in the principles to be applied ([14]).

119.2. The onus is on the appellant to establish that a condition which is otherwise appropriate would stifle an appeal but, if he establishes that it probably would, the condition should not be imposed ([15] and [16]).

119.3. Even if an appellant has no realisable assets, a condition will not stifle an appeal if the appellant can raise the required sum from third parties. However, the court must be cautious in applying this principle to the ability of a corporate appellant to raise money from its controlling shareholder, because "*The question should never be: can the shareholder raise the money? The question should always be: can the company raise the money?*" ([18]).

119.4. If on the evidence, a party has sufficient access to the resources of a third party, that is an answer to a contention that a condition (or an order for security) will stifle an appeal. However, to the extent that two decisions of the Court of Appeal (*Hammond Suddards Solicitors v Agrichem International Holdings Ltd* [2002] CP

Rep 31 at [41(4)] and *Société Générale SA v Saad Trading, Contracting and Financial Services Co* [2012] EWCA] Civ 695 at [54] and [55]) hold that sufficient access will be established merely because a company's wealthy owner could make the payment if he chose to do so, they were wrong to do so ([22] and [23]).

119.5. When considering whether the existence and ability to pay of a corporate defendant's wealthy owner is relevant to the question of whether a condition should not be imposed on the grounds that an appeal might be stifled, the "exceptional circumstances" test applied in earlier authorities was no longer to be followed:

> *"In this context the criterion is: "Has the appellant company established on the balance of probabilities that no such funds would be made available to it, whether by its owner or some other closely associated person, as would enable it to satisfy the requested condition?"* ([23]).

119.6. When judging the probable availability of funds from an owner or controller of a corporate appellant, the court should do so by reference to the underlying realities of the company's financial position and by reference to all aspects of its relationship with its owner. This will include the extent to which he is directing its affairs and is supporting it financially ([24]).

120. This authority is said by HCL to be relevant, because it confirms that DWHL's application is brought on a false premise. In particular it is submitted that DWHL's argument that HCL is to be stigmatised for non-compliance with the unless order made by Master Marsh involves the impermissible elision of Mr Jeans with HCL. It is said that the fact that Mr Jeans chose not to fund HCL's claim by advancing the required security does not assist because it was Mr Jeans' choice (made in a personal capacity) which cannot be imputed to HCL.

121. It is also submitted that any application by HCL to set aside the order for security made by Burnett J on the grounds that it should not have been ordered because HCL itself did not have the requisite funds would have failed, because the law was then wrongly thought to be accurately described in the passages from *Hammond* and *Société Générale* that I have referred to above. This also amounts to a submission that it can now be seen that Burnett J was wrong to make the order for security for costs that he did, or at the very least that Master Marsh was wrong not to give HCL the time that it sought at the time that he made the unless order which ultimately led to the strike out of the First Action.

122. DWHL disputes the relevance of *Goldtrail* to the issues that I am asked to decide. It submits that the case is concerned with the test to be applied when the question is whether or not an order for security ought to be made; it is not concerned with what ought to happen where an order, which has already been made has not been complied with. It also

submits that the case does not assist because it was common ground before Burnett J and Master Marsh that, although HCL itself had very few assets and very substantial liabilities, Burnett J specifically recorded that there was no suggestion that security beyond the amount already offered by HCL (£900,000) could not be provided. Furthermore, DWHL relies on the fact that, unlike in *Goldtrail*, no submission was made to Burnett J that a requirement to provide security would have stifled access to the court, and there was evidence before both Burnett J and Master Marsh that HCL's backers were prepared to provide security and to put HCL in funds to enable it to litigate.

123. DWHL also submits that HCL is wrong to contend that it could not have pursued the litigation in 2012, because all that the evidence establishes is that Mr Jeans decided that it was time to "*let go the efforts to sustain*" the First Action. This falls short of establishing that there was no other way in which HCL could have raised the security, if it (through its sole decision maker Mr Jeans) had chosen to take steps to do so. DWHL also submits that the decision to let the First Action go was made as much by Mr Jeans in his capacity as the directing mind of HCL, as it was made by him in his personal capacity. It criticises the lack of evidence describing the re-financing of HCL from which it might prove possible to assess why it is that HCL is now able to proceed when it was unable to do so in 2012. DWHL urges the court to ensure that, in assessing the evidence, consideration is given to the underlying realities, and in particular that the extent to which Mr Jeans is directing and has directed the affairs of HCL, and is supporting (and has supported) it in financial terms is given the weight contemplated by Lord Wilson in *Goldtrail* at [2017] 1 WLR 3014 at [24].

