Neutral Citation Number: [2021] EWHC 2615 (Comm)

Case No: CL 2019 000566

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 30/09/2021

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

EXCOTEK LIMITED	**Claimant**
- and -	
(1) CITY AIR EXPRESS LTD (IN LIQUIDATION)	
(2) CHAUCER CORPORATE CAPITAL NO. 3 LTD	**Defendants**

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- -

Tom Bird (instructed by **Hill Dickinson LLP**) for the **Claimant**
Peter Stevenson (instructed by **DAC Beachcroft LLP**) for the **Second Defendant**
The First Defendant did not appear and was not represented

Hearing date: 2 July 2021
Draft circulated: 27 August 2021

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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.

Mr Justice Henshaw:

(A) INTRODUCTION

1. The Claimant ("***Excotek***") applies for an extension of time from 6 February 2020 to 26 March 2021 for the service of Particulars of Claim on the Second Defendant ("***Chaucer***") , alternatively for a stay. The application is in substance for relief from sanctions following an omission to take steps to draft, and seek the court's approval for, a consent order reflecting a stay of proceedings which had been agreed in principle between the parties. Chaucer cross-applies to strike out Excotek's claim.

2. For the reasons set out below, I have come to the conclusion that the extension of time which Excotek seeks should be granted, and that the cross-application should be dismissed.

(B) FACTUAL AND PROCEDURAL BACKGROUND

3. These proceedings arise from the theft of goods belonging to Excotek from the First Defendant ("***CAE***")'s warehouse in Manchester on 15 October 2016.

4. Excotek is a supplier of computer hardware. On 7 October 2016 it concluded a storage contract with CAE for the storage of some of Excotek's goods. CAE transported the goods to the warehouse on 8 October. They were stolen about a week later.

5. Excotek alleges that CAE was liable as bailee for the loss of the goods. In outline, Excotek says CAE failed to take reasonable care of them: when the goods were stolen, the CCTV cameras covering the location of the theft were not operating and the alarm system was not activated. The total value of Excotek's claim is about £770,000 plus interest. CAE has been dissolved, and the claim is brought against Chaucer as CAE's liability insurer under the Third Parties (Rights against Insurers) Act 2010 ("***the 2010 Act***").

6. There is a dispute about the terms on which the goods were stored and whether a contractual time bar applies. Chaucer contends that CAE provided custodian services pursuant to an agreement incorporating CAE's standard terms and conditions. Excotek contends that the standard terms were not incorporated. If Chaucer is correct, then the contract between Excotek and CAE included a contractual time bar providing:

> "30(B). Notwithstanding the provisions of Sub-Paragraph (A) above the Company [the First Defendant] shall in any event be discharged of all liability whatsoever arising in respect of any service provided for the Customer [Excotek]…unless suit be brought and written notice thereof given to the Company within

> nine months from the date of the event or occurrence alleged to give rise to a cause of action …"

If incorporated, this provision required any claim against CAE to be brought, and written notice of it given, by 15 July 2017.

7. Following the theft, correspondence between Excotek and CAE was conducted through their respective insurers and their lawyers. Excotek was represented by Mr John Clarke, Senior Claims Analyst at DXC Technology, and Hill Dickinson LLP. CAE was represented by Christine Midwood, Claims Director at Lonham Group Ltd, and DAC Beachcroft LLP.

8. Between June 2017 and July 2019, Excotek sought a series of extensions of time for the commencement of proceedings.

9. On 20 June 2017 Mr Clarke noted that things were "*all a bit quiet my side of things*" and sought an extension of time "*while enquiries/cogitations progress*".

10. On 21 September 2017 Mr Clarke asked for more time "*while I chase up our insured re answers to a few questions*".

11. On 14 December 2017 Hill Dickinson sought a further extension up to 14 April 2018 without giving a reason for the request.

12. On 20 March 2018 Hill Dickinson requested a further extension to 14 July 2018, stating that Excotek was not yet in a position to revert substantively on the claim.

13. On 22 June 2018 CAE passed a resolution for its voluntary winding up. It entered into liquidation on 22 June 2018 and was subsequently dissolved on 19 November 2020.

14. On 3 July 2018 Hill Dickinson requested a further extension to 14 October 2018 in order to "*keep costs to a minimum"* while "*we are continuing our enquiries in this matter*". That request was granted, although DAC Beachcroft noted its dissatisfaction with the continued delays:

> "…It is not understood why your enquiries still continue, our client's position having been set out as long ago as November of last year. The position appears to us to be quite straight forward, and clearly our client cannot go on granting time extensions indefinitely. With that in mind please confirm when your clients / you anticipate concluding their / your enquiries."

15. On 21 September 2018 Hill Dickinson said "*we are close to finalising enquiries in this matter and will be writing to you on the substantive points over the next couple of weeks*", but requested a further extension to 14 November 2018, which Chaucer granted.

16. On 5 November 2018 Hill Dickinson indicated that "*having finalised enquiries, we are making recommendations to our client and will be writing to you on the substantial issues over the next 7-10 days*", but nonetheless sought a further extension to 14 December 2018.

17. On 28 November 2018 Hill Dickinson sought a further extension to 14 January 2019 "*with a view to minimising legal costs".*

18. In January, March and April, May, June and July 2019 Hill Dickinson sought further extensions without giving reasons. All of these were granted.

19. On 12 September 2019, two days before expiry of the last extension, Excotek issued a claim form naming CAE (then in liquidation) and Chaucer Syndicates Limited as defendants. Before service, Excotek amended the claim form to substitute Chaucer for Chaucer Syndicates Limited. The brief details of claim summarised the claims against both defendants, identifying Chaucer Syndicates Limited as CAE's liability insurers. In fact, Chaucer Syndicates Limited is not an insurer but the managing agent of the underwriter subscribing to Lloyd's Syndicate 1084, viz. Chaucer. It is not clear why Excotek failed to check this point before issuing proceedings. In a letter dated 26 September 2019 DAC Beachcroft highlighted Excotek's error, invited it to amend the claim form to identify Chaucer as the proper defendant, and indicated that the claim would be defended by attaching a draft acknowledgment of service.

20. After various chasers from Chaucer, Excotek served the amended claim form on Chaucer, via DAC Beachcroft, on 6 January 2020, which was six days before the claim form was due to expire. The amended claim form indicated that particulars of claim would follow if an acknowledgment of service were filed indicating an intention to defend the claim.

