JUDGMENT : Mr Justice David Steel: Commercial Court. 24th April 2008

1. In this application, the defendant underwriters seek an order striking out the action brought against them by the claimant shipowners on the grounds of abuse of process and/or delay. In the alternative they seek an order imposing conditions on the continued prosecution of the claim and, in any event, security for their costs.

2. The striking feature of the present state of play is that, whilst the material events took place in 1997, the claim form was not issued until near the end of the limitation period and even now the case has only advanced as far as the close of pleadings. Indeed, although the Claimants served a reply in March 2005, thereafter no further step in the action was taken until August 2007 when they sought to fix the CMC, prompting this application.

Chronology

3. It is necessary to rehearse in some detail the background. The relevant insurance policy incepted for 12 months from 31 October 1996. It covered two vessels: ALIKI A and ANNA MARIA H. By its terms it covered 70% of the insured valued in respect of total loss. The enumerated insured perils included latent defects and crew negligence (subject to no want of due diligence on the part of the managers). As regards a CTL calculation, only the costs relating to a single accident were to be taken into account.

4. ALIKI A suffered an engine failure in October 1997 whilst on a laden voyage from Rouen to Umm Qasr. She was towed to Piraeus. She was then arrested by various creditors and eventually sold by court auction in April 1999 for scrap.

5. In December 1997, the cargo-owners began proceedings against the Claimants in Scotland. This was followed by a default judgment in the amount of $1 million. In the meantime this court had also granted a freezing order to the cargo-owners over any proceeds of the policy, cargo-owners having put up counter-security in the form of two bank guarantees in the total sum of $500,000.

6. During this period, the Claimants and their mortgagees sought to pursue a claim on the policy. The Claimants wished to recover for a CTL. The mortgagees were disposed to be content with less. On 25 October 1999 the Claimants, the owners of the two vessels and the mortgagees entered into an agreement whereby on receipt by the bank of $1.35 million (the sum which underwriters were prepared to pay) the indebtedness of the two owners would be released.

7. On 18 October 1999, the policy was endorsed to reflect this payment in respect of unrepaired damage but leaving the Claimants "*free to proceed with presentation of a CTL claim in due course if he so wishes*."

8. Nearly a year later, on 24 October 2000 the Claimants entered into a settlement agreement with the cargo owners. The structure of the settlement was that the cargo-owners would receive US$100,000 out of any proceeds of recovery on the hull policy at which stage the Claimants would deliver up the guarantees posted under the freezing order. The machinery for this purpose was that the Claimant's brokers, Marsh, gave an undertaking to pay out the first $100,000 to the cargo-owners.

9. The broker concerned, a Mr. McMenamin, moved to Willis in July 2002 (but nothing turns on this). He then entered into negotiations with Mr. Thorne, the lead syndicate's claims manager. At this stage, on the underwriters' case, the Claimants through Mr. McMenamin were advancing, in addition to the hull total loss claim, a G.A. Claim in the sum of $1 million.

10. In the result, the negotiations resulted in an offer recorded in a file note as follows:
"*'ALIKI A'*

U/us have reviewed the file in great detail and further to numerous meetings with U/us technical consultant (Fred Emond) and the brokers. U/us are prepared to offer a further (and final) payment of $1,000,000 (for order) without prejudice: in respect of all claims arising d.c.o.p. (incl any G.A. claim(s)) Vessel to be considered a payment is subject to vessel being declared a total loss (compromised). Release to be obtained from owner. Subj agreement of XCS."

11. The file referred to included, it can be assumed, various reports to underwriters from the Salvage Association, the last of which dated 15 February 2001 was written by Mr. Emond. These reveal that there were three heads of damage relied upon as supporting the CTL calculation; main thrust bearing damages, damages to the crankshaft gear collar and fractures in the A frames.

12. Mr. Emond stated in the report that he was unconvinced that these three heads of damage were a result of the crew operating the engine incorrectly on 5 cylinders as had been suggested by owner's technical consultants. In short Mr. Emond concluded:

i) the main thrust bearing damage was the result of a long term oil circulation problem;

ii) the main crankshaft gear drive damage was the result of long term wear;

iii) the A frame cracking was also long term wear.

13. However a senior MAN engineer had expressed the opinion in July 1998 that all the damage was a result of excess relative movement because of slack tie rods. Mr. Emond expressed grave doubts about this but accepted that the owners could legitimately argue that this analysis was correct.

14. On 15 April 2003 Mr. Thorne, who was under the (mistaken) impression that the claim had actually settled at the level offered realised that it had not been processed. He wrote to Mr. McMenamin on 28 May warning that if the

owner did not accept the $1 million in full and final settlement within 21 days "the offer will be withdrawn". In the event there was no acceptance nor any express withdrawal.

15. In the meantime, the cargo-owners had heard about the offer and sought a third party debt order over the sum. In their evidence on this issue, the underwriters maintained that the claim had been compromised: the Claimants denied that a settlement had been reached. In July 2003 the interim order that had been made was discharged and the Claimants were awarded their costs of £10,000.

