Neutral Citation Number: **[2019] EWHC 1779 (Comm)**

Case No: **LM-2014-000154**

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
LONDON CIRCUIT COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/06/2019

Before :

His Honour Judge Rawlings

- -

Between :

ALBA EXOTIC FRUIT SH PK	**Claimant**
- and -	
MSC MEDITERRANEAN SHIPPING COMPANY S.A.	**Defendant**

- -
- -

Simon Butlet for the **Claimant**
Benjamin Coffer for the **Defendant**

Hearing dates: 17 May 2019

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Approved Judgment

I direct that pursuant to CPR 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.

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HHJ RAWLINGS

HHJ RAWLINGS :

BACKGROUND

1. The background to the present application can be set out relatively briefly.
2. Pursuant to Bills of Lading dated between April and May 2013 the Defendant, MSC Mediterranean Shipping Company S.A. ("MSC") agreed with the Claimant, Alba Exotic Fruit SH PK ("Alba") to carry bananas on four vessels (in refrigerated containers supplied by or on behalf of MSC) from Ecuador and Honduras to Duress, Albania ("Duress") for delivery to Alba.
3. The cargoes were loaded between April and September 2013 and delivered to Duress.
4. Alba says that when the bananas were discharged at Duress, a considerable number of cartons of bananas were spoiled such that they could not be sold. Alba says that the bananas were spoiled because of: (a) delays in the voyages; and/or (b) the refrigerated containers not being maintained at a constant 13.3 degrees centigrade for the bananas loaded in Ecuador and 12 degrees centigrade for the bananas loaded in Honduras. Alba says that MSC is responsible for the delay in the voyages and the failure to maintain the cargoes at the correct temperatures. Alba claims US $ 122,099.15 for the damaged cargo and loss of profit on the sale of the bananas of US $ 25,267.40.
5. MSC says: (a) the bananas were not in good condition prior to shipping; (b) Alba was required to ensure that the bananas were at plus or minus 2 degrees centigrade of 13.3 degrees centigrade for Honduras and 12 degrees centigrade for Equador prior to shipping and failed to do so; (c) it was Alba's responsibility to ensure that the temperature setting on the containers was correct and MSC's obligation to use its best endeavours to maintain that temperature inside the containers (which it complied with); (d) MSC denies that the transit times were excessive or that any delays in transit times caused damage; (e) Alba delayed in collecting some of the containers from Duress; and (f) US Customs required the index containers to be discharged at Port Everglades USA for inspection, which caused delay for which MSC is not contractually responsible.
6. MSC counterclaims for: (a) the costs and expenses of destroying the Honduras cargoes of US $ 23,527.13; and (b) freight and ancillary charges for the Honduras cargoes of US $ 17,763.
7. It is common ground that Alba's claims against MSC would have started to become statute barred from May 2014 onwards because under the applicable Rules of Carriage, Alba's claims had to be brought within 1 year of the date of delivery.
8. Alba issued its Claim Form on 14 April 2014 and the Claim Form and Particulars of Claim were served upon MSC on 31 July 2014. At the time of issue of proceedings, Alba was represented by Hughes & Dorman solicitors, a specialist shipping law firm.
9. MSC served its Defence and Counterclaim on 11 September 2014 and in accordance with CPR PD 59 paragraph 7.2 applying at that time, Alba should have applied to the court for a Case Management Conference ("CMC") within 14 days of service of MSC's Defence and Counterclaim (that is by 25 September 2014). Alba did not, at that time apply for a CMC to be fixed, nor has it done so at any point to date.
10. On 21 October 2014 Alba served a Reply and Defence to Counterclaim.
11. On 20 June 2018 there was served upon MSC's solicitors, Ince & Co (a) a notice of change of legal representative indicating that Alba had instructed Alexander Shaw solicitors to act on its behalf in these proceedings; and (b) an application to amend Alba's Particulars of Claim, supported by a witness statement signed by Mr Chaudhry of Alexander Shaw solicitors on 20 June 2018 ("Mr Chaudhry's First Statement")
12. On 29 June 2018 MSC requested that Alba provide security for its costs.

13. On 18 July 2018 MSC's solicitors wrote to Alba's solicitors seeking further information and documents in connection with matters raised in Mr Chaudhry's First Statement. Alba failed to provide any of the information or documents requested and Alba made an application for specific disclosure of the documents that it had requested on 18 July 2018.
14. MSC's application for specific disclosure came before HHJ Waksman (as he then was) on 13 August 2018. HHJ Waksman considered the application on paper on 13 August 2018 and determined that the appropriate course for MSC was to issue an application to strike out the Claim rather than pursuing its application for specific disclosure.
15. On 31 August 2016 MSC applied to strike out the claim under CPR 3.4 (2) (b) and CPR 3.4 (2) (c) ("the Strike Out Application"). A statement in support of that application was made on 31 August 2018 by Mr Graham, a partner in Ince & Co LLP ("Mr Graham's Statement").
16. On 19 September 2018 Mr Chaudhry made a second witness statement, this time in opposition to the Strike Out Application ("Mr Chaudhry's Second Statement").
17. On 14 November 2018 MSC issued an application for security costs ("the Security for Costs Application"). That application was supported by the witness statement of Mr Chetwood, another partner in Ince & Co LLP dated 14 November 2018 ("Mr Chetwood's Statement").
18. A witness statement made by Mr Dauti who it appears is a director and shareholder of Alba was made on 26 April 2019 in opposition to the Security for Costs Application (Mr Dauti's Statement").
19. Alba has made an application for permission to amend its Particulars of Claim. Mr Coffer, on behalf of MSC has indicated that if I do not strike out Alba's claim then MSC will consent to Alba's application to amend its Particulars of Claim. It is not necessary therefore for me to decide this application. The applications that I do have to decide are:
    (a) the Strike Out Application; and
    (b) the Security for Costs Application ("the Applications") made in each case by MSC.
20. In order to decide the Applications, I will:
    (a) set out what Mr Butler, counsel for the claimant and Mr Coffer, counsel for the defendant say are the legal principles applying to the Strike Out Application;
    (b) set out, having considered the submissions of Mr Butler and Mr Coffer, what legal principles I will apply in deciding the Strike Out Application;
    (c) decide whether Alba's claim should be struck out under CPR 3.4 (2) (b) and say why I have reached that decision;
    (d) decide whether Alba's claim should be struck out under CPR 3.4 (2) (c), and say why I have reached that decision; and
    (e) set out the legal principles applying to the Security for Costs Application (which are largely agreed by Mr Butler and Mr Coffer) and decide whether to order that Alba provides security for MSC's costs and if so what amount.

THE STRIKE OUT APPLICATION -THE LEGAL PRINCIPLES

Counsel's Submissions

21. The Strike Out Application is made under CPR 3.4 (2) (b) and (c).
22. CPR 3.4 (2) (b) provides that the court may strike out a statement of case if it appears to the court that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings.
23. CPR 3.4 (2) (c) provides that the court may strike out a statement of case if it appears to the court that there has been a failure to comply with a rule, practice direction or court order.
24. Mr Coffer says that there are three categories of case in which the court will exercise its power under CPR 3.4 (2) (b) to strike out a claim as an abuse of process, as a result of delay by the claimant:

(a) there has been inordinate and inexcusable delay and as a consequence of such delay there is a substantial risk that a fair trial will not be possible or of serious prejudice to the defendant;
(b) there has been intentional and contumelious delay involving a complete and total disregard for the rules of the court with full awareness of the consequences; and
(c) the claimant has made an intentional decision not to progress the claim.