21. On 9 January 2020 Chaucer filed an acknowledgment of service indicating an intention to defend the claim. Particulars of Claim as against Chaucer were therefore due by 6 February 2020.

22. CAE did not file an acknowledgment of service and one of its liquidators, Alex Coffey, informed Hill Dickinson that CAE did not intend to do so. Mr Coffey also said that the liquidators intended shortly to dissolve CAE. Excotek submits that the dissolution of CAE was a potentially significant development because (a) the claim could not proceed against a dissolved company, and (b) section 9(3) of the 2010 Act provides that the rights transferred thereunder are not subject to a condition requiring the insured (CAE) to provide information or assistance to the insurer (Chaucer) if that condition cannot be fulfilled because the insured is a body corporate "*that has been dissolved*".

23. On 3 February 2020 Hill Dickinson emailed DAC Beachcroft seeking Chaucer's agreement to a stay of the action, terminable on 28 days' notice by either party, said to be for the purpose of holding settlement discussions. The email attached draft Particulars of Claim. These were 4 pages long and could reasonably be described as a slightly longer version of the brief particulars set out in the claim form. Hill Dickinson's email stated *"if your clients are amendable to the stay, then we can explore with you how best to get the mediation into place, alternatively a wp meeting with clients if preferred"*.

24. On 4 February, DAC Beachcroft responded:

> "We have now sought our client's instructions, who are in agreement to the stay of proceedings proposed by your client, the same being terminable by either party on 28 days' notice.

> We trust you will make the necessary arrangements and look forward to receiving a draft Order for our client's consent."

25. An order was required because, although parties are permitted to agree extensions of time "*for a person to do any act*" (CPR 2.11), Practice Direction 58 § 7 states that in Commercial Court proceedings any such agreement must be notified to the court in writing, with reasons. Males J stated in *Griffin Underwriting v Varouxakis* [2019] 1 WLR 2529 that:

> "It is not open to the parties to agree an indefinite extension of time without notifying the court. To hold that the moratorium was effective despite the failure to comply with the notification requirement would deprive the court of control and would mean that there was no effective sanction for non-compliance. Or as Hobhouse J used to say in the days long before the CPR , in this court it takes three to make an agreement." (§ 47)

26. Chaucer submits that, whilst it was prepared to agree to a stay on the terms proposed, it was far from certain that such a stay would have been endorsed by the Court. Paragraph D8.9 of the Commercial Court Guide states that *"an extension will not normally be granted for more than four weeks unless clear reasons are given to justify a longer period"*.

27. No response was received from Hill Dickinson, and no attempts were made to pursue alternative dispute resolution. Chaucer heard nothing further from Excotek for a further 12 months, and its evidence is that it assumed the claim to have been abandoned. Chaucer's solicitor, Mr Menzies of DAC Beachcroft LLP says:

> "20. Surprisingly, we heard nothing more from Excotek's lawyers after that. Having diarised the matter, my firm wrote to them on the anniversary of our email of 4 February 2020, that is on 4 February 2021 …. We pointed out that no Consent Order had been produced for our consideration and that no such order had been filed. We explained that the claim was accordingly liable to be struck out for failure to serve Particulars of Claim, and we asked them to clarify their client's position.
>
> 21. For [Chaucer]'s part, it was assumed that the claim had been abandoned, but we wished to know whether Excotek proposed voluntarily to discontinue or whether it would be necessary for [Chaucer] to bring an application to strike out. Both of course would carry cost consequences but the costs of the latter would be rather greater and so we were reluctant to proceed until Excotek had clarified its intentions."

28. The evidence of Excotek's solicitor, Ms Messer of Hill Dickinson, is that the failure to prepare and submit a consent order was an oversight on her part, and she has apologised to the Court. Ms Messer says that, distracted by other matters, she overlooked the need to prepare a consent order and make the necessary arrangements for the stay. Ms Messer proceeded on the incorrect basis that the matter had been stayed on the terms agreed.

29. A few weeks after the correspondence in February 2020, the effects of the Covid-19 pandemic began to be felt.

30. On 4 February 2021, one year after the stay had been agreed, DAC Beachcroft emailed Hill Dickinson as follows:

> "We refer to our email of 4 February 2020, now exactly 12 months ago, in which we confirmed our client's willingness to enter into a Consent Order staying these proceedings on 28 days' notice. Matters rest there. We have no record of receiving your client's draft Consent Order for our clients' agreement, and no Order has been filed.
>
> In the circumstances, it would appear that your clients' claim is liable to be struck out. Without prejudice to our client's right to bring such an application, we should be grateful if you would kindly confirm your client's intentions with regard to this litigation."

31. The evidence indicates that this is the moment at which Ms Messer first realised that she had overlooked the need to prepare a consent order. She initially sent a holding response, on 5 February 2021, promising to *"revert generally next week"*. Ms Messer then responded substantively on 12 February 2021, thanking DAC Beachcroft for alerting her to the lack of a consent order and attaching a draft order for their review, providing for the proceedings to be stayed until service of notice by either side. Her email continued:

> "As to moving this matter forward, you are well aware of our client's position on issues of incorporation of terms, liability and quantum. Indeed there have been several detailed exchanges on these issues, including our lengthy response to your message of 29 November 2017. If you meant to refer to your later message of 3 January 2019, we had noted in a subsequent wp telecon that we could not see that your letter of intent argument had any traction at all, that we stood by our previous response as to the applicable terms. Insofar as we understand it, your insurer client is not raising any coverage points, such that the dispute remains focused on the applicable terms and on which we have exchanged lengthy views and provided the Claimant's key documents.
>
> We do still consider that the parties ought to be able to reach agreement in this matter without incurring the further significant costs of litigation. We would therefore encourage you to seek settlement proposals from your clients with a view to concluding this dispute. Otherwise we had floated the suggestion of mediation, and for which we would be happy to recommend to you clients the appointment of Stephen Mills as mediator. An alternative to mediation is a wp meeting preferably involving the parties' insurer representatives as well as lawyers (although our clients' assured would be happy to attend too). Obviously this would have to be a virtual meeting, which we can set up on

> Teams. If interested, please could you confirm your/your clients' availability over the coming weeks.
>
> We look forward to hearing from you shortly."