16. On 24 September, Holman Fenwick & Willan ("HFW") the Claimants' solicitors asked for an extension of the six year time limit. The response from the defendants' solicitors, Messrs Stephenson Harwood (SH) was as follows:

"We refer to your fax of 24 October requesting a six month extension.

Settlement was concluded between our respective clients on 12 July 2002 which thus draws a line in respect of the underlying merits of your client's claim. In such circumstances, your client's request for an extension is unnecessary and is thus declined."

17. The claim form was issued on 8 October 2003. This claimed US$2.8 million in respect of the CTL and $1.38 million in respect of G.A. and/or sue and labour expenses. It was served on 5 February two days before it expired.

18. Particulars of Claim were due on 5 March 2004 but that day the Claimants issued an application for a 52 day extension. The court ordered an extension of about 1 month. The Particulars were duly served on 4 April 2004. They however did not identify the relevant insured peril and were rather vague on the date on which the peril was said to have operated.

19. In response the underwriters sought further information under CPR Pt. 18. An extension of time for a response was agreed but not complied with. After expiry, a consent order was made extending time further but again was not complied with. They were eventually served on 18 June. They were particularly notable in reducing the G.A./sue and labour claim by $1 million to $372,000. The underwriters complain but no explanation has ever been forthcoming as to how the earlier figure had been put forward.

20. On the basis that the further information was inadequate, the underwriters issued a strike out application in July. This prompted the service of further information by the Claimants and the application was not pursued.

21. The Defendants did however pursue an application for security for costs. This however was dismissed by Cooke J on 30 July 2004. In his judgment he recorded Mr. Thorne's view that a deal had been done (although no decision whether to plead the settlement had been taken). He went on:

"The point, however, in my judgment is essentially this, and it goes to the question of the discretion of the court as to whether or not to make an order for security for costs. Whether or not the underwriters choose to plead the point or not, they have essentially recognised that the sum of $1 million or thereabouts is due and no-one thinks they have settled a case for $1 million without having taken the trouble to investigate and consider the matter and having decided whether or not sums are due and owing under the policy."

22. The defence was served on 10 August. It did not allege that any settlement had been concluded. It contained an explanation of the background to the offer and why it did not constitute any admission of liability. Further, it went on to contend that even if there had been an agreement it was vitiated by a false representation as to the G.A. claim.

23. On 22 September Clarke LJ dismissed an application by underwriters for permission to appeal Cooke J's refusal to grant security for costs. The ruling reads as follows:

"1. The judge was to my mind entitled to exercise his discretion by refusing the application for security for costs as matters stood when the application came before him.

2. At that time the underwriters had not made it clear whether or not they intended to rely upon the agreement which they had asserted had been made between the parties in which, albeit on a without prejudice basis, they offered US$1,000,000 to settle the owner's claim. The judge observed that counsel for the underwriters was sitting on the fence on the question whether to plead reliance upon the alleged agreement or not, although it appeared to him that a view must have been taken on that question. The underwriters had not yet pleaded to the claim when the application was before the judge. The judge thus proceeded on the basis that underwriters had essentially recognised that the sum of US$1,000.000 was due, since they must have investigated the matter and decided that sums of that order were due under the policy.

3. It seems to me that the judge was entitled to treat the matter in that way as the case stood when the matter was before him. I do not think that there is a real prospect of an appeal against that decision succeeding.

4. The only point that has troubled me is whether the judge's decision or reasoning might have the effect of precluding applications for security for costs in the future, given his expression of the view that, whether underwriters pleaded the agreement or not, 'what has taken place so far is tantamount to a recognition that a considerable amount of money is due to the claimants'. However, I have reached the conclusion that any new application would have to be considered on its merits on the basis of the material available to the court at that time. I note in this regard that underwriters have now pleaded their case and that they have given some explanation of their change of tack. Provided that the underwriters' changed position is fully explained to the court in the event of a future application for security for cost, I do not see why the decision of the judge based on limited material before him in July should prejudice such an application.

5. In all the circumstances I have reached the conclusion that there is neither a real prospect of success nor any other compelling reason for granting permission to appeal."

24. The underwriters served an amended defence in November 2004 followed by further information in February 2005. The Claimants served a reply on 23 March whereafter no steps in the action were taken until 8 August 2007 when they sought to fix the CMC.

The evidence

25. Before turning to events after March 2005 I should record the evidence before the court. It included the following:
    i) a statement of Mr. Simon Moore of Stephenson Harwood in support of the defendant's application;
    ii) a statement of Mr. Nicholas Austin of Clyde & Co, the Claimants' solicitors in place of HFW, opposing the application;
    iii) a statement of Mr. John Hoare, a broker from H.W.Wood who was retained in about March 2005, filed on behalf of the Claimants;
    iv) a statement of Mr. Thorne, the defendant's claims manager in response to Mr. Austin's and Mr. Hoare's statements.