Discussion and Conclusions

124. The mere fact that the First Action was struck out for breach of a peremptory order is not sufficient to justify the striking out of these proceedings as an abuse of process. In my view, the approach which the authorities require me to take in deciding whether a strike out is justified depends on whether, taking all the circumstances of the case into account, HCL's commencement of these proceedings constitutes a misuse of the court's procedure which would be manifestly unfair to DWHL or would otherwise bring the administration of justice into disrepute. As Judge LJ explained in *Collins* at [50]: "*The answer to the questions which necessarily arise for answer is always fact-specific".* In particular, I do not consider that it is appropriate simply to ask whether there are special reasons which justify a second action, because I do not consider that the First Action was so abusively conducted as to fall within the category described by Mance LJ in *Glauser* (at [30]).

125. In my judgment, applying this approach, and having regard to all the circumstances of the case, the present proceedings are an abuse of process and should be struck out. The remaining parts of this judgment explain why I have reached the conclusion that I have,

and identify the circumstances of the case which have caused me to determine that the court's process will be abused if the proceedings are permitted to continue.

126. In reaching this conclusion, I take into account the indisputable fact that the effect of this decision will be that HCL will not be able to pursue a very substantial claim which, for the purposes of this application, DWHL accepts has a real prospect of success. I also take into account the fact that there is no evidence that HCL has an alternative source of recovery if these proceedings are struck out.

127. I consider, however, that HCL's wish to proceed is outweighed by the circumstances in which the First Action was conducted and came to an end, and the need to allot the court's limited resources to other cases. In my judgment HCL ought to have made proper use of the opportunity provided by the First Action to resolve its dispute with DWHL, and that, not having done so, the pursuit of these proceedings can properly be characterised as unjust harassment of DWHL. Furthermore, the considerations which I am required to take into account by CPR 1.1(2) and the decision of the Court of Appeal in *Securum* support the conclusion that further pursuit of these proceedings by HCL would, in the particular circumstances of this case, be inconsistent with the overriding objective.

128. Although breach of a peremptory order in the First Action may not be sufficient in itself to make a second action an abuse of process, it is capable of being a significant factor depending on the circumstances in which it was made and not complied with. In the present case, there is no doubt that the breach of the order made by Master Marsh, which extended time for compliance with Burnett J's order but ordered that the proceedings be struck out unless the first tranche of security was provided by 20 December, was deliberate in the sense that HCL (through Mr Jeans as its directing mind) knew of its terms and made an informed decision not to comply with it.

129. It is said by HCL that its hands were tied because it itself had no funds with which it could comply with the terms of the orders made by Burnett J and Master Marsh. I accept that lack of funds is capable of excusing a failure to proceed with the resolution of all issues in dispute when given an opportunity to do so, but consider that this will often not be the case. This much is apparent from what Lord Bingham said in *Johnson v Gore Wood* in the passage from his speech that I have already cited. In the context of a *Henderson v Henderson* argument, he said that a failure to raise in earlier proceedings an issue which could and should have been raised then would not normally be excused by impecuniosity, but lack of funds will not always be irrelevant; all depends on the circumstances including in particular whether the impecuniosity was caused by the other party's breach. In my view, however, the circumstances of the present case do not sufficiently mitigate what was a serious breach for a number of reasons.

130. First, while it has always been the law that stifling is capable of being a sufficient answer to an application for security to be provided, HCL made no stifling argument at the

hearing before Burnett J and maintained this position at the November hearing before Master Marsh, when it only referred to the possibility of stifling in the context of its request for an extension of time to 9 January. This is particularly striking, as a stifling argument was made (and succeeded) in relation to DWHL's application for the payment in of £4.2 million as a condition for re-amending its Particulars of Claim, so it is clear that stifling as a relevant concept was at the forefront of HCL's mind. Even at the November hearing before Master Marsh, HCL did not say that there was any possibility that the claim would be stifled merely by the need to provide within short order the security ordered by Burnett J.

