Craig Lloyd v Richard Hayward, Sirocco Holdings Limited


No Substantial Judicial Treatment

Court
Chancery Division

Judgment Date
5 August 2024

Case No: BL-2020-CDF-000003

High Court of Justice Business and Property Courts in Wales Business List (ChD)

[2024] EWHC 2033 (Ch), 2024 WL 03656589

Before: His Honour Judge Keyser KC sitting as a Judge of the High Court

Date: 5 August 2024

Hearing dates: 18 July 2024

Representation

Greville Healey (instructed by Underwood Solicitors LLP) for the Defendants.
Natasha Dzameh (instructed by Mogers Drewett LLP) for the Claimant.

Approved Judgment

Judge Keyser KC :

Introduction

1. This is my judgment upon the defendants' application, by application notice dated 21 March 2024, for an order striking out the claim form and the particulars of claim as an abuse of process, pursuant to CPR r. 3.4(2)(b) . The basis of the application, in a nutshell, is that the claimant (so it is said) has, or at various times has had, no genuine intention of taking his claim to trial.

2. The application is supported by a witness statement dated 21 March 2024 by the defendants' solicitor, Paul Ainsworth Redfern, a partner in Underwood Solicitors LLP, who at all material times has acted for the defendants. In opposition to the application the claimant relies on a witness statement dated 16 April 2024 by Maeve Mary England, a partner in Mogers Drewett LLP, who acted for the claimant from June 2019 until December 2022 (other solicitors in that firm having had conduct of the matter on the claimant's behalf before and since). In response, Mr Redfern has made a second witness statement, dated 4 June 2024.

3. It was common ground between the parties that two issues arose for determination: first, whether there was abuse of process; second, if there was, what should be the court's response to the abuse of process. On the first issue, I find that there was no abuse of process. The second issue does not, therefore, fall for decision. However, if I were wrong on the first issue and if the claimant's conduct amounted to abuse of process, I would not have struck out the claim.

4. There was by no means full agreement as to the applicable principles of law; therefore, after setting out the relevant facts, I shall consider the law at some length, including the law relating to the second issue.

5. I am grateful to Mr Healey and Miss Dzameh, counsel respectively for the defendants and for the claimant, for their detailed and lucid submissions.

The Facts

6. The claimant and the first defendant are businessmen residing in South Wales. The second defendant is a company incorporated in Jersey and was at all material times prior to 10 October 2014 the registered proprietor of the SA1 Business Park in Swansea ("SA1"). The shares in the second defendant are held by a Jersey discretionary trust, of which the beneficiaries are the first defendant and members of his family. The dispute underlying these proceedings concerns a joint venture between the claimant and one or other of the defendants for the development of either the whole or a major part of SA1, involving the construction there by the claimant of small industrial or commercial units and the letting of those units to third parties. It is common ground that the joint venture was terminated long since: in December 2013, according to the

defendants; in September 2017, at the earliest, according to the claimant. It is also common ground that the claimant and the first defendant maintained an amicable working relationship from 2014 until September 2017, whether or not the correct analysis is that the initial joint venture agreement had already been terminated. However, in September 2017 that relationship came to an end.

7. The claimant instructed solicitors in October 2017. In February 2018 the claimant's solicitors sent a letter of claim to the first defendant, intimating an intention to make a pre-action disclosure application against him unless he provided documentation in respect of the joint venture. Such an application was duly made, against the first defendant only, in the County Court at Cardiff in April 2018. On 23 April 2018 an order for pre-action disclosure was made, on the papers and without notice to the first defendant. The required disclosure, described by reference to the application notice, was extensive. By a consent order dated 3 August 2018, the order for pre-action disclosure was set aside; and, on terms that the claimant pay the first defendant's costs of those proceedings and of providing disclosure (with a payment on account of £15,000), the first defendant was ordered to serve on the claimant by 15 September 2018 copies of the accounts of the joint venture, which were said then to be in the course of preparation. The consent order further provided that the claimant might, by 1 October 2018, request disclosure of the underlying documentation on which the accounts of the joint venture were based.

8. The claimant made the payment on account of costs (albeit late, say the defendants). On 14 September 2018 the first defendant produced accounts of the joint venture (the adequacy of which is disputed by the claimant). The claimant did not make a request for the underlying documentation by 1 October 2018. On 9 October 2018 the first defendant's solicitors wrote to the claimant's solicitors:

> ”We refer to our letter dated 14 September 2018, under cover of which, pursuant to paragraph 4 of the consent order dated 3 August 2018 (drawn 14 August 2018, the 'Order for Pre-Action Disclosure'), we served the joint venture accounts prepared on behalf of Sirocco Holdings Limited. We have nothing from you following such letter but should be grateful if, as there requested, you would now acknowledge receipt of the accounts.
>
> We also refer to paragraph 5 of the Order for Pre-Action Disclosure. We note your client gave no notice pursuant thereto for any Requested Disclosure, as there defined, by the deadline of 1 October 2018, over a

> week ago. Save for detailed assessment of our client's costs pursuant to paragraph 11 of the Order for Pre-Action Disclosure, which we are now putting in hand, your client's claim has therefore come to an end."

9. On 25 October 2018 the claimant's solicitors wrote:

> "Our client wishes to request the underlying documents, but is wary of committing to what is effectively an open-ended payment.
>
> Accordingly, we would be grateful if you would give an indication of the likely costs of providing the additional material. Of course, we would be prepared to agree a suitable timescale for provision of the additional materials."
>
> The concern regarding the cost of obtaining the documents is said to arise out of Mr Redfern's previous estimate, within those disclosure proceedings, that the cost of providing the full disclosure sought in the claimant's pre-action disclosure application could be £78,250 plus VAT. For the defendants, it is observed that the estimate given by Mr Redfern related to the very wide disclosure sought in the application, not to the more restricted, underlying documents mentioned in the order of 3 August 2018. Granting that, one might nevertheless think that such a large estimate for full disclosure would give cause for some nervousness about the cost even of more limited disclosure. Even so, the letter of 25 October 2018 did not constitute a request for disclosure and was anyway outside the permitted time for requesting disclosure.

10. On 14 November 2018 the claimant's solicitors asked for a response to the letter of 25 October 2018. No response was received. For the defendants, Mr Healey submits that no response was required to an enquiry that disregarded the terms of the consent order. That seems to me to be a bold attempt to excuse discourtesy. Mr Redfern states:

> ”On 14 September 2018 I served the Accounts on behalf of Mr Hayward. Mr Lloyd gave no notice, whether by 1 October 2018 or at all, requiring disclosure of documents, and after 14 November 2018 nothing more was heard from him or on his behalf for more than 18 months.”

Nothing in those words is false, but I am frankly unimpressed by its misleading selectivity, as I am by the decision to make no response at all to the letters from the claimant's solicitors.

11. The claim form in these proceedings was issued on 6 April 2020. It claims a declaration as to the existence and terms of a partnership between the claimant and the first defendant, alternatively the second defendant, relating to the development and management of SA1, together with an account of the profits of the partnership since inception. In the alternative, if the relationship between the parties did not amount to a partnership, it claims damages, with all necessary accounts and inquiries, for breach of contract in respect of a joint venture between the claimant and the first defendant, alternatively the second defendant. The particulars of claim alleged that in or around October 2010 the claimant and the first defendant entered into a joint venture agreement in respect of the running of SA1 as a business park, and that the joint venture agreement constituted a partnership agreement. The particulars of claim further alleged that the first defendant wrongfully contended that the joint venture agreement had been terminated by about April 2014, and they averred that the wrongful contention of termination itself amounted to a repudiatory breach of the joint venture agreement.

12. On 30 July 2020 District Judge Hywel James gave permission for the service of the claim form on the second defendant out of the jurisdiction.

13. The proceedings were served on the first defendant under cover of a letter dated 30 July 2020. Mr Redfern states, “Such proceedings came completely out of the blue, and were not preceded by a further letter of claim pursuant to the *Practice Direction—Pre-Action Conduct and Protocols.* “ (A couple of complaints are made concerning the lack of documentation provided with the proceedings, but, while noting the particulars of the complaints, I do not need to burden this judgment with them.)

14. After an order for service on the second defendant at an alternative address in Jersey had been made on 27 August 2020, the proceedings were served on the second defendant on 8

September 2020.

15. The defence and counterclaim for both defendants, dated 27 October 2020, averred that there was a joint venture (not a partnership) between the claimant and the second defendant (not the first defendant, who was said to be only the managing agent of the second defendant) in respect of part (not the whole) of SA1, and that the joint venture agreement had terminated in December 2013. It said that the balance of the account of the joint venture was in favour of the second defendant, not the claimant.

16. The claimant served a reply and defence to counterclaim dated 19 November 2020.

17. On 9 December 2020 the court issued Notice of Proposed Allocation to the Multi-Track.

18. On 21 December 2020 the claimant sent to the defendants a List of Issues for Disclosure (section 1A of the Disclosure Review Document ("DRD")). A response was due by 4 January 2021 but was not sent.