26. There were also bundles of correspondence before the court. Most were derived from the files of HFW including what would otherwise be privileged material.

27. It is not of course possible to resolve the differences of recollection between Mr. Hoare and Mr. Thorne. Nonetheless, these disparities are somewhat at the margin of the issues and the broad picture remains clear enough. However one aspect remained highly contentious. The Claimants contended that a misunderstanding arose somewhere in their chain of communication to the effect that there was an agreement or consensus between the parties that the action should not be progressed pending the outcome of further negotiations (which were materially delayed by the apparent need to recover the original policy documents held by Marsh).

28. The defendants submitted that the Claimants had failed to give any adequate explanation of any such misunderstanding or when or how such a misunderstanding had arisen. Whilst it was accepted that HFW did not realise that no such stay or understanding was in play, the contemporary material, it was contended, was only consistent with the Claimants itself, anxious to avoid progressing the action, misleading its solicitor (and the court) by suggesting that the defendants were content for the action to lie fallow.

The delay

29. As already mentioned, the Claimants instructed HHW as its broker in March 2005 in place of Marsh/Willis. The relevant individual was Mr. Hoare. Mr. Hoare briefly discussed the claim with Mr. Thorne in March. It seems likely that this meeting led to a request to Mr. Thorne to formalise his role. Certainly that is the Claimants' case.

30. While Mr. Thorne has no recollection of it, it also seems likely that there was a further meeting either in April or May or both. It was Mr. Hoare's evidence that at that stage Mr. Thorne said that no settlement discussions could take place until Mr. Hoare had the original policies. Mr. Thorne does not recollect this let alone giving any encouragement to the idea of settlement.

31. I am prepared to accept Mr. Hoare's account for present purposes: that is to say that he understood that there was a need to obtain the policies before any question of settlement discussions (however remote) could arise. Such discussions were also, he appreciated, subject to the answering of further questions which were unspecified but probably related to the G.A claim.

32. The need for obtaining the original policies may have been fortified by a comment by Mr. Johnston of HFW London in early April:
    "Just one further point, I believe that it will be helpful if Mr. Hoare's appointment is formalised in so far as he can make arrangements to ensure that, if a settlement is achieved, he is in a position to collect settlement monies. I just doubt that hull and machinery underwriters will be willing to discuss settlement until Mr. Hoare can confirm that he can actually collect monies on behalf of owners in the event settlement is achieved."

33. In his statement, Mr. Hoare agrees that there was no direct discussion with Mr Thorne of a stay of the proceedings. What he says is this:
    "I can well understand if the Owners obtained the impression that it did not make great sense for the court proceedings to be advanced at full speed in the meantime, especially given Mr Thorne's positive approach to discussing settlement once I had obtained the original policies and the outstanding questions answered."

34. The finger of suspicion as to the source of the misconception seems to point at Mr Hoare. It may well be that Mr. Hoare went away simply assuming (a) that the task of obtaining the policies would not be onerous and (b) that in the meantime neither side would regard it as sensible to progress the action. In this connection, whilst the defendants point out that no statement from Mr. Hallak has ever been tendered nor any disclosure of his email account made, nonetheless, when it emerged in August 2007 that underwriters were denying that there had been any form of standstill agreement, it is notable that Mr. Hallak commented as follows:
    "I read with great astonishment all the contents of this message and its attachments.
    Before considering your reply to opponents can you please confirm our understanding for your phrase about misunderstanding in owners' camp

That John Hoare information to us all this period was not exactly the one which coincide with the reality which took place between him and Thorne?

Is it the truth that there was standstill agreement or not? We were always told that there was.

If there was then why not declare it clearly all of us H.W.Wood, HFW, Owners?

If it is not then what is the reality of what happened between Hoare and Thorne?

....

We believe a CMC should be immediately set. Who do you think should make it HFW still or eventually the new solicitors?"

35. Reverting to the chronology, the owners' managing agents wrote to HFW Piraeus on 18 May expressing the owners' view that the case could make faster progress. Mr. Johnston sent a reply (on which underwriters placed considerable reliance) on 19 May.

"Noted, however we should point out that as explained to you before, the Court has not yet fixed a hearing date for the Case Management Conference. Further, whilst we would seek to expedite the proceedings, we have previously indicated to you that this would mean the disclosure stage would quickly be upon us thereby increasing the litigation costs significantly. In this regard, we have understood that your preference was not to actively seek to progress the litigation until such time as settlement is explored through HW Wood. Please let us know whether you would like us to proceed on a different basis."

36. The underwriters say that this letter makes it clear that the owners had given instructions (which were never withdrawn) to the effect that the claim should not in any circumstances be prosecuted since they had no intention of bringing it to a conclusion. The Claimants says that it simply exhibits a preference for not progressing the action until settlement terms were fully explored. Whatever may be the true position, this e-mail is at least inconsistent with any suggestion that the owners were aware throughout that no standstill arrangement had been reached yet chose to mislead HFW and the Court by asserting that there was.