25. Mr Coffer asserts that consideration of the principles applied by the court in deciding whether or not to grant a party relief from sanctions under CPR 3.9 is relevant to the question of whether or not the court decides to strike out the claim but he accepts that (unlike an application for relief from sanctions under CPR 3.9) the court must consider the proportionality of the strike out sanction.
26. Mr Butler on behalf of Alba says that inordinate and inexcusable delay, no matter the reason for it, of itself is not sufficient to amount to an abuse of process justifying strike out of the claim. In order to amount to an abuse of process justifying strike out of the claim there must be something more and that something more is a substantial risk that a fair trial will not be possible or of serious prejudice to the defendant.
27. Mr Butler says that if the court finds that there has been inordinate and inexcusable delay which poses a substantial risk that a fair trial will not be possible or of serious prejudice to the defendant, then the court's approach to an application for relief from sanctions under CPR 3.9 is not relevant and the court should consider whether there is a less draconian sanction available to it, which does not involve the striking out of the claim and if so apply that sanction.
28. As to CPR 3.4 (2) (c) Mr Coffer says that there has been a clear breach of Alba's obligations under CPR PD 59 paragraph 7.2 to apply to the court for a CMC within 14 days of service upon it of MSC's Defence and Counterclaim. That period expired over four and a half years ago, on 25 September 2014. That breach of the practice direction justifies the striking out of the claim under CPR 3.4 (c) and the fact that the MSC could itself have applied to fix a CMC is either irrelevant or insufficient to justify the court in not striking out the claim. Mr Coffer accepts that as for the application to strike out under CPR 3.4 (2) (b), the court must consider the question of the proportionality of striking out the claim.
29. Mr Butler accepts that the court has an unqualified discretion to strike out the claim under CPR 3.4 (2) (c) but he says that considering whether or not to strike out a claim is very different from considering whether or not to grant relief under CPR 3.9, to a claimant whose claim has already been struck out. He suggests that striking out the claim would be disproportionate and I should consider a more appropriate sanction such as making an unless order against Alba.

CPR 3.4 (2) (b) Legal Principles-my findings

30. I accept that Mr Coffer is right in his description of the three circumstances in which the court will strike out a claim as an abuse of process under CPR 3.4 (2) (b), save that in the case of a claimant making an intentional decision not to pursue a claim, the length of the delay, degree of the claimant's responsibility for it and reasons given will be relevant to the question of whether or not an intention by the claimant not to pursue a claim will amount to an abuse.
31. Mr Butler accepts that inordinate and inexcusable delay combined with a substantial risk: (a) that a fair trial will not be possible; or (b) of serious prejudice to the defendant is a ground upon which the court may strike out a claim (subject to considering the proportionality of that sanction).
32. In **Habib Bank v Jaffer [2000] All ER (D) 424** Nourse LJ said "delay which involves complete total or wholesale disregard, put it how you will, of the rules of court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so

the action will be struck out or dismissed on that ground." There is nothing in the judgement of Nourse LJ that suggests that in circumstances where there has been a complete, total or wholesale disregard for the rules of the court with full awareness of the consequences, that it is necessary to show, in addition that the delay involves a substantial risk that a fair trial will not be possible or of serious prejudice to the Defendant. For that reason I am satisfied that Mr Coffer is right that delay which involves a complete total or wholesale disregard of the rules of the court with full knowledge of the consequences, is a ground upon which the court may decide to strike out a claim even if there is not a substantial risk that a fair trial will not be possible or of serious prejudice to the Defendant.

33. In **Arbuthnot Latham Bank Limited v Trafalgar Holdings [1998] 1 WLR 1426** Lord Woolf MR at page 1437 identified what he termed as "warehousing" as an abuse of process which, without more may justify the strike out of proceedings. Lord Woolf MR said "Whereas hitherto it may have been arguable that for a party on its own initiative to, in effect, "warehouse" proceedings until it is convenient to pursue them does not constitute an abuse of process, when hereafter this happens this will no longer be the practice. It leads to stale proceedings which bring the litigation process into disrespect…… If they are brought and they are not to be advanced, consideration should be given to their discontinuance or authority of the court obtained for their being adjourned generally. Courts exist to assist parties to resolve disputes and they should not be used by litigants for other purposes."
34. In **Asturian Foundation v Ibrahim [2019] EWHC 274 (CH)** HHJ Cooke sitting as a High Court Judge considered that, in **Arbuthnot**, Lord Woolf MR was not setting down any rule that a decision by a claimant to pause the progress of proceedings for a period would necessarily be abusive of itself but rather that it may become abusive if the claimant maintained that position for an unreasonable period of time (see paragraph 26 of the judgement). Having carried out a review of **Arbuthnot**, at paragraph 41 of his judgement HHJ Cooke said "…. It is now established that delay may amount to abuse of process in circumstances short of a finding that the Claimant has permanently abandoned any intention to pursue them, but the court will examine all the circumstances in which the delay occurred, including the length of delay, the degree of the claimant's responsibility for that delay and the reasons given for it, and assess whether they amount to an abuse of process, as distinct from "mere" delay. "warehousing" may be descriptive of some circumstances which show abuse, primarily where for an extended period the claimant has no present intention of pursuing the claim but keeps going in case it decides to do so in future, but application of that term is not determinative one way or the other. If abuse is found, the question then arises whether striking out is an appropriate sanction."

CPR 3.4 (2) (c) Legal Principles-My Findings

35. There is a large measure of agreement between Mr Coffer and Mr Butler as to the position under CPR 3.4 (2) (c). They both agree, that my discretion under CPR 3.4 (2) (c) is a broad discretion. Whilst Mr Coffer emphasises that it is relevant to take into account the court's approach to an application for relief from sanction under CPR 3.9, in deciding whether or not to strike out Alba's claim for a breach of CPR 3.4 (2) (c), he nonetheless accepts that the question of the proportionality of striking out the claim is a matter that I should take into account under CPR 3.4 (2) (c), which is not taken into account in an application for relief from sanction under CPR 3.9. Those points are made by Richards LJ in **Walsham Chalet Park Limited (T/A Dream Lodge Group) v Tallington Lakes Limited [2014] EWCA Civ 1607** at paragraph 44 of his judgment, Richards LJ says "The judge treated the principles in Mitchell as "relevant and important" even though the question in this case was whether to impose the sanction of a strike-out for non-compliance with a

court order, not whether to grant relief under CPR 3.9 from an existing sanction. In my judgement, that was the correct approach. The factors referred to in rule 3.9, including, in particular, the need to enforce compliance with court orders, are reflected in the overriding objective in rule 1.1 to which the court must seek to give effect in exercising its power in relation to an application under rule 3.4 to strike out for non-compliance with the court order. The Mitchell principles, as now restated in Denton, having a direct bearing on such an issue. It must be stressed, however, that the ultimate question for the court in deciding whether to impose the sanction of strike-out is materially different from that in deciding whether to grant relief from a sanction that has already been imposed. In a strike-out application under rule 3.4 the proportionality of the sanction itself is in issue, whereas an application under rule 3.9 for relief from sanction has to proceed on the basis that the sanction was properly imposed…". I accept that as a statement of the correct legal principles.

THE STRIKE OUT APPLICATION CONSIDERATION AND CONCLUSIONS - CPR 3.4(2)(b)

Inordinate and Inexcusable Delay Combined with a Serious Risk that a Fair Trial Will Not Be Possible/of Prejudice to the Defendant

36. Mr Butler did not seriously argue that Alba's delay has not been inordinate. A delay of 4 years and 7 months in applying for a CMC is, on any view an inordinate delay, the question is whether the delay is excusable.
37. The explanations of Alba for its delay in applying to fix the CMC are set out in the first and second statements of Mr Chaudhry:
    (a) In Mr Chaudhry's First Statement (made in support of Alba's application to amend its Particulars of Claim), at paragraph 4 Mr Chaudhry says that since the filing and service of the Reply and Defence to Counterclaim on 21 October 2014 there had been significant inaction by both parties and the matter remained in abeyance. He refers to discussions between the parties on a without prejudice basis. In paragraph 29 of Mr Graham's Statement he specifically denies that there were any discussion between the parties from October 2014 on either an open or without prejudice basis. Mr Chaudhry gives three explanations for the Alba's delay in progressing the proceedings: (i) Alba is an Albanian company and it has been difficult for "the Claimant" to secure a Visa to visit the UK in order to give comprehensive instructions (by which it appears that Mr Chaudhry means Mr Dauti, a director of Alba). "The Claimant's" application for a Visa was only granted in November 2017; (ii) Alexander Shaw solicitors were approached by an Albanian translator on or around 7 April 2017 to act for Alba, they requested papers from Alba's previous legal representatives but those papers did not arrive until early June 2017; and (iii) Alba lost confidence in its first legal representatives (Hughes & Dorman solicitors) instructed replacement representatives, namely UK Law but they failed to progress the matter, prior to Alexander Shaw becoming involved;
    (b) In Mr Chaudhry's Second Statement (made in opposition to the Strike Out Application) he provides a much more detailed explanation for the delay after October 2014. He says: (i) after service of the Reply and Defence to Counterclaim on 21 October 2014, Alba and Hughes & Dorman were considering making an application to amend the claim to incorporate loss of profit, Hughes & Dorman requested documentary evidence to support the loss which was only made available by Alba in June 2015, on 19 June 2015 Hughes & Dorman invited Mr Dauti to visit them in England to discuss the amendment of the claim; (ii) Mr Dauti was only able to obtain a Visa to travel to a meeting in August 2015 but a colleague, Mr Kottori who was meant to attend the meeting and had details in support of the loss of profit claim, could not secure a Visa. At the meeting in August 2015, Mr Dauti was advised that an adverse costs order may