19. On 6 January 2021 the parties filed their Directions Questionnaires.

20. On 7 January 2021 the court made a simple order: "The action is stayed for 1 month." The order was silent as to what was to happen at the end of the stay.

21. On 14 January 2021 Ms England asked Mr Redfern, by email, "Are you open to engaging in without prejudice discussions with a view to seeking settlement?" Ms England's evidence is that no response was received to that question. Mr Redfern merely states that the defendants were not willing to engage in settlement discussions; he does not claim that a response was given to the enquiry.

22. The stay ended on 7 February 2021. In these circumstances, as Directions Questionnaires had been filed, the court ought to have listed a costs and case management conference (”CCMC”); see para 6.44 of *The Chancery Guide* . However, it did not do so. The court file does not record why no CCMC was listed; I assume that, as the order of 7 January 2021 had been silent on the point, the matter just “slipped through the net”. In fact, after that order there is no record on the court file until 7 December 2023.

23. After the expiry of the stay, the parties engaged in the process of completing the DRD. On 17 March 2021 the defendants belatedly sent their section 1A of the DRD. In his first witness statement Mr Redfern states:

> ”This was substantially agreed, although I acknowledge and apologise for the fact that the process was not then completed on behalf of the Defendants, but instead only much later in contemplation of the costs and case management conference listed for 26 March 2024 following the reactivation of the proceedings at (as it transpired) the behest of Mr Lloyd.”

In his second witness statement he states:

> ”It is right that completion of the Disclosure Review Document on behalf of the Defendants was late, for which I again apologise. But the vast majority of this was during the period of more than two-and-a-half years from April 2021 until December 2023 when Mr Lloyd seemed to have abandoned his claim.”

24. By letter dated 18 March 2021 Mr Redfern intimated to the claimant’s solicitors an intention to apply for summary judgment for the first defendant and the possibility that the second defendant would seek an order striking out parts of the claim against it. The claimant’s solicitors replied to that letter on 13 April 2021, contending that the case was not suitable for summary determination and repeating the invitation to engage in settlement discussions, with an invitation to participate in a mediation. On 15 April 2021 the claimant’s solicitors served the DRD with section 1B completed on behalf of the claimant.

25. On 23 April 2021 Mr Redfern wrote to the claimant's solicitors, acknowledging receipt of section 1B of the DRD; the letter stated in part:

> "Because in certain respects what was said in your letter dated 13 April 2021 departs from your client's pleaded case, this will have an impact in such respects on our client's approach to disclosure. It will therefore be sensible, indeed essential, for the next steps by our clients in the disclosure review process to be undertaken contemporaneously with our reply to your letter dated 13 April 2021.
>
> We have been considering your letter dated 13 April 2021, which gives rise to issues of some modest complexity, and had hoped to be able to reply substantively this week, reverting at the same time on the disclosure review. Unfortunately, due to other commitments, this will not now be possible, and for the same reason is also unlikely to be possible next week. We hope, however, to be able to revert during the course of the following week, which will still be quicker than your response dated 13 April 2021 to our letter dated 18 March 2021."

26. Mr Redfern states that, in the light of the response in the letter dated 13 April 2021 from the claimant's solicitors, the defendants decided not to make the application for summary disposal of the claim. However, he did not communicate that decision to the claimant's solicitors. Nor did he respond to section 1B of the DRD or to Ms England's proposal that the parties engage in attempts to settle the case.

27. On 28 June 2021 Ms England wrote to Mr Redfern by email:

> "We have on a number of occasions asked whether your clients are willing to attempt settlement negotiations. We are still at an early stage in these proceedings and so while matters are at this point, would your clients be open to attempting mediation to see if the matter can be settled?"

She states that no response was received to that email. Mr Redfern does not contradict her.

28. Eight months later, on 7 March 2022, Ms England wrote to Mr Redfern by email: "We have not heard from you in response to the below [that is, the email of 28 June 2021]. Can you confirm whether you are still acting for the defendants?" By email on the following day, Mr Redfern replied: "[W]e confirm we are of course still instructed by our clients and can see no reason why you should suppose otherwise." The tone of that response was hardly appropriate, especially as it came from a solicitor who had not been responding to communications from the solicitor of the opposing party.

29. There were no communications between the parties, or between either party and the court, between 8 March 2022 and 4 April 2023.

30. On 4 April 2023 the claimant's solicitors wrote to the defendants' solicitors without prejudice save as to costs. On 18 April 2023 the defendants' solicitors replied on the same basis. No further communications between the parties took place until December 2023.

31. On 7 December 2023 the claimant's solicitors wrote to the court:

> "By an order of the court dated 7th January 2021, this matter was stayed for a period of 1 month. The order did not make any provision for any steps to be taken thereafter and we have not heard from the court at the end of the stay.
>
> We would ask that in the circumstances, the court now issue Application Questionnaire to enable further directions to be provided."

32. By order dated 7 December 2023 (sealed on 12 December 2023) District Judge Jones-Evans directed that a CCMC be listed before a district judge of the Business and Property Courts.

33. On 13 December 2023, upon receipt of the order, Mr Redfern wrote to the claimant's solicitors, asking whether they had requested the listing of a CCMC.

34. Notice of Hearing of the CCMC was issued on 22 December 2023, and a revised Notice of Hearing was issued on 29 December 2023. The CCMC was listed for a hearing on 26 March 2024.

35. On 26 February 2024 the claimant sent a proposed case summary and proposed directions to the defendants.

36. On 29 February 2024 the claimant filed his costs budget in form Precedent H.

37. On 1 March 2024 Mr Redfern wrote to the claimant's solicitors, noting that he had received no reply to his letter of 13 December 2023 but observing that the reason for the listing of the CCMC was "of only marginal relevance" to the main contents of his letter, which was that, unless the claimant discontinued the claim, the defendants would apply for it to be struck out as being an abuse of process on account of delay.

38. On 4 March 2024 the defendants filed and served their Precedent H.

39. On 7 March 2024 the claimant's solicitors wrote to the defendants' solicitors, asking for confirmation that the case summary and proposed directions were agreed. The letter ended:

> "Whilst writing, we note that now the stay has been lifted, we still await to receive your client's DRD Section 1B response, which was due in April 2021, and which followed you having been previously some 3 months late with service of your client's DRD Section 1A.

> We also attach copy letter to the court asking for the stay to be lifted and confirming that we wished the litigation to be progressed."

40. On 11 March 2024 the defendants sent to the claimant section 1B of the DRD, having indicated that they would do so in April 2021.

41. On 19 March 2024 the claimant filed a hearing bundle, case summary and draft directions. The draft directions provided for a 5-day trial within the window between 19 November 2024 and 6 May 2025.

42. On 21 March 2024 the defendants filed the present application with supporting evidence.

43. The CCMC came on for hearing before District Judge Pratt on 26 March 2024, when he adjourned it for hearing after the determination of the defendants' application dated 21 March 2024. He ordered the defendants to pay the claimant's wasted costs.

The Law

The Civil Procedure Rules

44. The following provisions of the Civil Procedure Rules 1998 (" CPR ") are directly relevant to the present application.

> "1.1 The overriding objective
>
> (1) These Rules are a procedural code with the overriding objective of

enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –(i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues; and (iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

1.2 Application by the court of the overriding objective

The court must seek to give effect to the overriding objective when it –

(a) exercises any power given to it by the Rules; or

(b) interprets any rule subject to rules 76.2, 79.2 and 80.2, 82.2 and 88.2.

1.3 Duty of the parties

The parties are required to help the court to further the overriding objective.

1.4 Court's duty to manage cases

(1) The court must further the overriding objective by actively managing cases.

(2) Active case management includes—

…

(b) identifying the issues at an early stage;

…

(g) fixing timetables or otherwise controlling the progress of the case;

…

(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently."

"3.4 Power to strike out a statement of case

(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.

(2) The court may strike out a statement of case if it appears to the court—

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order."

45. The present application is brought under r. 3.4(2)(b). The abuse of process is said to consist in bringing and/or continuing the claim without having an intention to bring it to a conclusion for a substantial period of time. I shall refer to abuse of this kind as *Grovit* abuse.

Pre- CPR Case-law

46. *Grovit* abuse was recognised by the House of Lords in *Grovit v Doctor [1997] 1 WLR 640* . The House had already established in *Birkett v James [1978] AC 297* that a claim could be struck out (a) on account of intentional and contumelious default by a plaintiff and (b) on grounds of delay if (i) the delay was inordinate and inexcusable and (ii) the delay gave rise to a substantial risk that it would not be possible to have a fair trial or was likely to cause or have caused serious prejudice to the defendants. In *Grovit v Doctor* Lord Woolf, with whose speech the other members of the Appellate Committee agreed, acknowledged that the case did not present an appropriate opportunity to make significant inroads into the existing principles. However, the court at first instance and the Court of Appeal had come to the conclusion that the claimant in that case had maintained the action in existence notwithstanding that he had no interest in having it heard. At 647-648 Lord Woolf said:

> ”This conduct on the part of the appellant constituted an abuse of process. The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff’s inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in *Birkett v. James [1978] A.C. 297* . In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.”