37. Efforts in July 2005 to substitute an undertaking to cargo interests by HFW in place of Marsh failed for some reason to achieve fruition. The Claimants at the same time embarked on negotiations with the cargo owners seeking to recover the costs order in their favour and to obtain a reduction in the $100,000 settlement figure, together with "remuneration" for returning the bank guarantees posted under the (now lapsed) freezing order.

38. In August 2005, the managing owners wrote a long letter to cargo interests with this comment about the proceedings:-

"Turning to your reference to the expectation that the hull underwriters are likely to reimburse the owners for "a huge amount for the loss of your vessel" we would simply point out that (a) there are currently proceedings pending against hull underwriters in connection with the hull claim before the London High Court and the matter has so far advanced only up to close of pleadings (b) hull underwriters strongly contest the claim on various grounds and have also expressly denied the existence of a settlement in the sum of US$1,000,000 which Marine Law/Barry Young had previously alleged in their attempt to attach the funds in the hands of the underwriters and brokers (c) the court proceedings are expected to last at least another 2-3 years without even taking into account the possibility if an appeal."

39. There then started in October a series of communications from the court to the Claimants' solicitors asking for a written progress report on the action. During a subsequent email exchange within HFW on 12 October it was recognised that, absent some good reason to the contrary, it would be necessary to fix a CMC.

40. In the wake of further requests for an update, HFW sent the following email to the court on 21 October:

"As explained to you, our clients are currently preparing various aspects of the case (some of which are at the request of Opponents) in order to ensure that settlement negotiations get underway as soon as possible. They have been delayed somewhat by third party cargo interests (who are in liquidation) being rather difficult and slow in responding on one particular issue but it is hoped that that aspect will be dealt with in the next couple of weeks. The Defendants are aware of the Claimants intending to discuss settlement with them and we understand that they are also keen for those settlement discussions to take place.

In such circumstance we would hope that it would be unnecessary to incur further costs preparing for and attending a CMC just at the moment but we are hopeful that settlement discussions will succeed. We would suggest that the matter be reviewed in the New Year."

It is to be noted that this reply, as with all later responses to the Court, was not copied to the defendants' solicitors.

41. In the meantime, Mr. Hallak had been complaining to Mr. Johnston about the delay. The response from HFW also dated 21 October was to explain that HFW's hands were tied until the policies were released and thus the litigation had come to a *"standstill"*. It was also pointed out that absent answers to the questions about the G.A. claim it would be difficult for settlement discussions "*to produce a result*".

42. On 1 November, Mr. Johnston sent an email to Mr. Hallak in which he suggested that, given the delay in completing settlement discussions with cargo owners, Mr. Hoare might discuss with the defendants "a formal stay of the court proceedings" for a few months. He went on:

"I mention this because the court have recently been asking why the proceedings have not moved forward and it seems both parties want the settlement discussion to take place."

43. Mr. Hallak responded by expressing doubt whether there was any need to obtain the original policies as a pre-condition to the settlement discussion. He went on:

"Now as regards the formal agreement to stay the proceedings, we rely on your assessment of the matter but we would also remind you that while in your office in London we talked about setting a date for a Case Management Conference which can be used as a tactical move to show to underwriters the owners' determination."

44. On 24 November, Mr. Hallak sent a chaser asking for advice on the timing for a CMC. No reply appears to have been sent.

45. In the meantime, on 9 November, SH presciently wrote to inquire whether HFW had instructions to proceed or whether it was intended to withdraw the claim. No answer was sent (nor for that matter did SH repeat their inquiry).

46. By 2 December the Claimants had reached an agreement with cargo interests to return the bank guarantee against a payment of $35,000. There remained issues with regard to the outstanding costs order and the payment out of $100,000 from any recovery on the hull policy.

47. On 5 January, the court wrote again to HFW about the situation relating to the action. Their reply, again not copied to SH, was dated 10 January 2006:

"At present, our clients are involved in negotiations with cargo interests who are not a party to this action, but are involved in related disputes. Once these disputes have been resolved our clients will be in a position to conduct the long anticipated talks between themselves and the Defendants. The Defendants are aware of the position. "

48. The Claimants say that this is consistent with the misunderstanding that had arisen. Be that as it may, whilst the court was being assured that the underwriters were "aware" of the position, the reality was that, even if they were aware of the potential for talks, underwriters were unaware of the dispute with cargo owners and unaware of the difficulties in procuring the original policies. Indeed Mr. Hoare had not spoken to Mr. Thorne for over 18 months.

49. On 8 February 2006, Mr. Johnston sent a further email to Mr. Hallak. He described the litigation as "effectively suspended" but warning that there was pressure to progress it with the consequent risk of incurring of substantial costs. He expressed his understanding that if settlement discussions with cargo owners were successful, "the indication is that hull underwriters will discuss settlement with John Hoare providing there is confirmation that he has full authority and can collect the settlement monies."