131. Secondly, the seriousness of the breach is emphasised by the fact that a deliberate decision was made not to seek a further extension of time by way of relief from sanctions, and another deliberate decision was made not to pursue any appeal either against Burnett J's order or against the order made by Master Marsh on the grounds that it could now be seen that the order for security would stifle the claim. This decision was maintained up to the time the First Action was struck out and thereafter. (I note that the fact that a failure to appeal is capable of being a relevant factor where a first action had come to an end for breach of a peremptory order is apparent from both judgments in *Janov v Morris*).

132. The third point relates to timing, and the submissions which were made after the hearing on the decision of the Supreme Court in *Goldtrail* are relevant to this part of the case. As Mr Gourgey pointed out, the problem with HCL's submissions on the relevance of *Goldtrail* is that the question at the time the orders were made by Burnett J and Master Marsh was whether, in the light of the admitted impecuniosity of HCL, the evidence established on the balance of probabilities that HCL nonetheless would have access to other resources to fund the payment. It is clear that Burnett J was satisfied that those who were supporting HCL were prepared to fund the litigation with DWHL, and were prepared to provide the security. This conclusion was not at all surprising in the light of the fact that no case was ever advanced by HCL as a matter of principle that an order for the provision of security for costs in the amounts ordered by Burnett J would in fact stifle the claim. The fact that a subsequent decision was made by Mr Jeans that he was prepared to let the litigation go does not affect the conclusion that the orders made by either Burnett J or by Master Marsh were not wrong at the time they were made.

133. Fourthly, even if HCL had made a stifling argument in 2012, and even if the evidence now set out in paragraph 67 above had then been given, I am not satisfied that the court would have concluded that the security ordered would probably stifle the claim. The reason for this is that the evidence does not justify a conclusion that HCL did not have access to the means of providing the security ordered; it only justifies a conclusion that, for commercial reasons which it (together with GBGB and Mr Jeans) considered outweighed the consequences of the failure to provide security, it took a decision that it would not comply.

134. In its submissions HCL says that it was unable to comply with the order because it did not have the resources to do so, but in his evidence Mr Jeans explains that his acceptance of the need "*to let the litigation go*" was driven by his decision "*to focus on saving the business of both HCL and GBGB at that time*." Apparently, the decision that was made was against the background of a concern by Mr Jeans that HSBC was using the First Action as leverage in its more general negotiations for the refinancing of the facilities of Mr Jeans' various businesses including HCL. In my judgment, this evidence is equally consistent with a conclusion that HCL would have access to the necessary security if all concerned, including HCL, considered that it would be in their interests for that access to be made available.

135. Fifthly, I agree that there is any event an air of unreality about HCL's submissions. I do of course accept that a shareholder's distinct legal personality must be respected save where he has sought to abuse the distinction (per Lord Wilson in *Goldtrail* at [18]). Where, however, the shareholder is the sole owner of the company, its controller and directing mind, it is necessary to scrutinise the evidence with great care, and proper weight must be given to what Lord Wilson described as all aspects of the company's relationship with its owner, including the extent to which he directs its affairs and supports it financially: *Goldtrail* at [24]. In the light of the fact that Mr Jeans, as HCL's directing mind, says in his own evidence that he reluctantly accepted that he had to let the litigation go because he had decided "*to focus on saving the business of both HCL and GBGB at that time*", I do not accept that, even if a stifling argument had been made, the court would have concluded that HCL did not have access to sufficient funding to pursue the First Action if HCL's directing mind, acting in that capacity, had determined that pursuit of the First Action was the right thing to do.

136. As it was clear that Mr Jeans had the ability to fund the litigation (and had been doing so), and as there was no argument that an order for security would stifle the appeal, and as there was no evidence before the court that Mr Jeans *qua* funder (as opposed to Mr Jeans *qua* directing mind of HCL) had determined that he would not find the necessary support, HCL has not established that Burnett J or Master Marsh would have reached a different conclusion, even if the new evidence had been adduced before them and even if they had had the benefit of the Supreme Court's decision in *Goldtrail*.