32. DAC Beachcroft did not respond until a month later, on 12 March 2021, when they sent an email indicating that in the absence of an agreed and filed consent order, the action was not stayed; that the time for service of the Particulars of Claim had expired; that they had no instructions to waive Excotek's breach; and that "*any application now brought for a retrospective extension of time will be resisted*".

33. Excotek therefore issued an application on 19 March 2021 for an extension of time, alternatively for a retrospective stay of the proceedings. On the same day, Excotek purported to serve the Particulars of Claim and Initial Disclosure List on Chaucer. The Particulars of Claim were materially the same as the draft Particulars of Claim provided to Chaucer on 3 February 2020, save that the claim against CAE had been dropped.

34. On 1 April 2021 Chaucer applied for an order that Excotek's claim be struck out for failure to serve Particulars of Claim on time.

(C) PRINCIPLES

35. Excotek's application for an extension of time and Chaucer's application for a stay are governed by essentially the same principles. The question is whether the claim should be allowed to proceed or should be struck out, having regard to the principles governing situations where Particulars of Claim are not served on time.

36. It is common ground that unless the court grants a retrospective extension of time or stay, the Particulars of Claim were not served in accordance with the 28-day time limit set out in CPR 58.5. Excotek submits that it would not follow that the service was invalid, because under CPR 3.10:

> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction –
>
> (a) The error does not invalidate any step taken in the proceedings unless the court so orders; and
>
> (b) the court may make an order to remedy the error."

37. However, although the CPR specifies no explicit sanction for failure to serve particulars of claim on time, Edwards-Stuart J in *North Midland Construction plc v Geo Networks Ltd* [2015] EWHC 2384 (TCC) § 68 stated that the effect of a failure to do so is "*as if the action becomes stayed*", with the practical consequence being equivalent to strike out, "*because the starting of a second claim for the same cause of action while the first action is still in existence would probably amount to an abuse of the process of the court*". That statement is consistent with the note in White Book § 7.4.3 that:

> "Where the particulars of claim are not served in time in accordance with r.7.4 (whether this is because the claimant misunderstood the effect of r.7.4(2) or for some other reason), an application may be made to the court for an extension of time.

> An application for an extension may be made either before or after the expiry of the relevant time limit. For commentary on such applications, see para.7.6.8 below. The application must be determined by adopting the relief from sanctions framework under Pt 3.9. See *Price v Price* [2003] 3 All E.R. 911"

and the similar statement in note 7.6.8 that:

> "A party who has served the claim form in accordance with r.7.5, but who has failed to comply with the time limits for the separate service of particulars of claim imposed by r.7.4, may apply to the court for an extension of time for service of the particulars. A court considering whether, on such an application, it should exercise its general discretionary power, recited in r.3.1(2)(a)), to extend time for compliance with any rule (in this case r.7.4) should adopt the r.3.9 (Relief from sanctions) framework (*Price v Price* [2003] EWCA Civ 888; [2003] 3 All E.R. 911, CA)."

38. In *Price*, the Court of Appeal said:

> " … this court had made it clear in *Sayers v Clarke Walker (a firm)* [2002] EWCA 645; [2002] 3 All E.R. 490 that in a case of any complexity, when a court was considering an application for an extension of time made after the time prescribed for the taking of a step in proceedings had expired, the court should follow the checklist given in CPR 3.9. Although the present case is concerned with an extension of time for serving particulars of claim, and not with an extension of time for appealing, the underlying logic is the same. If the court is not willing to extend time, the action will be at an end because the claimant will not be able to proceed with it any further." (§ 4)

On that basis, Excotek needs to obtain an extension of time.

39. In *Integral Petroleum v SCU-Finanz* [2014] EWHC 702 (Comm), Popplewell J concluded that an error of procedure in serving the Particulars of Claim by e-mail was a failure to comply with a rule or practice direction that fell within CPR 3.10. Accordingly, under CPR 3.10(a) such service was to be treated as valid, so as to commence time running for the service of the defence (§ 34). Popplewell J noted at § 37 that *"CPR 3.10 is particularly apposite for treating as valid a step whose whole function is to bring a document to the attention of the opposing party where such function has been fulfilled. It prevents a triumph of form over substance"*. At § 39 he said *"to treat [email] service as outside the scope of CPR 3.10 so as to entitle a defendant to set aside judgment under Rule 13.2 as of right would confer an unjustified benefit on a defendant who could rely upon a technical defect which has had no practical effect, and caused no prejudice, so as to deprive the claimant of a judgment to which, on the present hypothesis, he is entitled"*. Popplewell J went on to state:

> "These reasons apply with even greater force to the applicability of CPR 3.10 to the other deficiency relied on in relation to

> service of the Particulars of Claim, namely that it was 5 days out of time" (§ 40)

40. *Price* was not referred to in *Integral Petroleum.* Conversely, Excotek points out that *Price* did not consider the effect of CPR rule 3.10. In the light of the conclusions I reach later in this judgment, I do not find it necessary to seek to resolve this matter. I proceed on the basis that late service of Particulars of Claim requires an application to be made by the claimant, to be determined applying the principles relevant to relief from sanctions. I note that it was common ground before Popplewell J in the later case *Viridor Waste Management v Veolia Environmental Services* [2015] EWHC 2321 (Comm) that that was the correct approach (see § 17).

41. Excotek seeks the extension pursuant to CPR 3.1(2)(a), under which the court's discretion is on the face of it unfettered. However, it is well established that an application made after the time for compliance has expired is sufficiently analogous to an application for relief from sanctions as to engage the principles in *Denton v TH White Ltd* [2014] EWCA Civ 906: see, e.g., White Book notes 3.1.2 and 3.9.15, and *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633.

42. Under those principles, the court should take a three-stage approach:

> "The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages.
>
> The second stage is to consider why the default occurred.
>
> The third stage is to evaluate "*all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]"….*"
>
> (*Denton* § 24, paragraph breaks interpolated)

"Factors (a) and (b)" are those referred to at (a) and (b) of CPR 3.9(1), i.e.:

> "the need— (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders".