50. Mr. Vassos (of HFW Piraeus) sent an email to Mr. Hallak on 15 March 2006 seeking to persuade him to be more flexible in his negotiations with the cargo interests. The primary reason for bringing matters to a head was spelt out as follows:-

"The lack of significant progress for what would now almost a year sends underwriters the wrong message about owner's wish to pursue the claim and further there is already considerable pressure from the court to list the matter for directions…."

51. The cargo disputes were eventually settled (involving payment of a figure of $57,500) in April 2006 but it took until December for the agreement to be executed. In a schedule for the settlement agreement it was agreed that Marsh would provide the Claimants with the original policies.

52. In the meantime, the Court had written yet again on 26 June 2006 for an update. The reply given in a letter dated 29 June 2006 from HFW was as follows:

"It has taken a long time but we are pleased that we can finally advise you that settlement between our clients and cargo interests has now been concluded (subject to finalisation of terms). As soon as the wording of the Settlement agreement has been agreed then our clients will be able to commence the long anticipated talks between themselves and the Defendants. The Defendants are not yet aware of the settlement with cargo but as soon as the Settlement Agreement has been signed with this entity then they will be informed….Please do not inform them of this at this stage."

In the spirit of the last sentence, the letter was as usual not copied to SH.

53. Once again in September, the court asked what was happening. Another chaser was sent in November. The reply, a letter dated 15 November 2006, referred to the slow progress of the settlement discussions and explained that the Claimants was "hesitant to disturb them by incurring costs in legal proceedings if it can at all be avoided."

54. The court tried again in February 2007. The answer from HFW in an email dated 21 February 2007 was:

"We refer to our telephone conversation this morning and write to confirm to you that we understand that our clients in this matter are in settlement discussions that continue with the Defendants direct. The settlement discussions are not being handled at solicitor/solicitor level. I understand that both parties are happy for these discussions to continue and for the High Court litigation to remain suspended at this time."

55. This information from wherever derived was clearly misleading in suggesting that discussions were underway with the defendants. It is true that the original policies had been obtained but Mr. Hoare had yet to make any attempt to contact Mr. Thorne.

56. On 15 March Mr. Hoare had a brief meeting with Mr. Thorne at a coffee shop. Again there is a disparity in their recollection of the content of their conversation but it is common ground that Mr. Thorne exhibited no interest in

settling the claim. However, a few days later, SH somehow got wind of the fact that HFW had been corresponding with the court without copying them in and asked the court for copies of the letters and other messages. Gloster J approved their release on 15 April 2007.

57. Meanwhile on 4 April Mr. Thorne told Mr. Hoare by email that "*the legal process should go forward*" for which purpose the outstanding queries by underwriters should be dealt with. This did not provoke any response.

58. On 5 July 2007 SH wrote to HFW taking issue with what HFW had said in their correspondence with the court. In their reply of 10 July HFW said that it was the Claimants' understanding from as long ago as May 2005 (following Mr. Hoare's meeting with Mr. Thorne) that it had been agreed the incurring of legal costs should cease while settlement discussions took place. For the purposes of these discussions, it was said, underwriters had insisted on production of the original policies and it was this process which had taken so much time but "*we have kept the court informed on a regular basis as you will be aware*":-

"We also understand that there have been a few brief and informal discussions between H.W.Wood and your client's lead underwriters Claims Manager during this period, although we are not aware of the full content. We had assumed that therefore your clients had been kept up to date, albeit perhaps not fully informed of everything happening on the Claimants' side."

59. Not surprisingly SH raised a number of questions in response to this letter about the alleged misunderstanding as to the existence of an agreement and about the content of the correspondence with the court. It was in particular pointed out that, far from a few brief meetings, Mr. Hoare and Mr. Thorne had not met at all between May 2005 and March 2007.There ensued an email discussion on the Claimants' side as to the state of play: this included the email referred to earlier from Mr. Hallak raising the question whether Mr. Hoare's report of his discussion with underwriters in 2005 was accurate.

60. On 6 August 2007, the Claimants wrote to underwriters (and to the court) apologising for the impact of the misunderstanding on their part which may have arisen because "it was lost in translation or interpretation by those in Greece." The CMC was fixed on 8 August 2007. The application to strike out the claim was taken out on 10 October 2007.

The Law

61. The underwriters advance their submissions that the claim should be struck out under two headings:

i) that there has been an abuse of process and, accordingly, whether or not it is possible to have a fair trial and whether or not the underwriters have been prejudiced, the claim should be struck out under the Court's inherent jurisdiction;

ii) that the claim should be struck out under CPR 3.4(2)(c).