137. In its final response note on *Goldtrail*, HCL submits it plainly would have been in HCL's interests if Mr Jeans had decided otherwise, and determined to put up the security. I do not accept that it is appropriate for that inference to be drawn. I agree with DWHL's submission that the court has not been provided with sufficient evidence to explain all of the thinking which went into the decision that attempts to provide the security would no longer be pursued, because to do so might endanger other business assets. Mr Jeans had continued to provide money to HCL for other purposes, and he had apparently taken the issue of security for costs off the table in his discussion with HSBC. Furthermore, the absence of any substantial evidence on the circumstances of the refinancing which have

now enabled HCL to commence these proceedings means that it is not possible to consider how matters have changed for the purposes of testing what may at any time have been in HCL's best interests. As matters presently stand the evidence remains consistent with the fact that the decision Mr Jeans made was made both in his own right and in his capacity as the directing mind acting on behalf of HCL and the other entities (such as GBGB) to whose affairs it related.

138. In making my assessment of the seriousness of this breach, I also bear in mind the lack of any explanation at the time of the breach as to why HCL was not in a position to comply with the orders. This lack of explanation was specifically commented on by Master Marsh in his judgment on the extension application but, notwithstanding that, there was no further development of the reasons in correspondence with DWHL or in communication with the court, and it was only on the context of the present proceedings that the fuller explanation I outlined earlier in this judgment was proffered. A failure to explain is a relevant factor (as to which see *Janov v Morris* and *Collins*) for a number of reasons including the fact that it makes it difficult for the court to assess the extent to which the breach was deliberate, and because it demonstrates a casual and cavalier attitude to non-compliance, anyway for so long as no explanation is given.

139. Turning to the evidence which has now emerged in relation to the transfer of the Property to HCL2 in April 2010, I have described what happened earlier in this judgment. It is clear to me that the way in which HCL presented its case in the First Action was materially misleading. In my view it is relevant to my assessment of the seriousness of the breach of the peremptory order (and to HCL's conduct at the time that the order was made and breached) that evidence which was relied on by Burnett J was inaccurate. In determining the application for security for costs he specifically relied on evidence that HCL owned the Property. This was not just a passing error, because (as I have already described) the inaccuracies were repeated on a number of occasions during the course of 2011 and 2012.

140. I do not accept HCL's submissions that the transfer was of no real significance, whether because HCL still had an asset in the form of the debt due from HCL2, or because HCL2 was its wholly owned subsidiary. Nor do I accept that the error in Mr Jeans' evidence on this application, which I have described in paragraph 79 above, is insignificant on the basis that, since HCL2 was wholly owned by HCL, its assets would be available to meet HCL's liabilities. Even giving some latitude for a lax approach to the proper distinction between the assets and liabilities of a subsidiary and its parent, this would not be accurate unless all of HCL2's assets are (and were at all relevant times) immediately distributable to HCL. As DWHL points out, this explanation is difficult to reconcile with the fact that HCL now accepts that it must give credit for the £16 million.

141. While I am not in a position to reach a concluded view as to whether or not this also led to the claims in the First Action being advanced on an obviously inflated basis, I cannot rule out the possibility that this may be the case. On this application, however, I think that it is

only appropriate for me to proceed on the basis that there is an unresolved question of whether or not the First Action was advanced on a false and inflated basis or that the sale would have put HCL in repudiatory breach of the Option Agreement thereby releasing DWHL from any further obligations under it. In these circumstances, I do not attach any weight on this application to that particular aspect of what occurred.

142. In these circumstances, it seems to me that the breach of the order made by Master Marsh was very substantially more serious than the breaches under consideration in *Glauser* or *Aktas v Adepta*. In those cases, the nature of what caused the strike out of the first set of proceedings was either a minor slip or a failure to serve a document in time, which (in the case of *Aktas*) was held to be not really comparable to a strike out for want of prosecution and abuse of process. In the present case, HCL's attitude to compliance was more cavalier, in the sense that the order was not to be treated as a necessary obligation, if the pursuit of other business considerations was perceived to be more beneficial.

143. Quite separately from the breach of the peremptory order made by Master Marsh, I agree with Mr Gourgey's submission that I should also take into account the approach which HCL has taken to compliance with other orders of the court. I bear in mind the fact that HCL has failed to comply with a number of costs orders made during the course of the First Action. Taken alone, these breaches would not weigh heavily in the balance on this application, but they are still material. The non-compliance with the orders for the payment of assessed costs has extended over a period of more than four years, and they were only complied with when it suited HCL's interests to do so, i.e. after the date that this application was made, which sought (in the alternative to a strike out) an order for payment of all costs of the First Action as a condition of permitting this action to proceed.