be made against Alba in relation to its application to amend its claim; (iii) Mr Chaudhry says there was confusion at the meeting in August 2015 in that Hughes & Dorman believed that Mr Dauti wanted time to consider his options and Mr Dauti believed that he had instructed Hughes & Dorman to proceed with the claim, this Mr Chaudhry says caused a delay between August 2015 and April 2016 (although Mr Chaudhry does not say what happened in April 2016); (iv) Mr Chaudhry refers to Alba being in financial and mental difficulties as a result of financial losses that it had suffered on previous cargoes and the index cargoes, he says that Mr Dauti received no update from Hughes & Dorman between April 2016 and January 2017 and that Mr Dauti sent an email to Hughes & Dorman in January 2017 chasing them for an update; (v) in February 2017 Hughes & Dorman transferred their file of papers to Thomas Cooper LLP, having received a request from Thomas Cooper LLP in January 2017 but Mr Chaudhry says that Thomas Cooper LLP do not at any stage appear to have gone on the record as acting for Alba and he has not seen any documents created by Thomas Cooper LLP; (vii) in January 2017 Mr Dauti had a meeting with counsel and a representative from a solicitors firm called UK Law; (viii) on 25 January 2017 Mr Dauti wrote to counsel asking about ongoing delay, confirming that he did not want any further delays; (ix) Alexander Shaw Solicitors were approached in April 2017 but the full file of papers was not received by Hughes & Dorman until June 2017; (x) Mr Dauti was granted a Visa to visit Alexander Shaw and a meeting took place on 7 November 2017 at Counsel's Chambers. Mr Dauti decided to proceed with the matter and formal instructions to pursue the matter were received in mid-March 2018 by Alexander Shaw. Counsel was instructed to draft the amended Particulars of Claim and an application to amend the Particulars of Claim was sent to the court on 21 June 2018.

38. Taking the contents of Mr Chaudhry's two witness statements at face value, none of what is contained in those witness statements represents an excuse for the delay on the part of the Alba in applying for a CMC. Even if, as is suggested, Alba is entitled to blame its legal representatives in whole or in part for the delay this would not amount to a good excuse for Alba's failure to apply to fix a CMC. The delay of Alba's legal representatives is, for these purposes, Alba's delay. Mr Butler pointed out that it was open to MSC to apply to fix a CMC. The obligation to apply to fix a CMC was however Alba's obligation under PD 59 paragraph 7.2. The fact that MSC could itself have applied to fix the CMC (but was not obliged by rule or practice direction to do so) is no excuse for Alba not complying with its obligations under PD 59 paragraph 7.2. Alba's delay is therefore inexcusable.
39. As to the risk of a fair trial not now being possible and of prejudice to MSC, evidence of this is dealt with on behalf of the MSC in paragraph 45 of Mr Graham's Statement. In that paragraph Mr Graham says "The serious prejudice to the Defendant in this case arises out of the difficulty in identifying and collecting evidence about the shipments in question many years after the cargoes were delivered. For example, determination of the claim would be likely to require evidence as to the maintenance of the containers and the circumstances in which the various delays occurred. It would plainly be more difficult to collect that evidence after the expiry of so long a period: the individuals involved in the shipments may have moved on and/or their recollection of the events in question will inevitably have diminished over time."
40. As to Alba's position, no explanation is given in either of the witness statements of Mr Chaudhry or in Mr Dauti's Statement as to why Alba says that there is not a serious risk of a fair trial not being possible or of material prejudice to MSC as a result of Alba's delay.
41. In his skeleton argument, and at the hearing, Mr Butler makes the following points in support of his submission that a fair trial will still be possible and there is no substantial prejudice to MSC, as a result of Alba's delay:

(a) Mr Graham makes general assertions only as to difficulty in identifying and collecting evidence, he does not say that evidence cannot be or has not been collected;

(b) a detailed Defence and Counterclaim was served (following Alba' agreement to extend time for the service of it) on 11 September 2014, approximately 7 weeks after service of the Claim Form and Particulars of Claim. Having regard to the contents of that Defence and Counterclaim, it is reasonable to assume that MSC collected documents and prepared witness summaries or witness statements in order to prepare that Defence and Counterclaim. Those documents and that evidence will still be available to MSC;

(c) more specifically, the assertions made by MSC in its Defence and Counterclaim show that, before that Defence and Counterclaim was drafted, documentation must have been recovered and witnesses interviewed in order to prepare that Defence and Counterclaim: (i) MSC accepted that, by the bills of lading it had acknowledged that the 28 sealed 40 foot refrigerated containers were in apparent good order and condition but said that MSC had no knowledge or means of knowledge of the quality or condition of contents of the containers; (ii) MSC denied that the cargoes were at a temperature of 13.3°C in the case of Honduras or 12°C in the case of Equador when delivered to MSC and asserted that in breach of the requirements of the bills of lading the cargoes were not delivered to the MSC at + or -2°C from those temperatures; (iii) MSC asserts that in accordance with the requirements of the bills of lading it was Alba's responsibility to ensure that the temperature controls on the containers were at the required carrying temperature and MSC did use, as it was required to do, its best endeavours to maintain the air temperature in the containers at + or -2° C (of 13.3°C in the case of the Honduras containers and 12°C in the case of the Ecuador containers); (iv) Alba was required to produce documentary evidence as to shipment surveys, records of age and grade, cutting records, quality control records, records relating to identification and control of disease, cooling records and packing records; (v) MSC denies that the cargoes were delivered in a damaged state and asserts that the majority of the containers were not significantly affected by over ripening; and (vi) MSC asserts that there was extraordinary delay by Alba in collecting 6 containers.

42. There is in my judgment an evidential burden upon MSC to explain how it has been prejudiced by the delay on the part of Alba and why it asserts that a fair trial is no longer possible as a result of that delay. This is because, the extent to which MSC is prejudiced by an inability to recover relevant documents or to obtain evidence from relevant witnesses, as a result of Alba's delay, is a matter known to MSC but not to Alba.

43. The assertions made by Mr Graham in paragraph 45 of his witness statement are very general in nature. He refers to difficulty in identifying and collecting evidence regarding the shipments in question many years after the cargoes were delivered and to it being "plainly" more difficult to collect the evidence after the expiry of such a long period with witnesses "perhaps" being unavailable and their recollection diminished over time. What Mr Graham does not do is refer to the unavailability of any particular witness or as to difficulty in obtaining any particular document or documents, relevant to the claim. He also does not provide any indication of the extent to which evidence had already been gathered by MSC or Mr Graham's firm in the form of documentation or the evidence of witnesses (either before serving the Defence and Counterclaim or after). I accept Mr Butler's point that the Defence and Counterclaim does contain very specific assertions (summarised in paragraph 41 (c) above) and it seems to me unlikely that MSC would have been in a position to make those assertions unless MSC's employees/agents and/or its legal representatives had, in the seven-week period between the service of the Particulars of Claim and the service of the Defence and Counterclaim recovered documents relevant to the claim and spoken to individuals with direct knowledge of the relevant shipments.