47. *Grovit v Doctor* was considered by the Court of Appeal in *Board of Governors of the National Heart and Chest Hospital v Chettle (1998) 30 HLR 618 (”the Chest Hospital case”)* , decided on 28 July 1997. The Court held that, on the facts of that case, the defendant could not establish the serious prejudice that he would need to show as a sufficient ground for striking out the action for want of prosecution. However, the claim was struck out on account of *Grovit* abuse; the facts and reasons appear clearly from the judgment of Aldous LJ (with whom Potter LJ agreed) at 628:

”As was stated in *Ashmore v. British Coal Corporation [1990] 2 Q.B. 338* at 348B, a litigant has a right to have his claim litigated provided it is not frivolous, vexatious or an abuse of the process of the Court. What may constitute such conduct must depend on all the circumstances of the case. One case of abuse was identified in *Grovit* , namely a case where the plaintiff commenced and continued the litigation for purposes which did not include bringing it to a conclusion. As stated by Lord Woolf M.R. in *Grovit* , the Courts exist to enable parties to have their disputes resolved. It follows that any proceedings not started for that purpose or, which once started are not maintained for that purpose, abuse the system. Such proceedings will normally be struck out as being an abuse of process.

In this case the action was started in claiming possession. The acts relied on started in l98*l* and extended to l986. It was prosecuted up to discovery in September l990. Having considered the documents disclosed on discovery by Mr Chettle, the plaintiffs accept that they ‘allowed the action to drift pending new facts coming to light which would enable the plaintiff to challenge’ Mr Chettle’s statement that since only he and his family had been in occupation of the house. There is no evidence of anything happening until l996. No explanation is provided for five years delay and it is reasonable to infer that nothing happened during that period.

Upon that evidence it is clear that in the plaintiffs decided that their chances of success were so poor that the action could not succeed unless fresh evidence was obtained. It was in those circumstances that they decided not to prosecute the action unless new facts came to light. That by itself would not amount to an abuse of the process. Delay is to be deprecated, but a delay to enable fresh investigations to be made does not in itself amount to an abuse. However that was not the position in this case. One year passed, then another, another, another and another. The result was that the action passed from being a genuine action to resolve a dispute over possession of a house into one which was moribund and only to be re -activated if something turned up. It is right to infer that at least by l992, the plaintiffs had no real intention of bringing the action to trial, or even progressing it for purposes of settlement. They had had ample time to investigate and had found nothing. At that stage the action became an abuse of the process of the Court. It was an action kept hanging over the head of Mr Chettle without any intention of bringing it to trial either upon the facts known in or upon the facts known after a reasonable time had elapsed to enable further investigations to be made. I therefore would strike the action out upon the basis that it came to be an abuse of the process of the Court. I realise that the plaintiffs can and may well start a fresh action, but that is

> to my mind not determinative. Once the action came to amount to an abuse of the process of the Court, it required to be struck out unless compelling reasons to the contrary could be demonstrated. There are no such reasons in this case. I therefore would allow this appeal and order that the action be struck out and that the plaintiffs should pay the costs of this appeal and of the action, to be taxed if not agreed."

48. I shall discuss the *Chest Hospital* case in some detail below. At present I simply note the following points. First, as the passage just cited makes clear, mere delay, even for the purpose of conducting fresh investigations, is not an abuse of process. Second, the abuse of process in that case consisted in the fact that the plaintiff had no real intention of bringing the action to trial "or even progressing it for purposes of settlement." Third, it was said that, once proceedings have become a *Grovit* abuse of process, they will "normally" be struck out, and that the claim before the court would be struck out "unless compelling reasons to the contrary could be demonstrated." As I shall explain below, I do not consider that to be a statement of the current state of the law, despite a recent decision to the contrary. Fourth, the case was decided before the CPR existed, let alone came into effect.

49. The availability of strike-out as a sanction for delay was again considered by the Court of Appeal, pre- CPR , in *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd [1998] 1 WLR 1426* , which was decided in December 1997. Lord Woolf MR, delivering the judgment of the Court, observed that the new unified rules—what became the CPR—were intended to come into force in April 1999. In the course of his discussion at 1436, under the heading "The future", he said:

> "In *Birkett v. James [1978] A.C. 297* the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration of increasing significance. Litigants and their legal advisers, must therefore recognise that any delay which occurs from now on will be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also in relation to the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of civil justice. The existing rules do contain time limits which are designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.

> It is already recognised by *Grovit v. Doctor [1997] 1 W.L.R. 640* that to continue litigation with no intention to bring it to a conclusion can amount to an abuse of process. We think that the change in culture which is already taking place will enable courts to recognise for the future, more readily than heretofore, that a wholesale disregard of the rules is an abuse of process as suggested by Parker L.J. in *Culbert v. Stephen G. Westwell & Co. Ltd. [1993] P.I.Q.R. P54* .
>
> While an abuse of process can be within the first category identified in *Birkett v. James [1978] A.C. 297* it is also a separate ground for striking out or staying an action (see *Grovit v. Doctor at pp. 642–643*) which does not depend on the need to show prejudice to the defendant or that a fair trial is no longer possible. The more ready recognition that wholesale failure, as such, to comply with the rules justifies an action being struck out, as long as it is just to do so, will avoid much time and expense being incurred in investigation questions of prejudice, and allow the striking out of actions whether or not the limitation period has expired."

At 1437 Lord Woolf said:

> "It has been the unofficial practice of banks and others who are faced with a multitude of debtors from whom they are seeking to recover moneys to initiate a great many actions and then select which of those proceedings to pursue at any particular time. This practice should cease in so far as it is taking place without the consent of the court or other parties. If there is good reason for doing so the court can make the appropriate directions. Whereas hitherto it may have been arguable that for a party on its own initiative to, in effect, 'warehouse' [1] 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 not be used by litigants for other purposes. This new approach will not be applied retrospectively to delays which have already occurred but it will apply to future delay."

50. I make the following observations. First, the way Lord Woolf expressed himself in *Arbuthnot Latham* is precisely in keeping with his remarks in *Grovit v Doctor;* one may note in particular the words "as long as it is just to do so". Second, there is no mention of a default sanction (viz. strike-out) for *Grovit* abuse. Third, however, there is a clear statement of the courts' willingness to strike out claims even in the absence of prejudice, where that is a just outcome. Fourth, Lord Woolf was expressly looking ahead to the time after the implementation of the CPR . Any such remarks prior to the coming into force of the CPR must necessarily be *obiter* , though from such a source they will carry great weight. Fifth, the passage at 1437 in the judgment was cited in *Solland International Ltd v Clifford Harris & Co [2015] EWHC 3295 (Ch)* , where Arnold J commented as follows:

> "54. As can be seen from these authorities [*Grovit v Doctor,* and *Arbuthnot Latham*], it is not a requirement of the *Grovit* limb of abuse of process that the claimant's lack of intention to pursue the claim to trial should persist as at the date of the application to strike out, still less as at a later date (such as the date of the hearing or an appeal). Thus it may be an abuse of process for the claimant unilaterally to 'warehouse' the claim for a substantial period of time, even if the claimant subsequently decides to pursue it."

Case-law under the CPR

51. *Asiansky Television plc v Bayer-Rosin (a firm) [2001] EWCA Civ 1792* was a second appeal from an order striking out the claim for breach of an order, pursuant to r. 3.4(2)(c); it was, therefore, not a case specifically concerning r. 3.4(2)(b). Clarke LJ, with whose reasoning Mance and Dyson LJJ agreed, observed at [39] that, as the claimants were in breach of an order: "It follows that the court had power to strike out the statement of case, and thus the action, under rule 3.4(2)(c). It was not, however, bound to do so." At [40] he cited at length from Lord

Woolf M.R.'s judgment in *Biguzzi v Rank Leisure Plc [1999] EWCA Civ 1972, [1999] 1 WLR 1926* , including the following passage at 1933:

> "Under rule 3.4(2)(c) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.
>
> Under the court's duty to manage cases, delays such as has occurred in this case, should, it is hoped, no longer happen. The court's management powers should ensure that this does not occur. But if the court exercises its those powers with circumspection, it is also essential that parties do not disregard timetables laid down. If they do so, then the court must make sure that the default does not go unmarked. If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant.
>
> There are alternative powers which the courts have which they can exercise to make it clear that the courts will not tolerate delays other than striking out cases. In a great many situations those other powers will be the appropriate ones to adopt because they produce a more just result. In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have to take into account the effect of what has happened the administration of justice generally. That involves taking into account the effect of the court's ability to hear other cases if such defaults are allowed to occur. It will also involve taking into account the need for the courts to show by their conduct that they will not tolerate the parties not complying with dates for the reasons I have indicated."