144. To the extent that HCL contends that it was justified in not complying with the costs order because it was short of funds, I am not satisfied that this is an adequate excuse. In any event, even that contention is no longer sustainable after July 2016 when, on its own case, Mr Jeans had refinanced and HCL was properly funded to proceed. The very fact that HCL did not hasten to pay the moment that it was in a position to do so (and only did so when DWHL's strike out application was launched), supports DWHL's submission that commercial considerations are more important to HCL than an unequivocal acceptance of the need to comply with an order of the court when in a position to do so.

145. HCL's admitted failure to comply with the *Practice Direction – Pre-action Conduct and Protocols* also has some relevance on this aspect of the case. This is not because it would justify the striking out of the proceedings without more. In my view it would not, but, nonetheless, it amounts to a disregard for the proper procedures of the court which, taken with all of the other factors I have described, demonstrates an attitude which is at variance with a party's obligation under CPR 1.3 to help the court to further the overriding objective (and in particular CPR 1.1(2)(f)). For the reasons that I have already given in paragraph 75 above, I do not accept that HCL's explanation for non-compliance is a good

one. It is also an example of conduct in the context of the present proceedings, as opposed to the First Action, which gives rise to legitimate concerns as to the way in which HCL intends to conduct them (cf Dunn LJ in *Janov v Morris*, at p.1395D).

146. Turning to the more general question of how the balance should be struck between the wish of HCL to try again with a second bite of the cherry, and the impact which this will have on the court's limited resources, I agree that this factor will have little significance if it is one of those cases in which (per Mance LJ in *Glauser* at [23]) "*the court's resources are being taxed twice, but they were taxed relatively little by the first action and the extra burden imposed on them by a second action can hardly be much greater than the burden which could and would anyway have been imposed*". In my view, however, the present proceedings are very far removed from such a situation, or indeed cases such as *Aktas v Adepta,* in which Rix LJ pointed out that, without even serving the claim form, it might be said that the claimant had not yet managed a single bite.

147. In my view, the extent to which the court's resources have already been utilised in dealing with HCL's claim in the First Action is significant. Quite apart from the description of the First Action which I have already given, extending as it did over a period of some 3½ years, some sense of its significance can be gained from the evidence relating to the amount of work already carried out by DWHL's solicitors. This shows that more than 2,400 hours had been charged to their clients in the First Action. Furthermore, the extent of the costs orders to which I have already referred earlier in this judgment, demonstrates the amount of time and effort that has been spent on the dispute. In my view, it had reached the stage contemplated by the Court of Appeal in *Securum*, such that a second action is capable of being abusive, because in the light of the First Action these proceedings will require the allocation of a greater share than is appropriate of the court's limited resources, a matter which I am also required to take into account by that part of the overriding objective which is referred to in CPR 1.1(2)(e).

148. In assessing the weight to be attached to this particular factor, I take into account the fact that a material part of the time spent on the First Action was either spent on applications in which DWHL was ultimately unsuccessful (such as the applications before Judge Seymour QC in July 2011 and the subsequent reversal of his decision by the Court of Appeal in April 2012) or was taken up by delays caused by the conduct of DWHL that was subsequently criticised by the court (such as the delay caused by the extravagant claim for costs referred to by Burnett J at [2012] EWHC 3082 (QB) at [49]).

149. However, it is also relevant that the First Action was pursued by HCL through a failed summary judgment application and up to the day of the trial, albeit only in relation to the Debt Claim (it then being adjourned for the purpose of expanding its remit), and that HCL had to reformulate its claim on a number of occasions as described above. I do of course accept that this, amongst other conduct, has been held by Burnett J not to be contumelious for the purposes of the good faith test referred to in *Olataruwa v Abiloye* [2003] 1 WLR

275 (at [25]), but that is a different question from the one with which I am now concerned, which is the extent to which, and the circumstances in which, the court's resources have already been taxed. Hallett LJ's comments on HCL's unsatisfactory approach to the pleadings and Mummery LJ's comments in refusing HCL's application for costs in April 2012 demonstrate that HCL's conduct of the litigation at first instance was far from satisfactory.