44. I accept the general point that Alba's delay of over 4 years and 7 months will have resulted in the recollection of witnesses in relation to matters relevant to the claim and counterclaim being diminished, however it does seem to me that documentation is likely to play a key part in the resolution of this dispute at trial. I am fortified in this view by the fact that a costs schedule exhibited to Mr Chetwood's Statement, in support of the Security for Costs Application, which provides details of projected costs up to trial, does not include any time to be spent in preparing witness statements. In addition, the contents of the Defence and Counterclaim suggests that a substantial amount of relevant documentation was recovered in order to draft the Defence and Counterclaim and might reasonably be expected to remain in the possession of MSC's solicitors. Mr Graham does not assert that MSC has suffered any prejudice in the form of being unable to produce documents relevant to the Defence of the claim, as a result of Alba's delay.
45. For all of the above reasons, whilst I am satisfied that the delay on the part of Alba in applying for a CMC has been both inordinate and inexcusable, I am not satisfied that that this delay has resulted in serious prejudice to the Defendant or that a fair trial is no longer possible as a result of that delay. It is not therefore appropriate to strike out the claim on this basis.

Intentional and Contumelious Delay involving a complete and total disregard for the rules of the court with full awareness of the consequences.

46. Mr Coffer makes the following relevant points in relation to Mr Chaudhry's explanations of the reasons for the Alba's delay:
    (a) in Mr Chaudhry's First Statement he only gives reasons for the delay after Alexander Shaw were approached in April 2017. Prior to that date he merely makes general references to the matter being in abeyance;
    (b) in Mr Chaudhry's Second Statement he does seek to account for the delay before April 2017 as follows: (i) 21 October 2014 to June 2015 considering amending the claim to incorporate a claim for loss of profit. But, says Mr Coffer, the original Particulars of Claim already included a claim for loss of profit and the amendments which Alba now seeks to make to its Particulars of Claim do not relate to the loss of profit claim. In addition a desire to amend the Particulars of Claim is not, Mr Coffer says, a reason not to apply for a CMC. Mr Coffer suggests that what is said by Mr Chaudhry amounts to an admission that, between 21 October 2014 and June 2015 Alba decided not to fix a CMC; (ii) in August 2015 there was a misunderstanding between Mr Dauti and Hughes & Dorman about whether Hughes & Dorman had been instructed to progress the claim. Mr Coffer says that there is no evidence to support the alleged miscommunication and Alba has failed to respond to the MSC's requests for documentation to support the assertion; (iii) after August 2015, according to Mr Chaudhry's evidence, nothing substantive happened until November 2017 when a meeting took place with Alexander Shaw and counsel in London, the purpose of which was to discuss whether or not Alba would proceed with the claim but no instructions to proceed with the claim were given until mid-March 2018.
47. In **Habib Bank** the Court of Appeal was concerned with a claim by Habib Bank against Mr and Mrs Jaffer in relation to personal guarantees which they were said to have given to the Bank in relation to corporate debt. Proceedings were issued on 13 January 1992 and an application for summary judgement made promptly. That application for summary judgement was initially granted and upheld on appeal to a High Court judge but overturned on appeal to the Court of Appeal who gave unconditional permission to defend to Mrs Jaffer and conditional permission to defend to Mr Jaffer. Thereafter, Habib Bank failed to provide discovery of documents or witness statements. On an application by Mr and Mrs Jaffer to strike out the claim the Bank conceded that there had been

inordinate and inexcusable delay on its part for two and half years and the Master struck out both claims as an abuse of process. On appeal to the High Court judge, the judge held that the Bank had not continued the actions with no intention of bringing them to a conclusion and there was no wholesale disregard of rules or orders with awareness of the consequences so as to constitute an abuse of the process of the court.

48. In the Court of Appeal, the leading judgement was given by Lord Justice Nourse with which Lady Justice Hale (as she then was) and Lord Justice Ward agreed. Lord Justice Nourse quoted from his own judgement in **Choria v Sethia [1998] CLC 625** at page 630 in which he had said "although inordinate and inexcusable delay alone, however great, does not amount to an abuse of process, delay which involves complete, total or wholesale disregard, put it how you will, of the rules of court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so, the action will be struck out or dismissed on that ground." Lord Justice Nourse found that on the evidence the Bank's solicitors had repeatedly advised it that failure to give full discovery and make progress with the preparation of witness statements may result in the claims being struck out. He considered that the delay was entirely the fault of the Bank itself and the failure to give discovery was "especially striking because the Bank not merely disregarded it solicitor's advice but did so because it thought it knew better than they did." For those reasons Lord Justice Nourse said that he was of the opinion that the Master was correct to think that the Bank's failure to give coherent instructions to its solicitors amounted to an affront to the court, a wholesale disregard for the norms of conducting serious litigation, in full knowledge (based upon the repeated advice of the Bank's solicitors) that the claims may be struck out. The decision of the High Court judge was overturned and the decision of the Master reinstated.
49. In order to strike out the claim on the grounds of abuse of process because of intentional and contumelious delay it is necessary that I be satisfied of three matters: (a) the delay was intentional; (b) the delay was contumelious in the sense of a total wholesale disregard for the rules of the court; and (c) Alba must have been aware that a consequence of that delay at least may be the striking out of the claim.
50. In **Habib Bank**: (a) the delay was intentional in the sense that it was the Bank's fault that proper instructions had not been given to the Bank's solicitors to progress the claim; (b) it involved a disregard for the rules of the court because the Bank had not merely disregarded its solicitor's advice as to what it must do in order to comply with the courts rules but had disregarded that advice because it thought it knew better; and (c) the failure to comply with the requirements regarding discovery and preparation of witness statements was in full knowledge of the consequences of the Bank's delay in doing so because the Bank had been advised repeatedly by its solicitors that their claim may be struck out as a result of that failure.
51. Notwithstanding the unsatisfactory state of the evidence given by Mr Chaudhry as to the circumstances in which Alba has failed to apply to fix a CMC I am not satisfied that all three of the elements necessary to show abuse of process because of intentional and contumelious delay are present in this case.
52. As to whether the delay was intentional, I am satisfied, on the balance of probability that Hughes & Dorman advised Alba that it had an obligation under the court rules to apply to fix a CMC within 28 days of service of the Defence and Counterclaim. Hughes & Dorman are an experienced firm of shipping solicitors and is unlikely that they would not have advised their client on the next step in the procedure, or as the timing of that step. Having found that Alba was advised that, in accordance with the court rules it was its obligation to apply to fix a CMC within 28 days of service of a defence, I consider that the delay was intentional at least at or about the time when that advice was given, in the sense that Alba had (on my findings) been advised that the next step it needed to take in the proceedings

was to apply to fix a CMC and there is no evidence that it has ever instructed any solicitor to take that step.

53. I am not however satisfied that there has been wholesale disregard by Alba of the rules of the court. Mr Chaudhry provides some explanation of the reasons for the delay and however unsatisfactory that explanation is, I am not satisfied that disregard of the court rules as opposed to the Claimant's financial constraints, language difficulties, preoccupation with other matters and dissatisfaction, for whatever reason with the solicitors providing legal advice to Alba and consequent changes of legal advisers, were not the predominant factors in causing the delay, rather than Alba's disregard of the rules of the court.
54. As to whether Alba was fully aware of the possible consequences of its failure to apply to fix the CMC, the advice given repeatedly by Clifford Chance to Habib Bank, that its claim may be struck out was considered to be of significant importance by Lord Justice Nourse in restoring the decision of the Master to strike out Habib Bank's claim. There is no direct evidence in this case (unlike in Habib Bank) that Alba were advised by Hughes & Dorman or by any of its legal representatives that its failure to apply to fix a date for a CMC may lead to the striking out of its claim. Mr Chaudhry's witness statements are silent on this point. Mr Coffer says that I should draw adverse inferences from that silence.
55. Whilst I have been prepared to conclude that Hughes & Dorman will have advised Alba of its obligations to apply to fix a CMC, because that was the next step in the procedure required to be taken by Alba, by a small margin, I am not prepared, similarly to conclude that Hughes & Dorman will have advised Alba that its claim could be struck out as a result of its failure to apply to fix a CMC or that if they did that Mr Dauti would have understood, at about the time that advice was given, that the step of fixing a CMC had not been taken or was not about to be taken. The difference between the two pieces of advice is that in the case of advice as to the next step in the procedure (the application to fix a CMC) I would expect this advice to be given as a matter of course by a solicitor (and certainly solicitors of the experience of Hughes & Dorman). The position is not quite so straightforward in relation to advice that the claim may be struck out if an application to fix a CMC were not made. Whilst I would still expect such advice to be given at some stage, the position is complicated by the question of when that advice should be given, by the changes in legal representative of Alba that appear to have taken place and by Mr Chaudhry's suggestion in his second witness statement of a misunderstanding between Mr Dauti and Hughes & Dorman as to whether or not Hughes & Dorman had been instructed to progress the case, in August 2015. Mr Dauti apparently considering that Hughes & Dorman had been instructed to progress the matter and Hughes & Dorman believing that Mr Dauti wanted to consider the matter before instructing them to proceed. If Mr Dauti thought, in August 2015 that Hughes & Dorman have been instructed to progress the matter then if he had been advised that failure to fix a CMC might result in Alba's claim being struck out at or prior to that point, if he understood that Hughes & Dorman were progressing the claim he may well reasonably have understood that this meant that Hughes & Dorman were taking the necessary step to fix a CMC so that there was no risk of strike out even if he had been advised of that possibility and had that advice in mind in August 2015.