62. There is a substantial overlap between these two propositions: indeed CPR 3.4(2)(b) provides for the strike out of a statement of case if it is "*an abuse of the court's procedures or is otherwise likely to obstruct the just disposal of proceedings*". As Cooke J observed in ***Nomura Int. Plc v. Granada Group Ltd*** *[2007] 2 All ER (Comm) 878*:-

"Whilst therefore Mr. Iain Milligan QC, acting for Nomura, is right to say that the starting point must be the CPR and in particular CPR 3.4.2(b) which refers to "an abuse of the courts' procedure", it is plainly right that, when considering abuse, regard should be had to the principles which the court has previously applied in considering when an abuse of process has taken place. The underlying thought processes that informed those judgments are thought processes which must be taken into account when considering whether there has been misuse of the court's procedure under the CPR, particularly in the context of the institution of proceedings where limitation is a potential issue."

63. Particular emphasis was placed by the underwriters on ***Grovit v Doctor*** *[1997] 1 W.L.R. 640* where it was held that, although there were links between abuse of process and the dismissal for want of prosecution, the former could always give the rise to a strike out irrespective of the matter of delay. It followed for instance that the commencement of litigation which the claimant has no intention of bringing to a conclusion may give rise to the action being struck out whether or not there has been inordinate delay and whether or not it is possible to have a fair trial.

64. As Lord Woolf explained in ***Arbuthnot Latham Bank Ltd v Trafalgar Holdings*** *[1988] 1 W.L.R. 1426 at p. 1437*:

"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. As case flow management is introduced, it will involve the courts becoming involved in order to find out why the action is not being progressed. If the Claimant has for the time being no intention to pursue the action this will be a wasted effort. Finding out the reasons for the lack of activity in proceedings will unnecessarily take up the time of the court. If, subject to any directions of the court, proceedings are not intended to be pursued in accordance with the rules they should not be brought. 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. The courts exist to assist parties to resolve disputes and they should be used by litigants for other purposes."

65. Another form of abuse is wholesale disregard of the rules of court. In reality if (as it is suggested here) proceedings are commenced but are deliberately not pursued this will necessarily involve disregard of the rules given the timetable for case management under the rules. Nonetheless it represents an important and discrete consideration:

"Although inordinate and inexcusable delay alone, however great, does not amount to an abuse of process, delay which involves complete, fatal or wholesale disregard, put it how you wish, 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": ***Chorariа v Sethia [1998] C.L.C. 625*** per Nourse LJ at p.363

66. The underwriters asserted that the Claimants had abused the process of the court in three respects:

i) they has issued proceedings without any intention of proceeding to trial;

ii) having done so there was wholesale disregard of the obligation to fix the CMC;

iii) this in turn was achieved by the dispatch of misleading letters to the court sent with the intention of postponing the CMC.

67. I take these propositions in turn:

i) It is clear that the Claimants had little enthusiasm for expending costs on pursuing their claim. The claim form was issued on the eve of the expiry of the time limit. Indeed a 6 month extension was sought but refused. But following service of the reply (and the consequent close of pleadings) in March 2005, there was obviously some (albeit perhaps mistaken) expectation on the Claimants' part that arrangements might be made for settlement discussions between Mr. Hoare and Mr. Thorne. I detect no basis for finding that the Claimants had no intention for progressing the action come what may. The owners were complaining about the delay in August 2005 and again in October. They were pressing for advice on the timing of a CMC in November 2005. The first reaction to the problem when it came to the forefront in August 2007 was to urge a CMC.

ii) The failure to fix a CMC was by any standard prolonged: see CPR r.10.2. But I am not persuaded that the breach of the relevant rules was intentional and contemptuous. I have already dealt with this issue in part. The contemporary internal correspondence between the owners and their solicitors shows that the requirement of a CMC was very much in mind. It may be that finances were such that if the owners were to fix a CMC purely as a tactic, their bluff might have been called. But legitimate concern to avoid the expenditure of legal costs cannot be classified as a refusal to heed the rules. The contemporary material is consistent with the owners having acquired a "misunderstanding" that the parties had in effect agreed a standstill. Whilst the full picture may not have emerged, for present purposes it would seem clear enough that the owners had got the impression from Mr. Hoare that the underwriters were happy for the action to lie fallow pending a further presentation by Mr. Hoare. That impression was passed on to HFW. Given the earlier offer by underwriters, it is perhaps not surprising that the Claimants and their advisers were optimistic as to the outcome. Thus, whilst it was recognised that there was no "formal" stay, that was treated as acceptable. I also accept that it was understood (rightly or wrongly) by Mr. Hoare that it was a precondition to any discussion that he should have the original policies. At the least this would demonstrate his apparent authority from the owners. The fact that the owners expended so much effort in obtaining the policies supports this contention. The delay that ensued was thus largely attributable to this somewhat barren exercise.

iii) This all elides with the correspondence with the court. It is fairly clear (and indeed it was the underwriters' case) that any misunderstanding on the part of the HFW was derived from the owners. I have already acquitted the owners of any intention to mislead and it follows that HFW were not participants in any such deception. Whilst it is very unfortunate that SH were not copied in (a matter to which I will revert), the whole run of correspondence is consistent with HFW's recognition of the implications of the rules and the need to justify any non-compliance.