150. In these circumstances, I must proceed on the basis that there is blame to be attributed to both sides for delay and inefficiency in the pursuit and defence of the First Action. However, the more important point is that HCL, as the party whose conduct led to the making of the peremptory order and to the First Action coming to an end, knew that very significant resources had already been expended. Despite that knowledge, it did not ensure that it used the opportunity provided by the First Action to resolve its dispute with DWHL.

151. There is, of course, a difference between the amount of time and effort expended by the court, where the issue is whether the court's limited resources have already been expended such that further pursuit of the second action would amount to a misuse of its procedures, and the amount of time and effort already expended by DWHL. So far as that is concerned, the issue is more closely linked to the question of whether these proceedings can be said to amount to unjust harassment of DWHL, of the form contemplated by Lord Bingham in *Johnson v Gore Wood*. As to that, I do not consider that the mere expenditure of time on the First Action means that pursuit of these proceedings will necessarily fall foul of this principle, not least because it is likely that some of the work already done will be re-useable, but there are other aspects of what has happened which, taken in the round, lead to the conclusion that further pursuit of these proceedings would be unjust.

152. At and after the time at which the first trial was adjourned by Judge Seymour QC, HCL pursued the First Action on the basis that it would bring forward in the same proceedings all of its claim arising out of the circumstances relied on. I have explained earlier in this judgment exactly how it was that this was communicated and discussed at the hearing in April 2010. While HCL is entitled to point out that it was not represented by counsel or solicitors at this hearing, I do not regard that as a very significant mitigating factor because it had been represented up to that point, and at no time subsequent to April 2010, even after the stage at which it was fully represented, did HCL assert that it was no longer intending to have the whole dispute between it and DWHL determined in the context of the First Action. This was also apparent at the hearing in July 2011 when it adduced evidence to the effect that it was now bringing forward all of its claims.

153. It follows that the devotion of considerable resources to the conduct and defence of the First Action occurred over an extended period of time in circumstances in which DWHL, HCL and the court had all accepted that it was appropriate for HCL to bring forward all of its claims in the First Action, and proceeded accordingly. This was against the background

of the fact that HCL had already been given the opportunity to resolve part of its dispute at the first trial and had chosen not to do so. Having had the indulgence of the trial being adjourned to facilitate (or at least not prejudice) a damages claim which it had not yet made, it was in my view all the more incumbent upon HCL to proceed to bring all of its claims before the court with expedition. It is clear that Mr Jeans knew that this was what the court expected HCL to do.

154. As I have already explained, HCL does not contend that the present proceedings are not properly to be treated as a second action merely on the grounds that no claim for consequential loss was made in the First Action. I agree that this is the correct approach, not least because the evidential basis for the claim now made was already available to HCL in the form of the KPMG report, and the explanations for the failure to include it in the First Action do not really address the absence of a claim in even the most general form. It follows that this claim as well must be treated as one of the categories of claim which both the court and DWHL were entitled to assume would be pursued in the First Action if it were to be pursued at all.

155. This is also just one aspect of the fact that the conduct of and termination of the First Action was intended to bring finality to the dispute between the parties. The relief which was granted by Judge Seymour QC at the hearing in April 2010 was consistent with this being the court's intention, an intention with which I am satisfied that HCL (through Mr Jeans) was well aware. Furthermore, the fact that Master Marsh said that DWHL was entitled to "*a degree of finality on this issue*" when he made the unless order in November 2012 is an illustration of the fact that the court was attempting to case manage the First Action with finality in mind. Of course, HCL may now say that this was not its intention at the time, but this would not be consistent with the fact that, on the occasions I have already identified it accepted that it needed to bring all of the issues in dispute into the First Action. It would also not be consistent with the fact that there is no evidence from what occurred at the end of 2012 that it told anyone that it intended to re-litigate any of the issues in the future, or reserved the right to do so. In my view, it should have made that point at the time, if it wished to reserve the right to resile from what it had previously said.

156. There was a theme throughout DWHL's submissions to the effect that, if an action such as the present were not to be struck out, it would drive a coach and horses through the established jurisprudence on the circumstances in which the court will exercise its jurisdiction to grant relief from sanctions. Mr Gourgey submits that, because an application for relief would not now be granted (and would never have been granted) if the principles established by *Denton v T H White Ltd* [2014] 1 WLR 3926 were to be applied, it would be illogical to permit this second action based on the same dispute to proceed.