The Claimant Made an Intentional Decision Not to Progress the Claim

56. Mr Coffer refers to two incidences of what he suggests are instances of intentional delay by Alba which equate to "warehousing" :
    (a) Mr Chaudhry's suggestion that Alba was considering amending its Particulars of Claim to include a claim for loss of profit would not justify it in failing to apply to fix a date for the CMC and Mr Chaudhry's evidence is tantamount to a concession on the Alba's

part that it took a deliberate decision not to fix the CMC or otherwise progress the claim, whilst it considered amending its Particulars of Claim;

(b) Mr Dauti met with Alexander Shaw and with counsel in November 2017, Mr Chaudhry refers to Mr Dauti having to make some difficult decisions in relation to whether or not he wished to proceed with the matter and to fund it and it was not until mid – March 2018 that Mr Dauti instructed Alexander Shaw to pursue the claim. This, says Mr Coffer is evidence of Mr Dauti delaying the progress of the proceedings until he decided whether he wanted to commit the funding to enable them to be progressed. That says Mr Coffer is again deliberate and intentional delay equating to "warehousing".

57. In **Asturian,** HHJ Cooke (sitting as a High Court Judge) was concerned with an appeal against the order of Deputy Master Cousins striking out a claim on the basis that the claimant's delay in pursuing it amounted to "warehousing" of the claim. In paragraph 25 of his judgment HHJ Cooke says "I am not however persuaded that the authorities establish any principle that delay that might be described as warehousing is always and necessarily an abuse of process."
58. HHJ Cooke referred to the judgement of Lord Woolf MR in **Arbuthnot**, in which Lord Woolf MR said (as noted above) that warehousing proceedings, until it was convenient to pursue them would constitute an abuse of process. HHJ Cooke pointed out that in **Arbuthnot**, the Claimant had pursued a company and two guarantors, no defence was entered by the company and the matter had proceeded to disclosure with thereafter no further steps being taken for almost 5 years. The original claimant then sold its portfolio of debts and it was the assignee of that portfolio of debts who sought to progress the claim after five years. HHJ Cooke thought that, what could be derived from the judgment of Lord Woolf in **Arbuthnot** was that it may amount to an abuse of process where there was a long delay in circumstances where there was a mass acquisition of bad debt portfolios and selective pursuit of debtors as and when it suited the assignee, even if there were no prejudice to the Defendant as a result of that delay. HHJ Cooke noted that in **Arbuthnot** the delay was five years and he considered that there may have been a different result if the delay had only been a matter of weeks or months. At paragraph 41 he said "What these cases show, in my judgement, is that it is now established that delay may amount to abuse of process in circumstances short of a finding that the Claimant has permanently abandoned any intention to pursue them, but that the court will examine all the circumstances in which the delay occurred, including the length of the delay, the degree of the Claimant's responsibility for the delay and the reasons given for it, and assess whether they amount to abuse of process, as distinct from "mere" delay. "Warehousing" may be descriptive of some circumstances that show abuse, primarily where for an extended period the Claimant has no present intention of pursuing the claim but keeps it going in case it decides to do so in the future, but application of that term is not determinative one way or the other."
59. Here Mr Coffer identifies two periods of delay which he asserts amounts to "warehousing": (a) a delay from 21 October 2014 to August 2015 (a period of 10 months) whilst Alba was considering amending its claim to include a claim for loss of profit; and (b) a delay from November 2017 to March 2018 (period of 4 months) whilst Mr Dauti was considered whether he wanted to fund the progression of the proceedings. The delay in fixing a date for a CMC as a whole is for the period of approximately 4 years and 7 months. The position in **Arbuthnot** was that the practice that was deprecated by Lord Woolf MR was the practice of a Bank or other institution with multiple debtors issuing many actions but then choosing which ones to progress at any particular time. Lord Woolf wished to make it clear that that practice should cease. The single operative reason for the delay under consideration in **Arbuthnot** was the same and it enjoyed the label of "warehousing"

which Lord Woolf attached to it. In this case it is not asserted that Alba engaged in "warehousing" for the whole of the period of the delay of 4 years and 7 months, instead two distinct periods of delay, one amounting to 10 months and the other to 4 months are picked out by Mr Coffer from the overall period of delay and labelled by him as "warehousing". That is a very different position than the one pertaining in **Arbuthnot** and whilst I do not say that it is not possible for MSC to demonstrate that Alba did engage in behaviour that can properly be termed as "warehousing" for two distinct periods of 10 months and 4 months out of the overall delay of 4 years and 7 months (and where the precise reason for the delay in the two periods was different) nonetheless I do consider that establishing that Alba has engaged in "warehousing" for those two periods is much less straightforward than it was in **Arbuthnot** (where there was a single reason for the entire delay and that reason more easily attracted the label of "warehousing").

60. As to the delay of 9-10 months from 21 October 2014 to August 2015, I am not satisfied that this was due to "warehousing" in the sense in which that term is used by Lord Woolf MR in **Arbuthnot.** Even if I interpret Mr Chaudhry's Second Statement to mean (as Mr Coffer says I should) that Alba deliberately decided not to fix a CMC until such time as Alba was ready to proceed with an application to amend its particulars of claim I do not consider that amounts to "warehousing" in the sense in which Lord Woolf MR meant it in **Arbuthnot**. In Arbuthnot Lord Woolf MR referred to a practice whereby Banks or other financial institutions issued proceedings against many debtors and then chose which ones to pursue. HHJ Cooke in **Asturian** describe warehousing as a situation where the claimant had no present intention to pursue the claim but kept it going in case it decided that it wished to do so in the future. That is not the same as delaying the fixing of a CMC until Alba produced draft amended Particulars of Claim and an application for permission to amend them.
61. The thrust of HHJ Cooke's judgement in **Asturian** is that "warehousing" is but one category of conduct that may amount to an abuse of process of itself without the need to show that a fair trial is imperilled by the delay or that the defendant has suffered material prejudice. On that basis it may be possible for me to find that delaying between 21 October 2014 and August 2015 in applying to fix a CMC whilst Alba was considering amendment of its Particulars of Claim is an abuse of process by Alba even if it was not "warehousing" as that term was used in **Arbuthnot**. I do not consider that, on the evidence given in Mr Chaudhry's Second Statement, Alba's delay whilst it sought to amend its particulars of claim and issue an application to do so amounts to an abuse of process that is more than "mere" delay (which would not require a finding that the delay imperils a fair trial or has caused material prejudice to the Defendant in order to amount to an abuse of process for the purpose of CPR 3.4 (2) (b)). Whilst taking time to consider amending its Particulars of Claim does not amount to an excuse for not applying to fix a CMC, that conduct is not, in my judgement, of itself in the same category as "warehousing" which Woolf MR considered to be an unacceptable "practice" (meaning a course of conduct by a claimant or claimant in relation to multiple claims) of deliberately choosing to delay proceedings but keeping them alive in order to enable the claimant to choose to continue the proceedings at some point in the future. That practice, Woolf MR thought led to stale claims and brought the litigation process into disrespect, the same could not be said about Alba delaying in fixing a CMC whilst it considered amendment of its Particulars of Claim.
62. As for the delay from November 2017 to March 2018 whilst Mr Dauti considered whether he wanted to fund the progression of the proceedings. I do not consider this delay to be "warehousing" in the sense in which that term was used in **Arbuthnot** either. The context was that Alba had instructed new solicitors and new counsel to act on its behalf and, on the face of it counsel had provided advice on the way forward and (potentially) the

solicitors had provided advice on the likely cost to be incurred in continuing to pursue the claim. In those circumstances, notwithstanding that proceedings had been issued already it was not unreasonable for Alba to take time to consider whether, in light of the advice received from counsel and Alexander Shaw solicitors, Alba wished to continue to pursue its claim. That is not delaying the progression of proceedings because at that point Alba had no present intention to pursue them but keeping them alive in order that Alba could pursue them at a time convenient to it. Instead it was taking time to consider whether or not to progress the proceedings at all and could not be said to form part of a "practice" of a claimant or claimant's (unlike "warehousing").