43. At §§ 26-28 of *Denton* the Court of Appeal said:

> "26. Triviality is not part of the test described in the rule. It is a useful concept in the context of the first stage because it requires the judge to focus on the question whether a breach is serious or significant. In *Mitchell* itself, the court also used the words "minor" (para 59) and "insignificant" (para 40). It seems that the word "trivial" has given rise to some difficulty. For example, it has given rise to arguments as to whether a substantial delay in complying with the terms of a rule or order which has no effect

> on the efficient running of the litigation is or is not to be regarded as trivial. Such semantic disputes do not promote the conduct of litigation efficiently and at proportionate cost. In these circumstances, we think it would be preferable if in future the focus of the enquiry at the first stage should not be on whether the breach has been trivial. Rather, it should be on whether the breach has been serious or significant. It was submitted on behalf of the Law Society and Bar Council that the test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which "neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation". Provided that this is understood as including the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense will be the most useful measure of whether a breach has been serious or significant. But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most obvious example of such a breach is a failure to pay court fees. We therefore prefer simply to say that, in evaluating a breach, judges should assess its seriousness and significance. We recognise that the concepts of seriousness and significance are not hard-edged and that there are degrees of seriousness and significance, but we hope that, assisted by the guidance given in this decision and its application in individual cases over time, courts will deal with these applications in a consistent manner.
>
> 27. The assessment of the seriousness or significance of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past. At the first stage, the court should concentrate on an assessment of the seriousness and significance of the very breach in respect of which relief from sanctions is sought. We accept that the court may wish to take into account, as one of the relevant circumstances of the case, the defaulter's previous conduct in the litigation (for example, if the breach is the latest in a series of failures to comply with orders concerning, say, the service of witness statements). We consider that this is better done at the third stage … rather than as part of the assessment of seriousness or significance of the breach.
>
> 28. If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If, however, the court decides that the breach is serious or significant, then the second and third stages assume greater importance."

44. Lord Dyson MR and Vos LJ expressed concern in *Denton* that a misunderstanding of the Court of Appeal's earlier decision in *Mitchell v News Group Newspapers (Practice*

Note) [2013] EWCA Civ 1537 was leading to decisions that were "*manifestly unjust and disproportionate*" (§ 38). Other cases have made clear that, where there is no prescribed sanction for a breach, the court should consider the effect of any refusal of relief and the proportionality of the response to the breach. If the practical effect of such a refusal would be to end the claim and this would be a disproportionate outcome, that would be a strong reason for granting an extension: see *Chartwell Estate Agents Ltd v Fergies Properties SA* [2014] EWCA Civ 506; [2014] 3 Costs LR 588 §§ 51-59; *Price v Price* [2003] EWCA Civ 888; [2004] P.I.Q.R. §§ 38 and 45; *Michael Wilson & Partners v Sinclair* [2015] EWCA Civ 774; [2015] 4 Costs LR 707 § 38.

45. It is relevant also to have some regard to the principles applicable to an application to strike out for a breach for which no specific sanction is prescribed. The similarities and differences in approach, as compared to cases of relief from a prescribed sanction, were highlighted by the Court of Appeal in *Walsham Chalet Park Ltd v Tallington Lakes Ltd* [2014] EWCA Civ 1607; [2015] 1 Costs LO 157. The defendant in that case had applied for the claim to be struck out for, among other things, failure to comply with the timetable laid down by an earlier order concerning disclosure and exchange of witness statements. The Court of Appeal said:

> "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 rule 3.9 from an existing sanction. In my judgment, 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 a court order. The *Mitchell* principles, as now restated in *Denton*, have 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 (see *Mitchell*, paragraphs 44-45). The importance of that distinction is particularly obvious where the sanction being sought is as fundamental as a strike-out. Mr Buckpitt drew our attention to the recent decision of the Supreme Court in *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd* [2014] UKSC 64 , at paragraph 16, where Lord Neuberger quoted with evident approval the observation of the first instance judge that "*the striking out of a statement of case is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified*"." (§ 44)

46. The Supreme Court in *Summers v Fairclough Homes* [2012] UKSC 26, [2012] 1 W.L.R. 2004 refused to strike out a highly overstated personal injury claim after a trial on quantum. Lord Clarke JSC said, "*The draconian step of striking a claim out is always a last resort, a fortiori where to do so would deprive the claimant of a substantive right to which the court had held that he was entitled after a fair trial*" (§ 49). Lord Clarke referred to various alternative sanctions at the court's disposal,

including adverse costs orders and reductions in the rate of interest that might otherwise have been awarded to the claimant (§§ 53-60); and said "*[t]he test in every case must be what is just and proportionate*" (§ 61).

47. Similarly, the Court of Appeal in *Michael Wilson & Partners v Sinclair* said:

> "34. Strike-out is, moreover, a sanction of last resort. In *Global Torch Ltd v Apex Global Management Ltd and Others (No. 2)* [2014] UKSC 64; [2014] 1 WLR 4495, Lord Neuberger (with whom Lord Sumption, Lord Hughes and Lord Hodge agreed) quoted with evident approval the observation of Norris J at first instance that "the striking out of a statement of case is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified". …" (§ 34)

The court criticised the single Lord Justice, who had refused to lift a stay following late payment of costs, for failing to consider proportionality:

> "… the refusal of relief from the sanction of a stay was going to lead automatically to the appeal being struck out. Yet no separate consideration was given to whether a strike-out was itself a proportionate sanction. … If it was going to be imposed as the consequence of the refusal of relief from the sanction of a stay, it was essential to factor it in to the exercise under rule 3.9. There is, however, no indication that Lewison LJ looked at the matter in those terms. When it is looked at through the lens of Denton, this consideration can readily be seen to come into the analysis at the third stage, when having regard to all the circumstances of the case." (§ 38)

48. In *Alba Exotic Fruit SH PK v MSC Mediterranean Shipping Co SA* [2019] EWHC 1779 (Comm), [2019] Costs L.R. 1115 HHJ Rawlings (sitting as a High Court Judge) declined to strike out a claim for the claimant's breach of PD 59 in having failed to apply to fix a case management conference four years and seven months after filing its claim form. Having regard to the three-stage test in *Denton* and the overriding objective, the judge held that striking out the claim would be disproportionate and was too draconian a step to take (§ 99). He held that the proportionate sanction was that the claimant should have to provide security for the defendant's costs in a higher figure than might ordinarily have been awarded (§§ 105-106).

49. Finally, Lord Dyson and Vos LJ in *Denton* stated that "*it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage*" (§ 41).