Having set out relevant rules, including CPR r. 1 (with the original formulation of the overriding objective), Clarke LJ referred to subsequent cases that had considered *Biguzzi* . Some of the *dicta* cited are relevant in the present case. At [42] he cited the judgment of Lord Lloyd of Berwick (with whom Ward LJ agreed) in *UCB Corporate Services Ltd v Halifax SW Ltd* (1999, unreported):

> ”It would indeed be ironic if as a result of the new rules coming into force, and the judgment of this court in the *Biguzzi* case, judges were required to treat cases of delay with greater leniency than they would have done under the old procedure. I feel sure that that cannot have been the intention of the Master of the Rolls in giving judgment in the *Biguzzi* case. What he was concerned to point out was that there are now additional powers which the court may and should use in the less serious cases. But in the more serious cases, striking out remains the appropriate remedy where that is what justice requires.”

At [43] Clarke LJ cited at length from the judgment of May LJ in *Purdy v Cambran [2000] CP Rep 67* , a case where the action was struck out for inordinate delay that rendered a fair trial impossible. The passages in which May LJ dealt with the courts’ powers to address delay included the following:

> ”50. Lord Woolf MR in *Biguzzi* drew attention to the armoury of powers which the court has under the Civil Procedure Rules in addition to that of striking out: see in particular his judgment at 1932G to 1934 C. In doing so, he was doing no more than emphasising the range of powers available to the court in its search for justice, indicating that the court should consider such powers as may be relevant to a particular case before deciding which to use. He was not indicating that any one of those powers was inherently more appropriate than any other. Mr Lewis has, correctly in my view, not suggested otherwise.
>
> 51. The effect of this is that, under the new procedural code of the Civil Procedure Rules, the court takes into account all relevant circumstances and, in deciding what order to make, makes a broad judgment after considering available possibilities. There are no hard and fast theoretical circumstances in which the court will strike out a claim or decline to do so. The decision depends on the justice in all the circumstances of the individual case. As I read the judgments of Lord Lloyd of Berwick and Ward LJ in the *UCB* case, they are saying nothing different from this. As Ward LJ said in the *UCB* case, Lord Woolf MR in *Biguzzi* was not saying that the underlying thought processes of previous decisions should be completely thrown overboard. It is clear, in my view, that what Lord Woolf was saying was that reference to authorities under the former rules is generally no longer relevant. Rather it is necessary to concentrate on the intrinsic justice of a particular case in the light of the overriding objective.”

Clarke LJ continued:

> ”44. In *Walsh v Misseldine* CAT 29th February 2000 (Stuart-Smith and Brooke LJJ), which is an important case which in my opinion should be reported, Brooke LJ set out the relevant rules and added:
>
> > ’69. Although CPR 3.1(a) expressly preserves the court’s inherent jurisdiction to protect its process from abuse, this is a residual long-stop jurisdiction. The main tools the courts have now been given to exterminate unnecessary delays are to be found in the rules and practice directions and in the orders they may make from time to time.’
>
> To my mind that paragraph is important because it stresses the fact that the court should approach the problems of the kind that have arisen here through the CPR , which, as Lord Woolf observes, are much more flexible than the old rules, i.e. the RSC. Thus the passage from Lord Lloyd’s judgment in the *UCB* case quoted above must be read subject to the fact that the new rules give the courts valuable powers to deal with delay short of striking out. See also to the same effect *Axa Insurance Co Ltd v Swire Fraser Ltd* , CAT 9th December 1999 (Auld and Tuckey LJJ) per Tuckey LJ at paragraph 20.”

52. In a further passage in *Asiansky* relied on by Ms Dzameh, Clarke LJ emphasised the importance of having regard to all the circumstances of the case and of giving consideration in every case to the proportionality of the strike-out sanction:

> ”47. I would also draw attention to one aspect of the CPR which has not, so far as I am aware, received consideration in the cases decided so far.

Part 23 contains general rules about applications for court orders. Paragraph 2.7 of the Part 23 Practice Direction provides: 'Every application should be made as soon as it becomes apparent that it is necessary or desirable to make it.' In my judgment that includes applications to strike out for breach of an order.

48. It is no longer appropriate for defendants to let sleeping dogs lie: cf. *Allen v McAlpine (Sir Alfred) & Sons [1968] 2 QB 229* . Thus a defendant cannot let time go by without taking action and then later rely upon the subsequent delay as amounting to prejudice and say that the prejudice caused by the delay is entirely the fault of the claimant. Such an approach would in my judgment be contrary to the ethos underlying the CPR , quite apart from being contrary to paragraph 2.7 of the Part 23 Practice Direction. One of the principles underlying the CPR is co-operation between the parties.

49. However that may be, I recognise that in this case the CPR did not come into force until 26th April 1999, some three months after the claimants should have set the action down for trial pursuant to the order of 1st December 1998. The essential question in every case is: what is the just order to make, having regard to all the circumstances of the case? As May LJ put it, it is necessary to concentrate on the intrinsic justice of a particular case in the light of the overriding objective. The cases to which I have referred emphasise the flexible nature of the CPR and the fact that they provide a number of sanctions short of the draconian remedy of striking out the action. It is to my mind important that the master or judge exercising his discretion should consider alternative possibilities short of striking out.

50. In this connection in *Grundy v Naqvi CAT* 1st February 2001 (Simon Brown and Longmore LJJ) Longmore LJ pointed to the fact that neither the district judge nor the judge gave any substantial consideration to the question whether striking out the defence would be disproportionate. In my judgment, consideration should be given to that question in every case, and except perhaps where striking out the statement of case or defence would be plainly proportionate, should give reasons why it was proportionate in the particular case: see also *Annodeus Ltd v Gibson* , unreported, 2nd February 2000 per Neuberger J at pages 6-7 and *Walsh v Misseldine* per Brooke LJ at paragraph 82 quoted above.

51. Finally, I revert to the view of Brooke LJ in paragraph 69 of *Walsh v Misseldine* that the power to strike out for abuse of process is a long-stop.

> The power was exercised by this court in *Arrow Nominees Inc v Blackledge [2000] 2 BCLC 187* . That was a case of flagrant abuse: see per Chadwick LJ at paragraphs 54-55 and Ward LJ at paragraphs 71-75. I accept Mr Moger's submission that only in such a case would the court be likely to strike out an action on the ground of abuse where a fair trial is still possible."

53. As I have said, the *Asiansky* case concerned strike-out for breach of an order, not for *Grovit* abuse. I think that as a matter of fact an order striking out a claim may well be a more usual response to *Grovit* abuse than to breach of an order, not least because the latter case covers a wider range of seriousness. However, I agree with Ms Dzameh that the fundamental approach, of considering the default in the context of all the circumstances of the case and with regard to the proportionality of available responses, is in principle applicable to r. 3.4(2)(b) as it is to r. 3.4(2)(c). I return to this point below.

54. In *Solland International Ltd v Clifford Harris & Co [2015] EWHC 3295 (Ch)* the Master had struck out the claim on the grounds (1) that it was an abuse of process and (2) that there had been significant delay on the part of the claimants, resulting in the inability to have a fair trial. The application on those grounds was advanced pursuant to the court's inherent jurisdiction, but on appeal Arnold J observed that the "abuse of process" ground could have been advanced pursuant to r. 3.4(2)(b), though "it is not suggested that this matters." Arnold J considered the law relating to *Grovit* abuse at [49]-[54] by reference to Lord Woolf's speech in *Grovit v Doctor* and his judgment in *Arbuthnot Latham* . In the context of the latter case, I have set out Arnold J's observations regarding "warehousing". With reference to the facts of the case before him, he said:

> "69. … [T]he Master accepted that, during the first period, it could be said that the Appellants had left this litigation 'in the sidelines'. Thus the Master made essentially the very finding that the Appellants say that he should have made. That finding does not assist the Appellants. On the contrary, it amounts to a finding that, unilaterally and without the consent of the Respondent or the court, the Appellants (to use the Appellants' own terminology on this appeal) 'put the litigation on hold for the time being'. That amounts to an admission that the Appellants did not intend to pursue the litigation to trial, or other proper resolution, for an indeterminate period: in other words, an admission of 'warehousing' the litigation. As Lord Woolf made clear in *Arbuthnot* , this is not acceptable and can

> constitute an abuse of process. Contrary to the Appellants' argument, it was not necessary in order for the Master to find abuse of process established for him to find that the Appellants had decided permanently to abandon the litigation (even if they subsequently changed their mind)."