63. For the reasons indicated above, I do not find that either of the two periods suggested by Mr Coffer as amounting to more than "mere" delay (so that they justify the striking out of Alba's claim without it being necessary for MSC to show that, as a result of the delay, a fair trial is no longer possible or that MSC has suffered serious prejudice) are made out.

THE STRIKE OUT APPLICATION - CONSIDERATION AND CONCLUSIONS ON CPR 3.4(2)(c)

64. The failure of Alba to apply to the court to fix a CMC by 21 October 2014 is a breach of PD 59 paragraph 7.2. CPR 3.4 (2)(c) provides that a court may strike out a statement of claim if there has been a failure to comply with a practice direction. I therefore have jurisdiction under CPR 3.4 (2)(c) to strike out Alba's claim.
65. In **Walsham Chalet Park** (see paragraph 35 above) Richards LJ gave guidance as the approach to be taken by the court when considering an application to strike out a claim under CPR 3.4 (2) (c). Lord Justice Richards said that in considering an application to strike out a claim under CPR 3.4 (2) (c) the matters which the court is directed to take into account under CPR 3.9 are relevant to the court's decision as to whether or not to strike out the claim under CPR 3.4 (2) (c). Richards LJ went on however to make it clear that in the case of an application for relief from sanctions under CPR 3.9 the court has already decided that the sanction of striking out the claim in the event that the claimant does not comply with the unless order is a proportionate sanction to apply to that default, whereas, in the case of an application under CPR 3.4 (2) (c), the court has to decide whether striking out the claim is a proportionate response to the failure of the Claimant to comply with a rule, practice direction or court order and the overriding objective under CPR 1.1 generally.
66. I propose, in light of the guidance given by Richard LJ in **Walsham Chalet Park** to approach the question of what sanction to apply to the claimant for its failure to comply with PD 59 paragraph 7.2 by: (a) considering whether or not I would grant Alba relief from sanction under CPR 3.9 if its claim had already been struck out because of a failure to comply with an unless order, requiring it to apply to fix a CMC in accordance with PD 59 paragraph 7.2 and providing that its claim would be struck out if it failed to do so; and (b) in the event that I decide that I would not have granted relief from sanction I will go on to consider the overriding objective under CPR 1.1 generally and in particular whether striking out Alba's claim is a proportionate response to its failure to comply with PD 59 paragraph 7.2 or whether some other sanction should be imposed upon Alba. If I decide that I would have granted Alba relief from sanction, in the event that its claim had already been struck out (because of a failure to comply with an unless order) then it follows from the guidance given by Richard LJ that I should also find that it is not appropriate to strike out Alba's claim under CPR 3.4 (2) (c).
67. In **Denton v TH White [2014] EWCA Civ 906** in the Joint Judgment of the then Master of the Rolls, Lord Dyson and Lord Justice Vos (as he then was) it is said that a three-stage

approach should be taken to considering whether or not to grant relief from sanctions under CPR 3.9:

(a) Assess the significance of the failure to comply with the rule, practice direction or order. If the breach is trivial then relief from sanctions will normally be granted;
(b) Consider whether there is a good excuse for the default. If there is then relief from sanctions will normally be granted; and
(c) if the failure to comply is not trivial and there is no good excuse for the default then the court should consider all the circumstances of the case, so as to enable it to deal with the application justly including: (i) the need for litigation to be conducted efficiently and at a proportionate cost; and (ii) to enforce compliance with rules, practice directions and orders.

68. As to the first stage of the test, a delay of 4 years and 7 months (and counting) by Alba in applying to the court to fix a CMC cannot on any basis be described as trivial. It is necessary therefore to progress to the second stage of the test, namely whether there is a good excuse for the default. The reasons given for the default are those set out in the first and second witness statements of Mr Chaudhry which I have summarised above. Mr Chaudhry refers to failings on the part of Alba's legal representatives, failings on the part of Alba or misunderstandings between Alba and its legal representatives. For the purposes of an application for relief from sanction, the fact that the default giving rise to the imposition of the sanction may be attributable in whole or in part to the fault of the sanctioned party's legal representative does not amount to a good excuse for the default. There is therefore no good excuse for the default and it is necessary therefore to pass to the third stage of the test.
69. As for all the circumstances of the case, Mr Butler says that the following circumstances support the court concluding that it should not strike out the claim (and therefore would favour the court granting relief from sanctions, if this were an application under CPR 3.9 for relief from sanctions):
    (a) It was open to MSC to apply to fix a date for the CMC itself and the CPR does place an obligation on all parties to assist the court in achieving the overriding objective (of dealing with cases justly and at a proportionate cost). Against that, however, PD 59 paragraph 7.2 places an obligation on Alba to apply to fix a CMC within 28 days of service upon Alba of a Defence. No such obligation is placed upon MSC which is merely provided by the rules with the ability to apply to fix a CMC but not an obligation to do so; and
    (b) the striking out of the claim would deprive Alba of the ability to pursue what, on its face is a legitimate claim against MSC for damage caused to bananas loaded in 28 containers and shipped by MSC to Alba in circumstances where I have <u>not</u> found that a fair trial is no longer possible or that MSC has suffered material prejudice as a result of Alba's delay.
70. The following circumstances are matters which favour my refusing relief from sanctions (if this were an application for relief from sanctions under CPR 3.9):
    (a) the length of the delay which is currently 4 years and 7 months;
    (b) the reasons given by Alba for the delay are not only not good reasons but the explanation of the reasons is vague and unsatisfactory, there are inconsistencies in the explanation and inadequate evidence has been provided to support the explanations that are given;
    (c) the need to conduct litigation efficiently and at proportionate cost favours the refusal of relief from sanction because Alba's delay has prevented a claim which should have been tried and resolved some years ago from proceeding beyond the close of pleadings. The delay also increases the cost of the proceedings for both parties (including the cost of MSC's application to strike out the claim);

(d) the need to enforce compliance with rules, practice directions and court orders also favours the refusal of relief from sanction because Alba has failed to comply with its clear obligation under PD 59 paragraph 7.2 to apply to fix a CMC within 28 days of service upon it of the Defence and Counterclaim of MSC. Refusing relief from sanctions acts as a strong incentive for parties to comply with rules, practice directions and court orders as was made clear by the Court of Appeal in **Mitchell v News Group Newspapers Limited [2013] EWCA Civ 1537** as clarified by the Court of Appeal in **Denton.**