(D) APPLICATION TO THE PRESENT CASE

(1) *Denton* stage 1: seriousness and significance of breach

50. Excotek submits that the breach in the present case was neither serious nor significant. It contends as follows:

    i) Excotek acknowledges that the Particulars of Claim were served on 19 March 2021, more than one year after they were due. Ordinarily, this would be a serious and significant breach. However, the materiality of the breach must be viewed in light of the parties' agreement. If the proceedings had been stayed on the terms agreed between the parties – as (Excotek says) they very likely would have been but for the oversight of Excotek's solicitor – then there is no reason to conclude that the Particulars of Claim would have been served any sooner.

    ii) The late service of the Particulars of Claim did not imperil future hearing dates, nor did it disrupt the conduct of this litigation or litigation more generally. It had no consequence other than the need to make the present application in response to the position taken by Chaucer.

51. Chaucer submits that proposition (i) above provides a purported explanation for the failure (and is thus relevant to the second stage of the *Denton* test) but does not alter or affect its seriousness or significance. Proposition (ii) elides the materiality of the failure with its seriousness and significance: while the materiality of a failure can be a useful measure of whether a breach is serious or significant, it is not a requirement. Chaucer highlights the following passage from *Denton*:

> "…It was submitted on behalf of the Law Society and Bar Council that the test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which "neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation". Provided that this is understood as including the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense will be the most useful measure of whether a breach has been serious or significant. But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most obvious example of such a breach is a failure to pay court fees. We therefore prefer simply to say that, in evaluating a breach, judges should assess its seriousness and significance. We recognise that the concepts of seriousness and significance are not hard-edged and that there are degrees of seriousness and significance, but we hope that, assisted by the guidance given in this decision and its application in individual cases over time, courts will deal with these applications in a consistent manner." (§ 26)

52. I do not accept Chaucer's submissions. The fact that the delay in serving the Particulars of Claim was consistent with a stay that the parties had, for good reason, agreed should be put in place in my view mitigates both the seriousness and the significance of the

breach. Further, the Court of Appeal in *Denton* did not draw a hard and fast distinction between materiality and seriousness/significance. Indeed, the concepts of materiality and significance are self-evidently closely related. The passage from *Denton* quoted above makes clear that, at stage 1, both seriousness and significance are relevant. It further indicates that materiality, in the sense of the effect on the litigation in question and litigation generally, will often be the most useful measure of whether a breach has been serious or significant.

53. It is also notable that Males J in *Griffin Underwriting*, having held that the parties' purported stay was ineffective, nonetheless took some account of it in assessing the nature and seriousness of the relevant party's failure:

> "Accordingly the first step is to identify the nature and seriousness of the defendant's failure. I have held that, strictly speaking, the defendant's time for making an application to challenge jurisdiction expired on 26 April 2017. On that basis, his application made on 25May 2018was 13months late. However, in a case where the parties had agreed a moratorium, even one which I have held was ineffective, it was understandable that the defendant did not take any step to challenge jurisdiction between 25 April and 6 November 2017. After termination of the moratorium on 6 November 2017, however, there was in my judgment no valid reason to refrain from making the application to challenge jurisdiction if that was what the defendant intended to do. Realistically, therefore, the failure in question was a delay of six months in making a jurisdiction challenge. This was a serious failure." (§ 53)

54. Chaucer says it is in any event wrong to suggest that Excotek's failure to serve particulars of claim within the specified deadline did not disrupt the conduct of the litigation. Had particulars been served in accordance with the rules, a defence would have been served and the proceedings progressed. The consequence of Excotek's failure to do so is that the proceedings have lain dormant and the dispute has become stale.

55. That is in my view the incorrect counter-factual. Both parties wished there to be a stay and for the litigation *not* to progress for the time being. There were, as I have said, good reasons for that. Proceedings were commenced early, in the context of the statutory limitation period, because of an arguable contractual time limit. That limit was, however, disputed. There was also some sense in delaying proceedings pending the outcome of the anticipated dissolution of CAE, which would make clear which was the appropriate defendant. Moreover, because the proceedings were in their very early stages, there was (and is) no real risk of a stay causing disruption of any litigation timetable in the present proceedings, nor any disruption of litigation in general.

56. More relevant is to consider what would have happened if Hill Dickinson had obtained DAC Beachcroft's agreement to a form of consent order, and presented it to the court. Chaucer says it is far from clear that the court would have endorsed a consent order in the indefinite terms proposed by Excotek. Paragraphs D8.9(c) and (d) of the Commercial Court Guide state:

> "(c) Where a stay has been granted for a fixed period for the purposes of ADR the Court has power to extend it. If an extension of the stay is desired by all parties, a Judge will normally be prepared to deal with an application for such an extension if it is made before the expiry of the stay by letter from the legal representatives of one of the parties. The letter should confirm that all parties consent to the application.
>
> (d) An extension will not normally be granted for more than four weeks unless clear reasons are given to justify a longer period, but more than one extension may be granted."

57. CPR 26.4 provides that if all parties request a stay to allow for settlement of the case, the proceedings will be stayed for one month; that if the court otherwise considers that such a stay would be appropriate, then the court will direct that the proceedings, either in whole or in part, be stayed for one month, or for such other period as it considers appropriate; and that the court may extend the stay until such date or for such specified period as it considers appropriate. White Book note 26.4.1 states:

> "A stay at the request of all the parties is for one month. A stay may be for a different period where para.(2A) applies. Subject to Practice Direction 2E, an order extending the stay must be made by a judge. The extension will generally be for no more than four weeks unless clear reasons are given to justify a longer time (PD 26 para.3.2).
>
> The rules aim to encourage parties to settle disputes without judicial decisions if possible (see, e.g. r.1.4(2)(f)). Rule 26.4 is an example of this. Stay is, in effect, automatic under r.26.4(2). A stay for settlement can be ordered for more than a month. Where all parties request a stay, or the court of its own initiative considers that a stay would be appropriate, the court should direct that the proceedings, either in whole or in part, be stayed for one month, or for such specified period as the court considers appropriate. Any stay must be seen in the context of case management: it is not possible for a case to evade case management. … "

58. In the circumstances of the present case, outlined in § 55 above, there would in my view have been a reasonable prospect that the court would have considered there to be good reason to grant a longer stay than 4 weeks, and quite possibly an indefinite stay terminable by notice of the kind the parties wished to implement. Failing that, there is a good prospect that the court would have endorsed rolling extensions of (say) 4 weeks each, even if in total they spanned a period of a year.