55. Arnold LJ again considered the issue of putting proceedings on hold in *Asturion Fondation v Alibrahim*[2020] EWCA Civ 32, [2020] 1 WLR 1627 . Ryder and Leggatt LJ agreed with his judgment. The Master had struck out the claim pursuant to r. 3.4(2)(b) on the grounds that the claimant had abused the process of the court by unilaterally placing the proceedings on hold for a substantial period of time without either the agreement of the defendant or an order of the court. The judge on the first appeal had allowed the appeal, on the grounds that the Master was wrong to find that there was abuse of process, and reinstated the claim. The Court of Appeal upheld the judge's decision. At [47] Arnold LJ reiterated the established position "that mere delay in pursuing a claim, however inordinate and inexcusable, does not without more constitute an abuse of process". At [48] he referred to Lord Woolf's reasoning in *Grovit v Doctor.* He continued:

> "49. Two points should be noted about this reasoning. The first is that, as Leggatt LJ pointed out during the course of argument, the words 'which you have no intention to bring to a conclusion' could embrace both (i) cases in which the claimant has no intention of ever bringing the claim to a conclusion and (ii) cases in which the claimant has no intention of bringing to a conclusion at present, but intends to do so in future, perhaps depending upon some contingency. On the facts, however, the case in question was of the first kind.
>
> 50. The second point is that Lord Woolf was clear that such conduct 'can' constitute abuse of process, not that it will automatically do so, and that it will 'frequently' be the case that the court will strike out the claim, not that it will always do so. If that is the position with respect to cases of the first kind identified in the preceding paragraph, then it is difficult to see why cases of the second kind should be treated more stringently."

Arnold LJ then cited from the judgment in *Arbuthnot Latham* and said:

> ”53. It can be seen from this that Lord Woolf again said that continuing litigation with no intention to bring it to a conclusion ‘can’ amount to an abuse of process, not that it necessarily does so.”

He then set out the passage from Lord Woolf’s judgment in that case at 1437 and said:

> ”55. Although this passage was strictly obiter, it was plainly intended to lay down the approach that the courts would adopt in future. It is clear from what Lord Woolf MR said that it is likely to be an abuse of process for the claimant unilaterally to decide not to pursue a claim for a substantial period of time, even if the claimant remains intent on pursuing the claim at some future point. In my view Lord Woolf MR cannot have meant that this will always constitute an abuse of process given what he had reiterated about the *Grovit* case. Nor is there any indication that Lord Woolf MR was differentiating between counsel for Asturion’s second and third classes of case.”

Having referred to two further Court of Appeal authorities, Arnold LJ said:

> ”61. In my judgment the decisions in *Grovit* , *Arbuthnot* , *Realkredit* and *Braunstein* show that a unilateral decision by a claimant not to pursue its claim for a substantial period of time, while maintaining an intention to pursue it at a later juncture, may well constitute an abuse of process, but does not necessarily do so. It depends on the reason why the claimant decided to put the proceedings on hold, and on the strength of that reason, objectively considered, having regard to the length of the period in question. A claimant who wishes to obtain a stay of proceedings for a period of time should seek the defendant’s consent or, failing that, apply to the court; but it is not the law that a failure to obtain the consent of the other party or the approval of the court to putting the claim on hold automatically renders the claimant’s conduct abusive no matter how good its reason may be or the length of the delay.”

At [64] Arnold LJ said that the analysis of an application to strike out for *Grovit* abuse fell into two stages: first, the court should determine whether the claimant’s conduct was an abuse of process; second, if the conduct was an abuse of process, the court should decide whether to

exercise its discretion by striking out the claim.

56. At [79] Arnold LJ considered whether, if (contrary to the judge's view) there had been abuse in that case, the judge was entitled to exercise his discretion not to strike out the claim. He said:

> "The Judge held that, even if there was an abuse, it was of a relatively minor nature and did not justify the sanction of striking out. In my judgment the Judge was fully entitled to take that view. Although neither the Master nor the Judge gave any detailed consideration to alternatives to striking out, there were lesser sanctions available to the court which were more proportionate to the abuse, if abuse there had been. For example, the court could have imposed tight directions to trial, including unless orders against Asturion, and it could have imposed a costs sanction. Striking out was a disproportionate response."

57. I take a number of points from *Asturion.* First, to commence and to continue litigation which one has no intention to bring to conclusion *can* amount to an abuse of process, but it does not *necessarily* amount to an abuse of process—even where the claimant has no intention of ever bringing the case to a conclusion, and *a fortiori* where the claimant merely intends not to bring it to a conclusion at present but to do so in the future (maybe even only in the event of a contingency). Second, it is *likely* to be an abuse of process for the claimant unilaterally to decide not to pursue a claim for a substantial period of time, even if the claimant remains intent on pursuing the claim at some future point. (I think that it must follow *a fortiori* that it is very likely to be an abuse of process for a claimant to decide not to pursue a claim for a substantial period of time if the claimant has no intention of ever pursuing the claim. Indeed, it is hard to imagine such circumstances that would not amount to an abuse of process.) Third, whether it is an abuse of process to "warehouse" a case for a significant period of time but with a conditional or contingent intention to pursue it at a later juncture depends on the reason why the claimant decided to put the proceedings on hold and on the strength of that reason, objectively considered, having regard to the length of the period in question. Fourth, even in cases of the first kind of abuse (no intention of ever bringing the case to a conclusion), an order striking out the claim is not automatic, though it is likely; *a fortiori* it is not automatic in cases of the second kind of abuse (a conditional or contingent intention to pursue the claim at some future time). Fifth, at the second stage of enquiry (the court's response to abuse), the court must have regard

to all the circumstances and to the full scope of its powers and must respond in a way that is just and proportionate. All of this seems to me (with respect) to be entirely consistent with *Grovit v Doctor* and *Arbuthnot Latham,* as well as with the CPR , *Asiansky* and *Solland.* It is right to observe that the remarks regarding the second stage of the enquiry (the response to abuse of process) were strictly *obiter* , but it is also to be noted that the Court, considering the matter in the light of the CPR , was satisfied to refer to the approach of Lord Woolf in *Grovit v Doctor* and *Arbuthnot Latham* ; there was no indication that some "compelling reasons" test was applicable.

58. The facts of *Asturion* have one feature that is of particular relevance to this case, as appears in the judgment at [11]:

> "11. In late January and early February 2016 the parties' solicitors discussed directions. An agreed set of directions was lodged at court on 2 February 2016. Through an oversight on the part of the court, however, the court did not either make an order embodying those directions or list a case management conference ('CMC'). This oversight was fatal to the court's ability to exercise active case management in respect of this claim, as is required by the Civil Procedure Rules ('CPR'). Moreover, it meant that neither party was subject to any deadline embodied in a court order for taking the subsequent steps in the proceedings. It is clear that this was a significant factor in what happened (or did not happen) subsequently."

Arnold LJ considered the court's failure to be significant:

> "73. Thirdly, Asturion contends that in para 36(2) the Master wrongly treated Asturion as having been solely responsible for the claim having made 'virtually no progress' for 'almost 2½ years'. I accept this point. In my view the procedural history demonstrates that both parties were slow to progress the claim down to 24 November 2016. Moreover, the Master failed to take into account the court's oversight in failing either to make an order for directions or to list the CMC. He also ignored the fact that it took Ms Alibrahim 3½ months from 23 August 2017 to issue her strike-out application."

59. In *Benka v Smith[2023] EWCA Civ 821* , the county court had stayed proceedings pending determination of certain issues that it referred to the First-tier Tribunal. The obligation to send the relevant documentation to the tribunal rested on the court, but the court did not send the documentation and the tribunal's case management powers were therefore never triggered. After the proceedings in the county court had been stayed for some 4½ years, the defendant applied for an order striking them out. One of the grounds of the application was that the delay constituted an abuse of process. The Court of Appeal held that the district judge had been wrong to strike out the claim. Lewison LJ, with whose judgment Baker and Nicola Davies LJJ agreed, referred to *Grovit v Doctor, Arbuthnot Latham, Asturion Fondation* and the decision of the Privy Council in *Icebird Ltd v Winegardner [2009] UKPC 24* . At [50] he observed that the question whether there has been an abuse of process requires the court to consider the length of the delay and the reason for it, objectively considered. He observed at [51] that the period of delay, or "lapse of time", was "extremely long" and that the claimant had not been powerless, because he could have applied to lift the stay or made enquiries with the court or the tribunal to find out what was going on. Nevertheless, he said at [53]: "[W]e are bound by authority to hold that the lapse of time, without more, does not amount to an abuse of process." At [54] Lewison LJ indicated that he did not accept the claimant's reason for inactivity as satisfactory and that the claimant's conduct in waiting until he was compelled to proceed amounted to "warehousing", but he continued:

> "But it is necessary to consider objectively the reason for the delay. Mr Benka's own perception is not determinative. As Mr Gatty said, the courts do not punish thought crimes. In this case it is hard to avoid the conclusion that the objective reason for the lapse of time was a combination of the court's own oversight in not complying with the Practice Direction, coupled with the stay. The court's own part in the lapse of time (either by adjourning the case generally as in *Barclays Bank Plc v Maling* [1997, unreported] or by failing to embody directions in an order and listing a CMC as in *Asturion*) is a highly relevant factor in deciding whether there has been an abuse of process."