68. Thus I reject the submission that the claimants' conduct of the proceedings was an abuse of process in the sense advanced by the underwriters although all the matters discussed above are material to the alternative way in which the application to strike out is advanced to which I now turn.

Delay

69. As regards the question of delay I was reminded of a number of authorities including ***Biguzzi v Rank Leisure plc [1999] 1 W.L.R. 1926***, ***Purdey v Cambran*** *Court of Appeal 17 December 1999*, ***Amadeus Ltd v Gibson:*** *Neuberger J., 2 February 2000* and ***Asiansky Television v Bayer Rosin (a firm) [2001] EWCA Civ 1792***. It is not necessary to cite any particular passage. There are, in short, no hard and fast rules. The essential task is to make a broad assessment as to what the just order should be having regard to all the circumstances of the case.

70. The following seem to me to be the most relevant circumstances:

i) <u>The totality of the delay</u>

The casualty occurred in 1997. Thus, since the action has only reached the stage of pleadings, there is no realistic prospect of any trial taking place before a date 12 years after it occurred. That said, 6 years of that time is made up of the limitation period. It is entirely legitimate to delay the service of proceedings within that period, perhaps the more so where, as here, settlement proposals in a substantial sum had been aired by the defendants. But by the same token, I accept that where a claimant delays service of the proceedings until the expiry of the limitation period he can properly be expected to take rigorous steps to prosecute the action thereafter. It follows that, whilst it is fair to say that the Claimants' pleaded case took some time to emerge, the primary focus of any complaint about delay must relate to the 2 1/2 year gap between March 2005 and August 2007 in fixing a CMC as required by the rules. But this in turn brings back into consideration what I have already said about the misunderstanding.

ii) Communications with the court

It is particularly unfortunate that the letters written by HFW were not copied to S.H. Indeed in one of them the Court was expressly invited not to give any notification to S.H. Whilst this cannot be laid directly at the door of the Claimants, it is a factor which it is proper to take into account.

The significance of the default can be derived from the practice of the court in regard to ensuring a prompt CMC appointment:

(a) The IT available to the Commercial Court registry enables it to track the due dates for fixing a CMC.

(b) Once the deadline is reached but no appointment has been made, a letter or email is dispatched to the Claimants' solicitors asking for information. If no answer is received, a chaser is sent.

(c) If no response is received, the CMC is fixed automatically. If there is a response, its contents are reviewed by the registry. If the response raises any apparent difficulty or gives rise to a dispute between the parties, the matter is put before a judge.

There can be little doubt that the misunderstanding would have been unearthed if SH had been copied in to the replies. The justification for not doing so is said to be that it was assumed that SH knew of the "understanding" from their clients which is perhaps no more than the reverse side to the coin of the misunderstanding. More troubling however is the suggestion that Mr Johnston was anxious to avoid SH stepping in to "gee-up" the underwriters to terminate the "stay" and thereby jeopardise the hopes for settlement. Quite why such a view was prevalent remains very obscure but it does little credit to the claimants' solicitors.

iii) The defendants' stance

It was submitted by the underwriters that it was legitimate for them not to exercise their liberty to fix the CMC under CPR PD 58.10.5. I disagree. It was not appropriate to let sleeping dogs lie. To the contrary, the parties are under a duty to help the court to further the overriding objective to deal with the case expeditiously and fairly: see CPR 1.3 and ***Asiansky Television v Bayer Rosin***, supra, para. 48. It follows that the underwriters had both the means and the obligation to intervene to flush out the Claimant's intentions and to thereby try to avoid or reduce any prejudicial impact of the delay. The one letter of inquiry in November (which was not responded to) fell well short of compliance with this obligation.

iv) Prejudice

The underwriters relied upon two points of prejudice. Attempts to settle the claim, as recorded earlier, began in 2002. It was at that stage that Mr. Thorne was told (according to the Defence) that the claim for G.A. was in the region of $1 million. This, he stated, prompted (at least in part) his offer. Come the particulars of claim, the G.A. claim (inclusive of sue and labour expenses) increased to $1.3 million. Further information was sought and the consequent particulars put G.A. at only $55,000 (with sue and labour expenses as $263,000). The Defence took the point (by way of challenge to any assertion that the claim had been settled) that any such settlement had been vitiated by fraudulent representation as to the scale of the G.A. claim.