71. Taking all of the circumstances into account my conclusion is that the factors set out in paragraph 70 above in favour of refusing relief from sanction greatly outweigh those factors set out in paragraph 69 above in favour of granting relief from sanction. In particular the length of the delay, the absence of any good reason for it, its effect upon the progress and cost of the proceedings and the need to enforce compliance with rules, practice directions and court orders outweigh the prejudice to Alba caused by it being unable to pursue what, on its face appears to be a legitimate claim.
72. In accordance with the guidance given by Richards LJ in **Walsham Chalet Park** I should next consider whether striking out Alba's claim is consistent with the overriding objective and in particular is a proportionate response to its failure to comply with its obligations under PD 59 paragraph 7.2.
73. Mr Butler, on behalf of Alba, says that striking out the claim is a draconian sanction for the Alba's delay and is disproportionate. He suggests that a more appropriate and proportionate remedy would be to impose an unless order upon Alba in relation to the remaining steps to trial so that Alba's claim would be struck out, in the event that it delays again in progressing its claim to trial.
74. Mr Coffer accepts that striking out the claim is a draconian sanction, extinguishing Alba's substantive rights but he submits that Alba's intentional conduct and disregard for the rules of the court together with the length of the delay and continuing non-compliance are such as to justify the court striking the claim out. He suggests that no other sanction is proportionate, given the seriousness and extent of Alba's breach.
75. I have already made findings that I am not satisfied that: (a) Alba's delay was intentional and contumelious in full awareness of the consequences; and (b) Alba did not make a conscious decision to maintain but not to progress the claim until a time convenient to it (referred to in the relevant cases as "warehousing"). The delay here is nonetheless very significant (over 4 years and 7 months and still continuing) and as indicated above the explanation for that delay is unsatisfactory.
76. Counsel accept that an alternative sanction, for Alba's default in failing to apply to fix a CMC to striking out the claim would be for me to order Alba to provide security for MSC's costs of the proceedings.
77. There is a complication here in that MSC has separately made the Security for Costs Application pursuant to CPR 25.12. MSC may therefore be entitled to security for costs under CPR 25.12 in any event and if it is so entitled, then ordering Alba to provide security for MSC's costs, as a sanction for its failure to apply to fix a CMC pursuant to PD 59 paragraph 7.2, would simply duplicate any order I made under CPR 25.12.
78. What I propose to do therefore is to consider whether MSC is entitled to security for its costs from Alba pursuant to the Security for Costs Application and then decide what sanction should be applied to Alba for its failure to comply with PD 59 paragraph 7.2 (strike out of Alba's claim, an unless order or security for costs) having regard to the proportionality of the sanction and the overriding objective.

THE APPLICATION FOR SECURITY FOR COSTS

79. The security for costs application is made under CPR 25.13 (2) (a). CPR 25.13 (2) (a) provides that a court may make an order for security for costs under rule 25.12 where

"…the Claimant is: (I) resident out of the jurisdiction; but (II) not resident in a Brussels Contracting State, a State bound by the Lugano Convention, a State bound by the 2005 Hague Convention or a Regulation State as defined in Section 1 (3) of the Civil Jurisdiction and Judgements Act 1982.

80. It is common ground that the conditions set out in CPR 25.13 (2) (a) are met and that I therefore have a discretion to order Alba to provide security for MSC's costs.
81. MSC concedes that although there is no reciprocal treaty for enforcement of judgments between England and Albania there is a procedure under Albanian law which enables the enforcement of a foreign court orders, however, in Mr Chetwood's Statement, he says that the estimated costs of such enforcement action are approximately Euro 10,000- Euro 20,000 and the enforcement process can take between two months and five years to complete.
82. Mr Coffer says that in addition to the difficulty and expense of enforcing judgment in Albania there are reasons to be concerned as to the financial position of Alba. In particular:
    (a) In Mr Chaudhry's Second Statement, in referring to the reasons for Alba's delay he says, at paragraph 10 that Mr Dauti had not appreciated there could be financial consequences if the Claim was amended or that security for costs could be ordered against Alba and at paragraph 11 he refers to financial losses incurred by Alba and "financial and mental difficulties";
    (b) Financial information in relation to Alba referred to in Mr Dauti's Statement refers to Alba having a cash balance of only around US$30,500 as at 25 April 2019;
    (c) the audited accounts of Alba produced as an exhibit to Mr Dauti's Statement show Alba making a profit of only LEK 1,678,369 in 2016, but in his witness statement, Mr Dauti says that Alba's profits have increased over the years and its profit for 2016 was LEK 11,678,369 (LEK 10,000,000 more than is shown in the audited accounts). Mr Dauti also produces a spreadsheet summarising Alba's profits which includes the figure of LEK 11,678,369 as profit for 2016 and contains other figures which are inconsistent with the audited accounts of Alba exhibited to Mr Dauti's Statement.
83. Mr Butler says, of MSC's application under CPR 25.12, that:
    (a) English judgements can be enforced in Albania at a cost of, in the region of EUR 10,000; and
    (b) any application for security for costs should be made promptly and MSC's delay in making the application is a matter that the court can and should take into account in deciding whether or not to grant security;
84. I have, as I have already indicated, a discretion under CPR 25.12, to order Alba to provide security for MSC's costs on the basis that the conditions set out in CPR 25.13 (2) (a) are made out.
85. The purpose of CPR 25.12 is to protect a defendant who is defending a claim from a real risk that, if the defendant is successful in defending that claim and a costs order is made in the defendant's favour, the defendant will be unable to enforce that costs order against the claimant.
86. On the evidence before me, as set out in Mr Chetwood's Statement the fact that Alba is incorporated in Albania does not of itself create a real risk that MSC will be unable to enforce any costs order made in its favour against Alba, but MSC will incur cost and delay in seeking to enforce any such costs order.
87. CPR 25.13 (2) (c) describes another circumstance in which the court is given jurisdiction to make an order for security for costs, namely where the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so. MSC in making its application for security for costs does not rely upon CPR 25.13 (2) (c) but Mr Coffer says

(and I accept) that in exercising the discretion that I have to order that Alba pay security for costs, because the conditions set out in CPR 25.13 (2) (a) are met, I should take into account the risk that MSC may be unable to recover any costs order made in its favour because of the financial position of Alba.

88. The financial position of Alba, as revealed by Mr Dauti's Statement is a cause for concern. The cash balance of US$30,500, as at 25 April 2019 is very unlikely to be sufficient to discharge a costs order made in favour of MSC if it successfully defends the proceedings. The discrepancy between the audited accounts of Alba produced by Mr Dauti and his description of Alba's financial position is a cause for concern. In particular, in producing a summary of Alba's financial performance, Mr Dauti seeks to show that Alba's profits are increasing year on year but in doing so he overstates Alba's profit in 2016 by LEK 10,000,000 (the profits were only LEK 1,678,369, whereas Mr Dauti in his statement and in the summary of Alba's financial position attached to Mr Dauti's Statement suggests that the profits for 2016 were LEK 11,678,369). There are also the references in Mr Chaudhry's Second Statement to Alba's apparent past financial constraints or difficulties.
89. Mr Dauti says that the Claimant has assets with a value of just in excess of £1.5 million although their realisable value in a distressed sale position is likely to be significantly less. The audited accounts for 2017 suggest that at that stage Alba had a surplus of assets over liabilities (including profit for that financial year of LEK 15,679,023) of LEK 33,366,772. The present value of one LEK is approximately 0.0072 of £1 giving a surplus of assets over liabilities of £233,500 approximately as at 31 December 2017. Mr Dauti says that Alba made a profit of LEK 17,057,427 (£120,122.72) in 2018.
90. Mr Dauti overstates Alba's profits for 2016 by LEK 10,000,000 (according to the audited accounts that he produces). I am satisfied however that this is an error and nothing more sinister because the error is an obvious one in circumstances where Mr Dauti produces both the audited accounts and his financial summary. The audited accounts (presumably) show the true position.
91. On the evidence of Mr Dauti, Alba's total net assets as at the end of 2018 would amount to just in excess of £350,000 with Alba continuing to generate profits. Although I have concerns as to the reliability of the accounting information produced by Mr Dauti I have come to the conclusion that although there is a material risk that MSC would be unable to enforce a costs order made in its favour against Alba, that nonetheless the risk is not a substantial one. Alba, on the face of it, is not balance sheet insolvent, or cash flow insolvent, it is trading profitably and its total assets exceeded its total liabilities as at the end of 2018 by a sufficient amount (just in excess of £350,000) to discharge an order for costs that may be made in favour of MSC, if MSC is successful in defending Alba's claim. MSC's solicitors have produced a costs summary suggesting that its total costs to the end of the trial will amount to £125,887.10. The financial position of Alba does not show a sufficiently impecunious position to justify my exercising my discretion in favour of ordering the Claimant to provide security for the Defendant's costs. Given however that, on the evidence produced in Mr Chetwood's Statement it appears that it would cost MSC between $10,000 and $20,000 to enforce, in Albania, any costs order made in its favour in England, I am inclined to order that Alba provide security for these enforcement costs. Before deciding that point however I will decide the appropriate sanction for Alba's default (because if I decide that the appropriate sanction is to order that Alba pay security for MSC's costs, then it may no longer be necessary or appropriate to order that Alba provide security for costs that MSC may incur in enforcing any costs order made in its favour in England).