59. Chaucer suggests that if such a stay had been agreed and endorsed, but Excotek had failed to pursue ADR (as it did), it is perfectly conceivable that Chaucer would have sought to have the stay lifted and the proceedings progressed in order to prevent the claim from becoming stale. Although that is conceivable, it does not seem to me probable. Neither Excotek nor Chaucer appears to have taken any steps towards ADR during the year in question. It would have been open to Chaucer at any stage to have

called on Excotek to progress or drop its claim, but it did not do so. Instead, it may have decided to wait and see whether Excotek woke up to the need for a consent order, and then immediately following the end of the year to ask Excotek what its intentions were.

60. Chaucer cites, as indicating the meaning of a non-serious breach, the guidance of the Court of Appeal at the first stage in *Mitchell* (§ 40), cited at *Denton* § 12:

> *"The principle 'de minimis non curat lex' (the law is not concerned with trivial things) applies here as it applies in most areas of the law. Thus, the court will usually grant relief if there has been no more than an insignificant failure to comply with an order: for example, where there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms."*

61. By contrast, Chaucer submits, Excotek seeks relief for having missed a 28-day deadline by more than 13 months, which must be regarded as an extreme failure and very far from a case of narrowly missing a deadline. Chaucer contrasts the facts of the present case with other post-*Mitchell* cases involving failure to serve particulars of claim on time:

    i) In *Mitchell* at §§ 49-51 the Court of Appeal criticised the decision to grant relief from sanctions in *Raayan al Iraq Co Ltd v Trans Victory Marine Inc* [2013] 6 Costs LR 911 where the claimant missed the deadline for service of particular of claim by two days as a consequence of an explicable oversight by solicitors.

    ii) In *Associated Electrical Industries Ltd v Alstom* [2014] 3 Cost LR 415 Andrew Smith J had little hesitation in concluding that a delay of 20-days in serving particulars of claim could not be categorised as trivial and, having regard to *Mitchell*, refused relief from sanctions: despite it being argued that this would result in the claim being time-barred and despite expressing the view that striking out was disproportionate (§§ 41-42 and 47-48).

    iii) In *North Midland Construction plc v Geo Networks Ltd* [2015] EWHC 2384 (TCC) Edwards-Stuart J held that *"[t]he rules provide a not ungenerous time of four months in which to serve particulars of claim and in this context I cannot see how a delay of over six weeks can be regarded as either minor or insignificant"* (§ 54). The judge refused relief from sanctions, despite it being argued that this would result in the claim being time-barred (§ 70), having concluded *inter alia* that the claimant's solicitors had been guilty of gross carelessness and possibly sharp practice. In a related action, he stated that a failure to serve particulars of claim until over two weeks after the expiry of a deadline, particularly when that deadline was about 10 months after the claim form had been issued, should be regarded as a serious and significant breach (§ 46), though the judge proceeded to grant relief in that instance.

    iv) In *Chelsea Bridge Apartments v Old Street Homes* [2017] 9 WLUK 12 a three-month delay in serving particulars of claim was held to be serious and significant, and relief from sanctions was refused.

v) Chaucer says the only case of which it is aware where a failure to serve particulars of claim within the specified deadline has not been treated as a serious and significant failure is *Viridor*. Popplewell J held there that: "*In circumstances where the delay which matters is measured in hours and not days and is immaterial to the future conduct of this action and to the use of this court by other court users, I cannot regard the breach as either significant or serious*." (§ 22)

62. Comparison with the facts and outcomes of previous cases, particularly pre-*Denton* cases, is generally of limited assistance. Further, none of the cases Chaucer cites on this point involved a situation where the parties had agreed in principle on a stay of proceedings (with a commensurate delay in service of particulars of claim) but the claimant had inadvertently failed to take the necessary steps to seek approval from the court of a consent order. That factor places the present case in a markedly different category from the cases mentioned above.

63. In my view, Excotek's breach cannot be regarded as trivial, because it deprived the court of the opportunity to consider whether or not the stay sought by the parties should be granted or not. However, it is nonetheless relevant to consider whether it can properly be described as serious or significant in the sense discussed in the passage from *Denton* quoted in § 51 above. In my view it was not. The delay in serving the Particulars of Claim was entirely in line with the stay that both parties were content to agree. It cannot realistically be said to have disrupted the present litigation: after all, Chaucer could have brought the delay to an end at any time. Nor has it had the potential to disrupt litigation in general. It was accordingly a breach of only limited seriousness and significance.

(2) *Denton* stage 2: reason for breach

64. Excotek accepts that the default occurred due to the mistaken belief of its solicitor that the proceedings had been stayed, and that that was an error, for which Ms Messer has apologised both to the court and Chaucer. Excotek does not contend that there was a 'good reason' for the default, but makes the point that it was an unintentional and unfortunate oversight, as opposed to a deliberate breach of the rules.

65. Chaucer complains that Excotek's approach does not explain:

i) Excotek's apparent failure to appreciate that it is not open to parties to agree an indefinite stay of proceedings and, accordingly, that it would have been necessary to serve particulars of claim by 6 February 2020 (or apply for an extension of time) in any event; or

ii) Excotek's failure to seek relief from sanctions promptly upon being explicitly reminded, on 4 February 2021, that there was no stay in place and that the claim was liable to being struck out. Rather than seeking relief immediately, Hill Dickinson took a week to respond and a further five weeks to apply.

66. As to (i), parties can agree an indefinite stay, subject to termination by notice, if the court is willing to endorse it. The point is thus merely a repetition of the fact that Hill Dickinson were wrong to fail to seek a consent order.

67. Point (ii) is an unfair one, since it attributes to Excotek Chaucer's own month-long delay in responding to Hill Dickinson's communication of 12 February 2021. It was not unreasonable, given the parties' previous agreement that the proceedings should be stayed, for Hill Dickinson to seek to rectify matters by means of a consent order. Chaucer now, belatedly, takes the point that the proffered form of order would not have been sufficient because it would not have cured the accrued failure to serve Particulars of Claim on time. However, if a consent order had been agreed and approved in that form, it is unrealistic to suggest that Excotek's claim would nonetheless subsequently have been liable to be struck out by reason of the previous failure to serve Particulars of Claim on time.