On the facts, the Court held "with reluctance" that there had been no abuse of process, despite the claimant's subjective intention to "warehouse" the claim, the "extremely long" delay, and the fact that the lapse of time had probably caused prejudice to the defendant and made it doubtful whether a fair trial remained possible. The facts of the case are very unusual and I doubt whether the judgment establishes any new proposition of law; however, as the application of the principles in the earlier authorities to the particular facts of the case, it illustrates the point that undue delay coupled with the subjective intention to warehouse does not *ipso facto*

constitute abuse of process, and it demonstrates how failures of case management by the court are capable of affecting the conclusion as to the existence of abuse of process.

60. The other decisions to which I was referred are all at first instance. In *Quaradeghini v Mishcon de Reya Solicitors [2019] EWHC 3523 (Ch), [2020] 4 WLR 34* , Philip Marshall QC, sitting as a deputy High Court judge, reviewed the authorities on *Grovit* abuse, beginning with *Grovit v Doctor* itself. Having quoted at length from Lord Woolf M.R.'s judgment in *Biguzzi v Rank Leisure plc [1999] 1 WLR 1926, 1932-1934* , he said:

> "15. These observations, regarding the flexibility that the Civil Procedure Rules afford the court when dealing with the issue of delay, have meant that the requirement of proportionality has become central. In considering what form of response is appropriate it is essential that the court consider whether it is a proportionate response to the default identified. This has been emphasised time and again. See, for example, the decision of Neuberger J in *Annodeus Ltd v Gibson* The Times, 3 March 2000, *Walsh v Misseldine [2000] CP Rep 74, para 82* and *Grundy v Naqvi [2001] EWCA Civ 139 at [22]–[25]* . In *Asiansky Television plc v Bayer-Rosin [2001] EWCA Civ 1792; [2002] CPLR 111, para 50* , Clarke LJ (with whom Mance and Dyson LJJ agreed) expressed the view that the issue of proportionality was so important that 'consideration should be given to that question in every case, and except perhaps where striking out the statement of case or defence would be plainly proportionate, should give reasons why it was proportionate in the particular case'."

Mr Marshall QC proceeded to quote from Clarke LJ's judgment in *Asiansky* and continued:

> "17. In the light of the above, in my judgment, under the present procedural regime, it will be a relatively rare case in which the court will strike out proceedings for abuse of process based on delay in the first instance. The much more likely remedy is relief of a lesser form proportionate to the default. Cases of striking out are more likely to follow only after an 'unless' order has been sought and obtained and breached. Although 'warehousing' of claims or the bringing of proceedings without an intention to prosecute will constitute an abuse of process that may warrant the striking out of a claim, it seems to me likely that in many cases the court will wish to test the lack of any intention to prosecute by, for

example, making a peremptory order or imposing conditions rather than proceeding to rely on inferences drawn from an absence of activity. Such an approach is in line with observations of the Court of Appeal in cases such as *Walsh v Misseldine* , where Brooke LJ, at para 69, viewed the court's jurisdiction to protect its process from abuse as 'a residual long-stop jurisdiction' and noted that 'The main tools the courts have now been given to exterminate unnecessary delays are to be found in the rules and practice directions and in orders they may make from time to time'. It is also in line with the need to recognise the right of access to the court under article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (a point made in *Annodeus* The Times, 3 March 2000) and with the approach taken in decisions such as that of *Olatawura v Abiloye [2002] EWCA Civ 998; [2003] 1 WLR 275, para 25* , in which the Court of Appeal considered an order for the provision of security for costs to be a potentially suitable order in cases where a lack of good faith was suspected 'good faith for this purpose consisting of a will to litigate a genuine claim or defence as economically and expeditiously as reasonably possible in accordance with the overriding objective'.

18. The decision of Arnold J in *Solland [2015] EWHC 3295 (Ch)* that the deputy master referred to in his judgment is entirely consistent with the approach described above. There the master had carefully considered the issue of proportionality and in the rather unusual facts of that case concluded that striking out was the appropriate sanction and Arnold J upheld that conclusion at paras 84–96. …"

61. In *Alfozan v Alrasheed [2022] EWHC 66 (Comm)* , His Honour Judge Pearce, sitting as a Judge of the High Court, noted that the claimant had warehoused the claim and had taken no meaningful steps to progress it until pressed by the defendant and threatened with the claim being struck out; even after prolonged delay and an application to strike out the claim, the claimant had still failed to get his case in order or to demonstrate any genuine intention to progress it. At [13] Judge Pearce said: "In considering the issue of proportionality, the court should have regard to the various powers in its armoury to avoid unnecessary delay." Having quoted from paragraph 17 in the judgment in *Quaradeghini* he gave this salutary warning against presuming on the court's indulgence:

"15. It is clear from both the judgment of Mr Marshall QC in *Quaradeghini* and that of Nicklin J in *London Borough of Havering v*

> *Persons Unknown* that it is important to bear in mind the court's powers to take steps short of striking out the claim when considering the exercise of the power to strike out once an abuse of process is established. But the availability of such powers is not relevant to the prior issue identified by Arnold LJ in *Asturion Fondation v Alibrahim* as to whether the conduct amounts to abuse of process. Establishing whether the conduct is an abuse involves examining the state of mind of the Claimant, not the powers available to the court to change that state of mind.
>
> 16. Further, even in respect of the exercise of the judgment as to whether to strike out the claim, the availability of alternative powers can only be one factor. As Lord Woolf noted in the passage from *Arbuthnot Latham v Trafalgar* cited above, the investigation of why a party has not prosecuted the claim is itself a drain on the court's resources. It would be inconsistent with the overriding objective to disregard the diversion of resources that arises when the court needs to investigate a party's procedural failings in particular if the evidence suggests a continuing reluctance by that party to comply with the norms of litigation. I accept that the power to strike out is a long-stop jurisdiction, only to be invoked where other powers appear insufficient to achieve the purpose of progressing the claim, but where the court is satisfied that a claimant has no intention at all to progress the litigation I would not see the doctrine of proportionality or the need to consider alternative less draconian orders first as necessarily a bar to striking out the claim."

On the evidence, the imposition of lesser orders was unlikely to cause the claimant to conduct the litigation properly. The claim was accordingly struck out.

62. In *Morgan Sindall Construction and Infrastructure Limited v Capita Property and Infrastructure (Structures) Limited [2023] EWHC 166 (TCC)* , Eyre J reviewed the authorities including *Grovit v Doctor, Arbuthnot Latham, Asturion Fondation* and *Alfozan* . At [14]-15] he expressed agreement with Judge Pearce's summary of the law in *Alfozan,* including the statement that, "In considering the issue of proportionality, the court should have regard to the various powers in its armoury to avoid unnecessary delay." Having referred to Arnold LJ's judgment in *Asturion,* he said:

> "30. So it is right to say that a distinction is drawn between the two kinds of abuse: starting proceedings with no intention of continuing them; and starting with an intention of continuing but then putting the case on hold in

> the course of proceedings. The former is the graver abuse. That does not, of course, mean that putting proceedings on hold in the course of proceedings is not an abuse: the authorities are clear that it can be. The distinction between the two categories can be relevant to sanction and in particular to whether the proportionate response is striking out."

This passage, consistently with the earlier authorities, identifies the need to focus on the particular facts of the abuse in the individual case and on the proportionality of any particular response. At [32]-[36] Eyre J observed that in deciding whether delay amounted to abuse it was necessary to identify the subjective intention with which a claimant had failed to progress a case; in that regard, the court "must be on guard against making undue assumptions."

63. Eyre J addressed one matter that has been raised before me, namely the relevance of pre-action delay:

> "37. There was a degree of debate between counsel before me as to the relevance of pre-action delay although in reality there was little between the competing positions in this case. My understanding of the law is this. The relevant abuse must be in the context of an action which has been commenced. So, where a party is saying that an action has been put on hold during the course of proceedings it is that action in the course of the proceedings which is the abuse. Delay in the period before proceedings were commenced can, however, be highly relevant. First, it can support the view that a claimant intended to put the action on hold and also the conclusion that a claimant has no real intention to continue proceedings. It can support the view that a claimant's actions are to be seen as doing the bare minimum necessary to keep a potential claim alive. Second, it can be highly relevant to the question of whether putting the proceedings on hold is an abuse and to the related question of the sanction if it is.
>
> 38. A party who has delayed significantly before starting proceedings will find harder to show that it was appropriate to put the proceedings on hold at some point during the course of proceedings than a party who has been energetic in the pre-action stages. In addition a party who has delayed before the start of proceedings will find a contention that the proceedings were put on hold for good reason being viewed more sceptically.
>
> 39. Similarly, if there is pre-action delay as well as putting on hold during the course of proceedings it is more likely that it will be appropriate to

> strike out the claim as a response to the abuse of this kind. In such circumstances that will be because where there has been pre-action delay the adverse effects of putting the proceedings on hold in the course of proceedings will be compounded and there will be a greater risk that the administration of justice will be hindered and the defendant prejudiced by the staleness of the case."