157. In my judgment, this submission overstates the position. I agree with Mr Brindle that it is not possible simply to apply the *Denton* principles to a situation in which the strike out of a second action is sought. One reason for this is that the established jurisprudence is different. Another is that there will be situations in which the court considers that it is appropriate for the first set of proceedings to be brought to an end by refusing relief from sanctions, entirely without prejudice to the question of whether a new claim could then be brought. In that kind of case the intended finality that is relevant in the context of an application to strike out a second action (as referred to by Mance LJ in *Glauser*) would not apply.

158. It seems to me, however, that two matters relating to *Denton* are relevant to an overall assessment of the justice of the case. The first is that the mere fact that no application for relief from sanctions was made at the time or shortly after the peremptory order was made is capable of supporting an application to strike out a second action. I have already explained that, in the present case, no such application was made, and have described what I consider to be the consequences of that failure.

159. The second matter is that, while not logically determinative in the sense suggested by DWHL, the likely result of any application for relief from sanctions (whether made then or now) is another relevant factor on an application to strike out a second action. In the present case, I agree that it is unlikely that relief from sanctions would now be granted so as to reinstate the First Action, a course which in any event was not suggested by HCL. In others words this is not a case in which HCL submitted that a result similar to that achieved in *Glauser* might be appropriate.

160. I also consider that it is very difficult for the court now to determine what would have happened on the hypothesis that an application for relief from sanctions had in fact been made back in 2012. Much will depend on the extent to which the court is required to assume that HCL might have then decided to adduce evidence which the court now knows is available. If the application for relief had then been made, and if the evidence which is now available had been adduced, it is possible that relief from sanctions might have been given. However, as the explanations for not providing security that are now in evidence were not given to DWHL at the time because the information was confidential, I do not see how it is appropriate for me to proceed on the hypothesis that the court would have granted relief from sanctions on the basis of that evidence if an application had then been made.

161. The final relevant matter on which Mr Gourgey placed particular reliance was the expiry of time between the striking out in December 2012 and the commencement of these proceedings in December 2016. I proceed on the basis that mere delay in commencing a second action within the limitation period is not relevant to the question of whether those proceedings are an abuse of process.

162. However, there are two aspects to the present case which mean that the delay cannot sensibly be considered in isolation and is, in my view, a factor which, in the light of those matters, weighs in the balance in support of DWHL's case that these proceedings are an abuse.

162.1. The first is that Burnett J reached the findings on which HCL relied on the basis that HCL's claim in the First Action was proceeding with expedition and this was not a case in which HCL was dragging its feet. As I read his judgment this consideration had a material influence on the conclusions that he reached. Given the expiry of four years between the end of the First Action and the commencement of these proceedings, and the absence of any explanation for the timing of these proceedings apart from the single sentence about refinancing that I have referred to in paragraph 115 above, I am unable to conclude that this is any longer the case. Even after these proceedings were commenced, they were not served until the very last minute; conduct the explanation for which (as I have explained above) is very thin.

162.2. The second is the prejudice asserted by DWHL in relation to the unavailability of witnesses and their willingness to cooperate as a result of the delay. I am unable to reach any very clear conclusions on whether there is anything in these concerns, but I do not think that HCL has adduced very compelling evidence that they are without foundation. In my view, the time which has expired, when considered in conjunction with the fact that everybody was proceeding quite reasonably on the basis that the dispute between DWHL and HCL was at an end, means that there is a real possibility that some material prejudice will be suffered by DWHL. I cannot, and do not, put the point any higher than that.

163. In these circumstances, I am satisfied that the present proceedings are an abuse of process and should be struck out accordingly. I do not therefore need to consider the alternative case advanced by DWHL to the effect that they should be stayed pending the payment of all of the costs of the First Action. I can say by way of summary that, had it been necessary for me to make any determination of that question, I would have concluded that it was reasonable for DWHL not to take any steps to have its outstanding costs of the First Action assessed after the First Action had been struck out. I would also have concluded that it would have been appropriate for these proceedings to be stayed pending the assessment of those costs and their payment in full by HCL.