(3) *Denton* stage 3: circumstances as a whole

68. As a preliminary point, Chaucer submits that, whilst there is no limit to the factors which can be considered, the third stage should not be treated as a 'get out of jail card' permitting a party in default to fall back upon arguments concerned with prejudice and justice. Chaucer cites the following statement from *Mitchell*:

> "In line with the guidance we have already given, we consider that well-intentioned incompetence, for which there is no good reason, should not usually attract relief from a sanction unless the default is trivial. We share the judge's desire to discourage satellite litigation, but that is not a good reason for adopting a more relaxed approach to the enforcement of compliance with rules, practice directions and orders. In our view, once it is well understood that the courts will adopt a firm line on enforcement, litigation will be conducted in a more disciplined way and there should be fewer applications under CPR r.3.9." (§ 48)

69. Insofar as this passage, taken alone, might otherwise be thought to suggest that a solicitor's mistake leading to any non-trivial breach should normally lead to a refusal to grant relief from sanctions, it must now be read in the light of *Denton*. In particular, *Denton* makes clear that the question at stage 1 is not whether the breach is trivial, but its seriousness and significance assessed in accordance with the approach quoted in § 43 above. Stages 2 and 3 then consider the reason for the breach and the circumstances as a whole. There is no suggestion of any particular gloss to be applied where a solicitor has made a mistake, and indeed any such gloss would in my view be arbitrary. The fact that the breach arose from a solicitor's mistake, as opposed to other causes (which may vary widely), is a relevant consideration at stages 2 and 3 of the *Denton* test but no more than that.

70. At stage 3, the court has to consider all the circumstances of the case to enable it to deal justly with the application, including the matters identified at CPR 3.9(1)(a) and (b), i.e. the need for litigation to be conducted efficiently and at proportionate cost, and to enforce compliance with rules, practice directions and orders. I agree with Excotek that, as part of this assessment, the court should have regard to the proportionality of its response to a default in a case where there is no explicitly prescribed sanction.

71. In the present case, the late service of the Particulars of Claim has not in my view prevented the litigation from being conducted efficiently and at proportionate cost (CPR 3.9(1)(a)). If relief from sanctions is granted, Chaucer will serve a defence and the

claim will proceed in the ordinary way. The position will be the same as it would have been had the proceedings been stayed in the way the parties had agreed.

72. Chaucer objects that it will be prejudiced in its conduct of the litigation. If relief is granted, it will be required to defend a claim concerning events that occurred five years ago, and in which Excotek *"had given every impression that it had lost interest".* Further, CAE's dissolution may make it harder to obtain evidence. On the other hand, Mr Menzies' evidence, quoted in relevant part in § 27 above, does not refer to any such potential prejudice, and does not specify when Chaucer assumed the claim to have been abandoned: it is consistent with no such assumption having been made until February 2021, following the end of the diarised year of waiting. By that stage CAE had already been dissolved.

73. In addition, the nature of Excotek's claim had been set out in the amended claim form served on 6 January 2020 and the draft Particulars of Claim provided on 4 February 2020. Chaucer thus had a clear opportunity to investigate the claim, as one would expect, and does not provide evidence that it refrained from doing so.

74. It is of some relevance that the default arose from an inadvertent oversight. Excotek says it follows that relief from sanctions would not undermine the need to enforce compliance with rules, practice directions and orders (CPR 3.9(1)(b)). That overstates the matter. As Chaucer points out, the court retains a legitimate interest in enforcing compliance with rules, practice directions and orders even in relation to non-deliberate breaches. Nonetheless, some account should in my view be taken of the fact that Excotek and its solicitors did not intend to breach the rules.

75. Excotek submits that it would suffer substantial and potentially irremediable prejudice if an extension were refused and its claim struck out. Were Excotek to issue a new claim, it would incur a fresh issue fee and very likely face an application from Chaucer that the second action should be struck out as an abuse of process (see White Book note §3.9.25), leading to satellite litigation and costs. Chaucer cites the Court of Appeal's statement in *Harbour Castle Limited v David Wilson Homes* [2019] EWCA Civ 505 that:

> "the authorities establish that a proper basis for finding the second action to be an abuse will be shown if (but this is not intended to be an exhaustive list) the first action was struck out for a deliberate failure to comply with a peremptory order or for inordinate and inexcusable delay in its prosecution or for a wholesale disregard of the rules" (§ 9).

Moreover, Chaucer would be likely to contend that the claim was now time-barred pursuant to the contractual provision quoted earlier (to which Mr Menzies refers in his evidence).

76. The risk of a time bar defence is not necessarily a factor in favour of granting relief from sanctions. As Dyson LJ said in *Hoddinott v Persimmon Homes (Wessex) Ltd* [2008] 1 WLR 806:

> "Where there is doubt as to whether a claim has become time-barred since the date on which the claim form was issued, it is

> not appropriate to seek to resolve the issue on an application to extend the time for service or an application to set aside an extension of time for service. The approach of the court should be to regard the fact that an extension of time might "disturb a defendant who is by now entitled to assume that his rights can no longer be disputed" as a matter of "considerable importance" when deciding whether or not to grant an extension of time for service."

77. *Hoddinott* related to the time for serving a claim form. In the present case, the claim form had been served, and, having regard to the chronology referred to in §§ 7-33 and 72 above, it is debatable whether Chaucer has, for any relevant or appreciable period of time, been in a position to assume that it was free of Excotek's claim. Conversely, the possibility that refusal to grant relief from sanctions will result in a claim for some £770,000 becoming time barred is relevant when considering the proportionality of the court's response, bearing in mind the point made by Lord Clarke in *Summers v Fairclough Homes* (§ 46 above) that striking out is a draconian sanction of last resort. Excotek points out that if Chaucer is correct that CAE's standard terms were incorporated into the contract, then Chaucer will have an argument that its liability is in any event limited by clause 29 to a sum which, counsel indicated, was of the order of £10,000. Insofar as that point has any relevance, it could be regarded as cutting both ways: it may reduce the potential prejudice to Chaucer if the action is allowed to proceed, but may also diminish the real effect on Excotek if relief from sanctions is not granted.