STRIKE OUT, SECURITY FOR COSTS OR AN UNLESS ORDER?

92. I now need to decide on the appropriate and proportionate sanction for Alba's failure to comply with PD 59 paragraph 7.2 having regard to the overriding objective under CPR 1.1.
93. Mr Coffer says that striking out the claim is the only proportionate response given the length of the delay (over 4 years and 7 months) and its impact on the progress of the litigation. Mr Butler says that the striking out of the claim is a draconian step and is not proportionate to Alba's default. Mr Butler suggests that the proportionate response would be to make an unless order so that, if Alba fails to comply with any direction going forward in respect of disclosure, witness statements or other directions then Alba's claim will be struck out.
94. The overriding objective set out in CPR 1.1 (1) is to deal with cases justly and at proportionate cost. CPR 1.1 (2) explains that dealing with a case justly and at proportionate cost includes, so far as practicable:
    (a) ensuring that the parties are on equal footing;
    (b) saving expense;
    (c) dealing with cases in ways which are proportionate:
    (i) to the amount of money involved;
    (ii) to the importance of the case;
    (iii) to the complexity of the issues; and
    (iv) to the financial position of each party;
    (c) ensuring that it is dealt with expeditiously and fairly;
    (d) allotting to it an appropriate share of the court resources, while taking into account the need to allot resources to other cases; and
    (e) enforcing compliance with rules, practice directions and orders.
95. Ensuring that the parties are on an equal footing, saving expense and ensuring that cases are dealt with expeditiously and fairly are all factors relevant to deciding what directions to give in relation to preparing a matter for trial or in relation to the trial itself, but I do not regard them as relevant factors in deciding what sanction should be applied for Alba's default.
96. The proportionality of the sanction to be applied to Alba is very much an issue that I need to consider, and I will do so below however I do not consider the amount of money involved, importance of the case, complexity of the issues or financial position of the parties is of direct relevance to this issue. Issues relevant to the proportionality of the sanction relate more to the seriousness of Alba's default, the prejudice suffered by MSC as a result of that default and the effect on Alba of the sanction.
97. As to ensuring that this matter is allotted an appropriate share of the court's resources, while taking to account the need to allot resources to other cases, and the need to enforce compliance with rules, practice directions and orders, these factors tend to support the imposition of a sanction which encourages parties to progress their cases efficiently and in compliance with rules, practice directions and orders. In my judgment these factors would therefore tend to support the imposition of a more serious sanction, but the most significant question that I need to answer is the question of which sanction is the most proportionate response to Alba's default.
98. I do not accept that the proportionate response in this case is, as Mr Butler suggests, to make an unless order against Alba. Whilst such an unless order may ensure that Alba complies with any directions that the court may make in relation to preparations for trial (and would encourage Alba to comply with directions orders going forward) it would not amount to a sanction in relation to Alba's default, namely its failure to apply, in accordance with PD 59 paragraph 7.2 to fix a CMC.
99. As to the choice between striking out the claim on the one hand or ordering that Alba provide security for the MSC's costs on the other hand I consider that the choice is finely

balanced however I have come to the conclusion that the most proportionate sanction is to order that Alba provide security for MSC's costs. My reasons are as follows:

(a) the delay by Alba in applying to fix the CMC is a long one (4 years and 7 months and Alba has still not applied to fix a CMC. Nonetheless I have found that the delay has not resulted in a fair trial no longer being possible or substantial prejudice to MSC in terms of the evidence that MSC can produce at trial. It is for this reason that I refused to strike out the claim under CPR 3.4 (2) (b) as an abuse of process (on the basis of my finding that there had been inordinate and inexcusable delay);

(b) whilst it is true that the obligation fell on Alba, under PD 59 paragraph 7.2 to fix the CMC it is also true that it was open to MSC to apply to fix the CMC itself. Whilst therefore MSC is not itself in breach of any practice direction, MSC could have ensured that the matter progressed to trial without the delay caused by Alba's default, by applying itself to fix the CMC; and

(c) depriving Alba of the ability to have the court determine what on its face appears to be a legitimate claim in circumstances where I have found that a fair trial is still possible and that there has been no substantial prejudice to MSC's ability to defend the claim (as a result of Alba's default) appears to me to be too draconian a step to take.

100. I have, by a small margin decided that the risk of MSC being unable to enforce a costs award against Alba is not sufficiently serious to justify an order being made that Alba provide security for MSC's costs under CPR 25.12. The question of security for costs, when considered afresh as a sanction for Alba's default is different. Alba's default is a serious one, it has delayed the litigation significantly and increased the costs of the litigation. If MSC is ultimately successful in defending the claim and receives a costs order in its favour then it would, in my judgment be grossly unfair if MSC were unable to enforce that costs order. In order to avoid that potential consequence and having regard to the need to impose some sanction upon Alba for its default, it appears to me that the most appropriate course of action is to order Alba to provide security for MSC's costs under CPR 3.1(5). I considered that requiring Alba to provide security for MSC's costs is a fair and proportionate sanction to impose for its default.

THE CORRECT LEVEL OF SECURITY FOR COSTS

101. MSC seeks security for its costs in the sum of £100,000 (as part of its application under CPR 25.12). It has produced a schedule of its estimated costs to trial in the total sum of £125,887.10 which includes its cost to date and projected costs to the end of the trial. MSC is therefore seeking security amounting to just over 79% of its costs.

102. As to the quantum of any security, Mr Butler says that:

(a) MSC should not be entitled to any security for its costs predating its application for security for costs dated 14 November 2018 because it ought to have sought security prior to that date if it was concerned about enforcing any costs award in its favour. If pre-November 2018 costs are deducted, then MSC's total costs are reduced to £83,090;

(b) an order for security costs in the range £40 – £50,000 would be appropriate.

103. As to the schedule of costs produced by MSC of £125,887.10, Mr Butler did not suggest that the estimate was overstated in any way and I can see nothing in it to suggest that it has been overstated.

104. I do not consider that MSC should be restricted to costs incurred after 14 November 2018 when it made its security for costs application. It is true that MSC could have made a security of costs application earlier, but the reality of the position is that for over 4 years prior to 14 November 2018, Alba had failed to fix a CMC and MSC were, in my view

entitled to wait to see if they did so before incurring the costs of an application for security for costs.

105. In addition, and more importantly, it is not MSC's application for security for costs under CPR 25.12 (which Mr Butler criticises as being made late) that has been successful, instead I have decided to order Alba to pay security for MSC's costs as a sanction for Alba's failure to comply with PD 59 paragraph 7.2. In that context the lateness of MSC's unsuccessful application for security for costs under CPR 25.12 is, in my view, irrelevant to the question of what security for MSC's costs Alba should be required to provide, as a sanction for its failure to apply to fix a CMC.

106. Whilst the level of security sought by MSC in relation to their projected costs is relatively high at 79% (a higher percentage than the court might normally award on an application for security under CPR 25.12) I have come to the conclusion that it is appropriate to order security for costs at this level, because ordering that level of security is a proportionate sanction for Alba's default for over 4 years and 7 months in failing to fix a CMC and helps to ensure that MSC does not suffer a material shortfall in its recovery of costs at the end of the proceedings if it is ultimately successful in its defence of Alba's claim. Having ordered that Alba provide security for 79% of MSC's projected costs I do not consider it necessary or appropriate to order Alba in addition to provide security for costs that may be incurred by MSC in seeking to enforce a costs order in Albania, because MSC will substantially be able to recover its costs out of the security provided by Alba.

107. Alba must therefore provide security for MSC's costs in the sum of £100,000 and I invite counsel to agree how that security will be provided.