64. I agree that pre-commencement delay can be relevant both to deciding whether post-commencement delay constitutes abuse and to identifying the appropriate response. The only minor gloss (possibly clarification) that I would add concerns its relevance to deciding whether there has been *Grovit* abuse. Pre-commencement delay is (in my view) relevant at that stage only insofar as it informs the inferences to be drawn as to the claimant's subjective intentions in causing post-commencement delay. If the proper inference is that the claimant did not cause the post-commencement delay with the necessary subjective intention (viz. not to progress the claim), pre-commencement delay has no further logical relevance to the question whether putting the proceedings on hold is a *Grovit* abuse. (It might be relevant to the question whether putting the proceedings on hold amounted to some other form of abuse: for example, whether it has resulted in inordinate delay that occasions substantial prejudice to the defendant.) I respectfully agree that, where *Grovit* abuse supervenes on significant pre-commencement delay, it may well be more likely that an order striking out the claim will be a proportionate response to the abuse, even if no specific prejudice to the defendant can be identified.

65. Before me, Mr Healey placed reliance on the decision of Richards J in *Watford Control Instruments Ltd v Brown [2024] EWHC 1125 (Ch)* on appeal from a decision of Master Pester. The Master had found that the claimant's failure to pursue its claim for a substantial period amounted to *Grovit* abuse, but he had held that it would be disproportionate to strike out the claim. Permission to appeal was given on the ground that the Master had applied the wrong test in deciding what sanction to apply. Richards J considered the law on sanctions for *Grovit* abuse at [22]-[47]. He referred in detail to the *Chest Hospital* case, and at [33] he cited the passage in which Aldous LJ had said, "Once the action came to amount to an abuse of the process of the Court, it required to be struck out unless compelling reasons to the contrary could be demonstrated." At [34] he noted that the defendant submitted that this passage was "a statement of principle, binding on this court". In the succeeding paragraphs he noted that the claimant did not suggest that Aldous LJ was expressing "an evaluation only on the facts of the case before him" but did submit that "the apparent statement of principle" was not binding. I set out Richards J's discussion of that submission in full.

”36. The Claimant’s first argument is that the apparent statement of principle is not binding because it was inconsistent with the speech of Lord Woolf in *Grovit* itself in which he held only that strike-out will ‘frequently’ be the appropriate sanction for the identified abuse. I do not accept that there is any such inconsistency. In *Chest Hospital* , the Court of Appeal provided further guidance on the nature of the ‘frequent’ situations which Lord Woolf had identified in which strike-out will be appropriate. That is guidance as to the proper interpretation of *Grovit* which is binding on this court.

37. Next, the Claimant argues that Chest Hospital has scarcely been cited since and that the principle that I have quoted has been diluted in subsequent cases.

38. The Claimant’s first argument is based on [79] of Arnold LJ’s judgment in *Asturion Fondation* . In that paragraph, having concluded at [78] that the judge at first instance was entitled to find Asturion’s conduct fell short of amounting to *Grovit* abuse (because it had an objectively good reason for not pursuing its claim for 10 months), Arnold LJ said:

> ’Even if the Judge was wrong to conclude that Asturion’s conduct was not an abuse of process, the question would remain as to whether he was entitled to exercise his discretion not to strike out the claim. The Judge held that, even if there was an abuse, it was of a relatively minor nature and did not justify the sanction of striking out. In my judgment the Judge was fully entitled to take that view. Although neither the Master nor the Judge gave any detailed consideration to alternatives to striking out, there were lesser sanctions available to the court which were more proportionate to the abuse, if abuse there had been. For example, the court could have imposed tight directions to trial, including unless orders against Asturion, and it could have imposed a costs sanction. Striking out was a disproportionate response.’

39. I am quite unable to accept that this passage involves any 'dilution' of the principle that Aldous LJ formulated in *Chest Hospital* . The passage is clearly obiter, as the Claimant accepts, since it is dealing with the position on the hypothesis that, contrary to Arnold LJ's conclusion, Asturion was guilty of *Grovit* abuse. *Chest Hospital* was not cited to the Court of Appeal as authority for any proposition relating to the determination of an appropriate sanction in cases of *Grovit* abuse. Indeed, *Chest Hospital* did not need to be cited for that proposition since, as Arnold LJ observed at [1] of his judgment, the issue of principle that was raised in *Asturion* was what kind of conduct amounts to *Grovit* abuse, and not the sanction that should be applied in cases where such abuse is present.

40. In short, Arnold LJ made obiter statements as to the sanction that might be appropriate in the particular case before him if, contrary to his finding, it did involve *Grovit* abuse. These statements are incapable, as a matter of precedent, of altering the principle that Aldous LJ formulated in *Chest Hospital* . They are entirely consistent with the proposition that where a claimant is engaged in *Grovit* abuse the claim will be struck out absent 'compelling reasons' with Arnold LJ simply expressing the obiter view that, since any abuse was minor in nature, the necessary compelling reasons were present in the case before him.

41. The Claimant's next argument is based on the judgment of Philip Marshall QC, sitting as a judge of the High Court, in *Quaradeghini v Mishcon de Reya Solicitors [2019] EWHC 3523 ('Mishcon de Reya')* . In that case, a Deputy Master had found that a claimant was guilty of *Grovit* abuse and struck the claim out. That order was, however, reversed on appeal with Mr Marshall QC holding that the introduction of CPR in 1999 had changed the landscape since Grovit was decided. At [14], the judge quoted a lengthy extract from the judgment of the Court of Appeal in *Biguzzi v Rank Leisure plc [1999] 1 WLR 1926* for the proposition that, following CPR , courts had an array of sanctions available to them to deal with cases of delay and should exercise a power to strike out with circumspection. At [16], he noted, by reference to the judgment of the Court of Appeal in *Asiansky Television plc v Bayer-Rosin [2001] EWCA Civ 1792 ('Asiansky Television')* that it was incumbent on defendants who felt that they were on the receiving end of excessive delay, to apply for an 'unless' order as soon as reasonably practicable rather than 'letting sleeping dogs lie'.

42. Mr Marshall QC did not refer to *Chest Hospital* , no doubt because it

was not cited to him, and concluded, following his review of the authorities at [17]:

> 'In the light of the above, in my judgment, under the present procedural regime, it will be a relatively rare case in which the court will strike out proceedings for abuse of process based on delay in the first instance. The much more likely remedy is relief of a lesser form proportionate to the default.'

43. Of course, as a matter of precedent, a judgment of the High Court cannot vary or qualify a binding statement of principle made by the Court of Appeal. However, the Claimant's argument is that it was CPR that operated to cause the principle set out in *Chest Hospital* no longer to be good law.

44. I do not accept that analysis. In the first place, as Lloyd LJ observed at [23] of *UCB Corporate ServicesLtd v Halifax (SW) Ltd* (Court of Appeal, unreported 6 December 1999), *Biguzzi* should not be read as 'some landmark decision which throws all of the [law previous to CPR] on its head'. Moreover, he noted that thought-processes that informed pre- CPR judgments should not be 'completely thrown overboard' particularly judgments that had in mind the direction of travel under CPR when given.

45. In my judgment, CPR did not 'throw overboard' the judgments in either *Grovit* or in *Chest Hospital* . Both before, and after, CPR a court had power to strike out a claim that involved an abuse of process with the post-CPR power being found in CPR 3.4(2)(b) , as Arnold LJ explained in *Asturion Fondation* . At its heart, *Grovit* simply expanded the category of claims or behaviour that involve abuse. While CPR clearly resulted in a step-change in the courts' attitude to non-compliance with rules, practice directions and orders (which can lead to strike out under CPR 3.4(2)(c)), I have not been referred to material that suggests a similar step-change in relation to the courts' attitude to strike-out in cases of abuse of process which are dealt with under CPR 3.4(2)(b) . *Biguzzi* itself, on which the conclusions in *Mishcon de Reya* were based, was squarely a case involving a possible strike-out under CPR 3.4(2)(c)).