78. The parties disagree about whether Excotek made its present application promptly. Chaucer submits, first, that an application would probably have been required even if Excotek had provided the draft consent order by 4 February 2020. Unless the court would have been prepared to grant an indefinite stay before 6 February 2020, the deadline for service of the particulars would have passed. As to that, I have already expressed the view that the court would have been likely in all the circumstances to approve either a stay terminable on notice, or a series of 'rolling' extensions of time for service of Particulars of Claim. Secondly, Chaucer submits that an application was certainly required on 4 February 2021. Whether or not Chaucer had agreed to sign the draft consent order that was finally provided on 12 February 2021, that order could not relieve Excotek of the consequences of its failure to serve Particulars of Claim in February 2020. As to that, I have concluded that if a consent order had been agreed and approved in that form, it is unrealistic to suggest that Excotek's claim would nonetheless subsequently have been liable to be struck out by reason of the previous failure to serve Particulars of Claim on time. As a result, I do not consider that the lapse of time from 12 February 2021 to 12 March 2021, when Excotek awaited a response from Chaucer, means that Excotek failed to apply promptly.

79. There is also a disagreement about the significance of Excotek's previous conduct of the litigation. Chaucer submits that Excotek's failure to prepare and file a consent order in February 2020 was not an isolated lapse, but rather was "*consistent with the haphazard and dilatory way in which the claim had been advanced from the outset*". I consider this submission to have limited force:

    i) Chaucer points out that between June 2017 and July 2019 Excotek sought 14 extensions of time to commence the proceedings. Where a reason was given for

the request, it was simply to allow for 'further investigations', and the claim was not otherwise pursued.

ii) Chaucer criticises Excotek for issuing proceedings on 12 September 2019, only two days before the expiry of an agreed extension: but Excotek did nonetheless issue the claim in time. The statutory limitation period for the claim against CAE would not have expired until October 2022 and the parties had agreed an extension until 14 September 2019 on the contested hypothesis that CAE's standard terms (which contained the contractual nine-month time bar) were incorporated into the storage contract.

iii) Excotek named the wrong insurance defendant in the original claim form, apparently believing the syndicate's managing agent to be the correct defendant. After DAC Beachcroft clarified the position, Excotek amended the claim form pursuant to CPR 17.1(1) and served it on Chaucer. Although this took several months, the error pre-dated, and was corrected before, formal service of the proceedings and cannot have given rise to any real prejudice to Chaucer.

iv) The claim form was not served until 6 January 2020: however, that was still six days before expiry of the period for serving it.

v) On 3 February 2020, three days before the deadline for service of particulars of claim (and allowing insufficient time for an order to be approved in any event), Excotek asked Chaucer to agree an indefinite stay of the proceedings but, despite being expressly asked to do so, did not prepare (let alone file) a draft order specifying the terms of the proposed stay or prepare reasons to persuade the court to grant such an order. This is the error giving rise to the present applications.

vi) Chaucer suggests that there was a lack of enthusiasm on the part of Excotek in prosecuting the proceedings, referring *inter alia* to Excotek's request for a potentially long stay and its inaction during the period of the putative stay. Excotek makes the point that few parties embark on commercial litigation with unalloyed enthusiasm, and Excotek had made clear its preference to resolve this dispute via ADR if possible. That does not explain Excotek's failure to take any steps towards ADR during the relevant year. Nonetheless, the fact remains that both parties agreed to the stay, and were equally inactive during the year.

80. Taking all these matters into account, including the limited seriousness and significance of the breach, why it occurred, and the circumstances as a whole, I have come to the conclusion that it would be fair, just and proportionate to grant relief from sanctions and the retrospective extension of time sought for service of the Particulars of Claim. In my view the breach, whilst not trivial, was not especially serious or significant. The delay in serving the Particulars of Claim was consistent with the gist of the parties' (reasonable) consensus and has not been shown to have had adverse consequences for Chaucer, or the court's processes in general, such as to make it appropriate to refuse relief from sanctions (thus bringing the claim to an end). There was no undue delay in Excotek making the present application.

(E) EXCOTEK'S ALTERNATIVE APPLICATION FOR A STAY

81. In the alternative, Excotek applies for a stay of the proceedings with effect from 4 February 2020 pursuant to CPR 3.1(2)(f) or the court's inherent jurisdiction. The purpose of this stay would be to give effect to the parties' agreement that the proceedings should be stayed.

82. Since I have decided to grant an extension of time for service of the Particulars of Claim, I do not consider it necessary or appropriate to order a stay. If the parties wish, in the light of this judgment, to seek a prospective stay of the proceedings of any kind then it is open to them to put forward an appropriate consent order for consideration by the court.

(F) STRIKE OUT

83. Chaucer contends that Excotek's claim should be struck out under CPR 3.4(2)(c) for its failure to serve the Particulars of Claim within time.

84. I have considered the relevant principles applicable to striking out in §§ 45-49 in the context of relief from sanctions. It is common ground that these are essentially similar to those that apply on Excotek's application for an extension of time. Hence, for example, in *Alpha Rocks Solicitors v Alade* [2015] EWCA Civ 685, [2015] 1 WLR 4534 the Court of Appeal when considering an application to strike out (for abuse of process, arising from exaggerated bills of costs based on fabricated documents) indicated that there was an analogy with the *Denton* principles (§ 23). The court added that:

> "The cases I have mentioned were right to emphasise in the context of striking out what is effectively factor (a), namely the need for litigation to be conducted efficiently and at proportionate cost. The need for compliance with rules and orders is equally important. But it must be remembered that the remedy should be proportionate to the abuse. In the context of this case, it is also worth emphasising before I turn to the particular circumstances that litigants should not be deprived of their claims unless the abuse relied on has been clearly established. The court cannot be affronted if the case has not been satisfactorily proved. This aspect is obviously inter-related with whether or not a fair trial remains possible. Moreover, the fact that solicitors have signed bills that appear to be inaccurate or worse is obviously a matter for concern, but that concern does not abrogate the need for the issue of whether the bills were indeed inaccurate to be fairly resolved between the parties, if that remains possible." (§ 24)

85. In the present case, the findings and conclusions I have made and reached in relation to relief from sanctions also mean that it would not be just or proportionate to strike out Excotek's claim for failure to serve the Particulars of Claim on time.

(G) CONCLUSION

86. For all these reasons, I shall grant the retrospective extension of time sought for the service of the Particulars of Claim and dismiss Chaucer's strike out application.

87. I am grateful to counsel on both sides for their clear and helpful exposition of the principles, facts and arguments.