There ensued a number of letters from SH asking for details of how the G.A. claim had been put at the level of $1 million to which no response was ever made. Furthermore, and Mr. Hoare fully understood this to be the case, it was a precondition to any resumed settlement discussions that an explanation should be forthcoming. It is now the underwriters' position (as forewarned in their further information relating to the amended defence) that they would have wished to plead that the claim should fail because it was prosecuted fraudulently. But now, however, Mr. Thorne says that he has no recollection of the original representation. Thus it is claimed the underwriters are prejudiced by the delay. The point might have greater force if the underwriters had pleaded the point as they originally threatened to do in the absence of a "satisfactory" response to their letter concurrently with the further information in February 2005. Indeed, whether Mr. Thorne's recollection was any better at that stage must be a moot point. In any event, as already stated, the underwriters could have invoked the court's assistance in obtaining further information and keeping the litigation going by fixing a CMC.

v) The second aspect of prejudice was said to arise from a list of issues prepared by the underwriters. The list suggested that there was an issue as to the allocation of the original payment of $1.35 million to the Bank of Scotland as between the two vessels covered by the policy. This issue, it was submitted, would involve investigating matters from 1999 and involved a claims manager other than Mr. Thorne. But since the point is in fact not pleaded by the Claimants I put it out of account.

vi) Fair Trial

This is fairly complex and fact heavy litigation. The reports to underwriters by the Salvage Association make it plain that it will be necessary to investigate the operation and maintenance of the vessel's main engines for a prolonged period in the run up to the failure on 23 October 1997. Three items of damage are said to have been caused to the main engine at that stage and there was a substantial dispute between the Salvage Association and the owners' surveyors as to the cause of the defects and further whether they are attributable to one or other of the perils pleaded. Included in these issues are questions of due diligence on the part of the managers.

It has to be accepted that resolution of those issues will be the more difficult after 12 years rather than say 7. That said the following matters are worthy of note:

(a)There is a substantial body of contemporary survey reports.

(b)There is no reason to think that contemporary documentation (if any) regarding the maintenance and operation of the engines will not be adduced on disclosure.

(c)Whilst the Salvage Association surveyors may have now retired, it is likely that underwriters would have retained independent forensic expert evidence in any event who would not have had an opportunity to inspect the vessel before she was sold and scrapped.

(d)Whilst the memories of lay witnesses would have faded further over the last 3 years, it is the documentation on which the court is likely to place reliance.

(e)Such difficulties as emerge are likely to prejudice the claimants as effecting a substantial obstacle to their being able to establish their claim.

(vii) Delay in taking out this application

It is also submitted by the underwriters that even when the misunderstanding potentially lost its impact in March 2007 after Mr Hoare's meeting with Mr Thorne which revealed that the latter was not interested in any settlement, yet even then the CMC was not fixed until August. This is a valid point so far as it goes. But equally notable in my judgement is the fact that, having obtained the correspondence with the Court in April, it was not until July that SH wrote to HFW explaining the position from their clients' perspective. It was then that the claimants were in a position to take stock.

Conclusion

71. Primary responsibility for the delay must rest with the Claimants, exacerbated by the failure of their solicitors to keep their opponents properly informed. Their understanding of an informal stay must have based on a somewhat slipshod approach to the situation. They are therefore exposed to the imposition of any appropriate sanctions including a strike-out. On the other hand, the underwriters cannot escape their own responsibility for failing to step in and get the action back on track. I am not persuaded that the underwriters have been materially prejudiced by the delay. Nor am I persuaded that a fair trial is no longer possible. Standing back from all these and the other considerations, I have come to the conclusion that it would be disproportionate to strike this claim out. I turn therefore to consider what (if any) other forms of sanction it would be appropriate to impose.

72. The underwriters made various suggestions:

(a)Order the Claimants to pay the costs of the action.

This would not be just. The costs incurred so far other than those associated with this application have not been caused or even materially increased by the delay.

(b)Order the claimants to pay the costs of this application.

I will consider this suggestion when my judgment is handed down.

(c)Deprive the Claimants of all or part of any interest on their claim accrued to date.

I see the force of this submission (although I have not forgotten that the underwriters did nothing to bring the delay to an end). I propose to leave it to the trial judge who will be better placed to assess the impact of the 2.5 years delay that has occurred.

(d)Debar any amendment by the Claimants which introduces an issue which is not already pleaded.

I accept this proposal.

Security for costs

73. The underwriters renew their application for costs as contemplated by Clarke L.J. I have come to the conclusion that the underwriters are entitled to security whether or not it is appropriate to categorise it as a sanction.

74. The original application for security for costs was made at a strikingly early stage and against the background of underwriters' contention that a compromise had been reached. Matters have now moved on:

i) It is now nearly 4 years on and the only procedural steps taken since the earlier application in July 2004 are the service of a defence in August 2004 (amended in June 2005) and a reply in March 2005.

ii) The initial defence explained why the offer no longer could be construed as an admission of liability.

iii) The application for leave to appeal the original order was considered in September 2004. In the light of Clarke L.J.'s decision, the court is fully entitled to consider its discretion afresh.

iv) Indeed in the present context, it is difficult to see what relevance the original offer has. There is nothing in the existence of an offer which has been rejected which affords any security to the Defendants. The Defendants remain at risk of being unable to recover their costs if the Claimants unsuccessfully pursue their claim.

75. Questions of the form of the security and the appropriate figure I leave for further argument at the CMC. At the same time appropriate directions must be given for the future conduct of the action involving active supervision by the court.

S.J. Phillips (instructed by Clyde & Co.) for the Claimants
Claire Blanchard (instructed by Stephenson Harwood) for the Defendants