> 46. I am reinforced in that conclusion by the fact that the Court of Appeal has already considered the role of *Grovit* abuse in a post- CPR world. In *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd [1998] 1 WLR 1426* , in a section of his judgment headed 'The Future', Lord Woolf MR emphasised the consistency between the recognition in *Grovit* that delay has consequences that affect court users generally, and not the particular parties to the action, and the 'change of culture' that CPR sought to effect. If CPR truly were intended to water down the proposition set out in *Grovit* that strike-out would 'frequently' follow in cases of such abuse, the comments he made in that section would be misplaced.
>
> 47. In conclusion, therefore, I consider that the proposition in *Chest Hospital* that 'compelling reasons' are needed to prevent a claim involving *Grovit* abuse from being struck out remains good law. It is true that CPR stresses the proportionality of any sanction that the court imposes. Chest Hospital does not cut across that, but rather decides that in cases of Grovit abuse, strike out will be a proportionate sanction unless 'compelling reasons' to the contrary are shown. After all, two obvious points that might be made in objection to strike-out in cases of *Grovit* abuse are that the defendant has suffered no severe prejudice and that a fair trial remains possible. However, as *Grovit* itself stresses, the abuse can still be present in these cases. While it is not for me to expand on the reasons that Aldous LJ gave in *Chest Hospital* , I respectfully consider that the approach of requiring 'compelling reasons' to enable a defendant to resist strike out is consistent with the nature of the abuse identified in *Grovit* ."

66. I say nothing about the actual decision in *Watford Control.* But I am afraid that I consider both the conclusion and the reasoning in this passage to be wrong. My decision on the facts of this case does not rest primarily on that opinion. However, as I think Richards J's analysis to be incorrect in principle as well as out of step with other post- CPR cases, and as the matter was argued before me and forms an alternative basis of my decision, I shall explain my reasons at some length.

1) *Grovit* abuse was first recognised by the House of Lords. Lord Woolf's speech in *Grovit v Doctor* simply says that, where there is such abuse, the courts will dismiss the action "if justice so requires". Whatever difficulties of application may arise in a particular case, that seems to me to be a fairly straightforward test; Lord Woolf appears to have thought so. Lord Woolf also remarked parenthetically that justice would "frequently" require the dismissal of the case. That is an observation, not a legal test (Richards J refers to it as a "proposition", but that risks giving it an inappropriate status);

however, in conjunction with the statement that the power to strike out an action for this form of abuse does not depend on the existence of want of prosecution under either of the limbs in *Birkett v James* , the observation serves to indicate that claimants who abuse the process of the court cannot presume on being indulged by the court with a further bite of the cherry.

2) The statement in the *Chest Hospital* case, that once proceedings have become a *Grovit* abuse, they will "normally" be struck out—that is, that they will be struck out "unless compelling reasons to the contrary could be demonstrated"—is by no means necessarily inconsistent with *Grovit v Doctor* , but it introduces a gloss that goes further than anything said in that case.

3) Although I do not especially rely on the point, I am not entirely convinced that it is sensible to treat everything said by a court in explaining its reasons for a particular decision as representing a precise formulation of a legal test (and therefore, in the case of the Court of Appeal, as a binding formulation). Judges ought to be free to explain their decisions without having their words used in that manner. There is nothing that I can see in the *Chest Hospital* case to suggest that Aldous LJ was intending to state a refinement of what Lord Woolf had said in *Grovit v Doctor.* Indeed, the remark about "compelling reasons" was specifically formulated with reference to the case before the Court ("Once *the action* …"—my emphasis), not as a general legal proposition, and in the light of the nature of the abuse in that case it is no doubt understandable. I am not greatly surprised to find only one judgment before 2024 that cites the *Chest Hospital* case [2] —and none, other than *Watford Control* itself, after the making of the CPR.

4) However, if the *Chest Hospital* case is to be taken as having set down a legal test, two points arise. First, any legal test formulated in terms of a "normal" response in the absence of "compelling reasons" to the contrary requires interpretation. It could mean that only the strongest reasons (or at least very strong reasons) could suffice to justify anything other than strike-out. It could, however, mean simply that the burden lies on the claimant to show a sufficient reason why anything less than strike-out is appropriate, but that the court must consider all the circumstances of the case so as to deal with the application justly. I return to this observation below.

5) Second, the *Chest Hospital* case was decided before the existence, let alone the coming into force, of the CPR . With respect to Richards J, it seems to me that this alone means that it cannot constitute a binding precedent as to the correct response to *Grovit* abuse. How to respond to an abuse of process is a matter for the discretion of the court. In exercising its discretion the court is obligated to seek to give effect to the overriding objective. There was no overriding objective (whether in its present or in its original form) and no such obligation in 1997, when the *Chest Hospital* case was decided. Further, as the citations above show, the courts have repeatedly emphasised that the CPR provide an armoury of new powers to respond to delay. Again, under the CPR it is no longer appropriate (as once it might be) for a defendant to let sleeping dogs lie: see *Asiansky* at [48]; and, though this may be relevant to the question whether there is an abuse of process, it is also a factor that may be relevant in deciding how to respond

to an abuse. These facts necessarily mean that the remarks of Aldous LJ in the *Chest Hospital* case cannot constitute a statement of principle that is legally binding on a court exercising its discretion under the CPR . Of course, that does not mean that the thought processes underlying the remarks are henceforth to be disregarded: see *per* May LJ in *Purdy v Cambran* at [51], cited by Clarke LJ in *Asiansky* at [43].

6) Accordingly, it is not in my view adequate to say that Arnold LJ's remarks in *Asturion Fondation* , being *obiter,* "are incapable, as a matter of precedent, of altering the principle that Aldous LJ formulated in *Chest Hospital* " (*Watford Control* at [40]). The question of precedent did not arise. Arnold LJ's remarks, though *obiter* , reflected the post- CPR position as indicated, again *obiter,* by Lord Woolf MR in *Arbuthnot Latham* and as explained in detail in *Asiansky* .

7) *Asiansky* concerned strike-out under r. 3.4(2)(c) (breach of an order) rather than under r. 3.4(2)(c) for abuse of process. It may be that strike-out will more commonly be the response to abuse of process than to the breach of an order. But that does not mean that there is or ought to be any basic difference in approach when considering the two situations. In *Asiansky* Clarke LJ relied *inter alia* on May LJ's judgment in *Purdy v Cambran* , which concerned inordinate delay and was decided under the CPR . Swinton Thomas LJ said at [1] that the claim had been struck out "for want of prosecution as being an abuse of the process of the court"; his conclusion at [41] represents application of the second limb of *Birkett v James.* May LJ, whose judgment contains the main discussion of the overarching approach, actually referred specifically to r. 3.4(2)(c) and r. 3.1(2)(m) as containing the power (if to be found nowhere else: see [45]) to strike out a claim for delay. But he could just as well have mentioned r. 3.4(2)(b). However the various factors to be considered might weigh in the balance in a particular case, I can see no justification for thinking that the approach of Clarke LJ in *Asiansky* at [49] is applicable to r. 3.4(2)(c) but not, at least without some additional gloss, to r. 3.4(2)(b).

8) This conclusion is reinforced by another consideration. Even *Grovit* abuse comes in various shapes and sizes. As Eyre J noted in *Morgan Sindall* at [30], there are two basic kinds of *Grovit* abuse: (i) starting proceedings with no intention of continuing them; and (ii) starting with an intention of continuing but then putting the case on hold. As Eyre J also noted, the former is the graver abuse. But within each kind, there are surely different degrees of gravity. Thus, for example, a claimant whose abuse is of the first kind may thereafter repent and decide to proceed; and the warehousing of a claim, within the second kind of abuse, may be for varying lengths of time or dependent on the occurrence of different sorts of contingencies. It is not clear, at least to me, why (a) every variant of *Grovit* abuse should be subject to the same "compelling reasons" test or (b) why this "compelling reasons" test should be applicable to every instance of *Grovit* abuse, regardless of gravity, but not at all to instances of breach of orders. If the response to (a) were to the effect that reasons that might not be compelling in one case might nonetheless be compelling in another, then the "compelling reasons" test seems to have collapsed into the second possible interpretation mentioned above and, as it imports confusion, to have outlived any usefulness that it might have had before the

CPR.

9) Finally, a "compelling reasons" test for *Grovit* abuse appears incongruous when one considers the different test that applies to relief from sanction.

67. In my view, accordingly, the proper course is simply to approach the matter by reference to the approach in *Asiansky* , *Alfozan* and *Morgan Sindall* and exercise the discretion in accordance with the overriding objective and make such order as is just and proportionate on the facts of the particular case.

68. Having said all this, I respectfully think that Richards J was correct to be concerned at the possibility that the approach to the exercise of discretion under the CPR might be misunderstood to have drawn the teeth from the court's response to abuse of process. *Grovit* abuse is an inherently serious matter, both because it involves a subjective intention that is repugnant to the proper conduct of litigation and because of its effect on the efficient administration of the justice system as a whole and individual cases in particular. The overriding objective itself identifies the need to ensure that cases are dealt with expeditiously and fairly and the importance of having regard to the resources of the court and the calls of other court users. Further, the jurisdiction to strike out for *Grovit* abuse specifically does not depend on prejudice to the defendant in the particular case. For my part, I should be hesitant to say, with the deputy judge in *Quaradeghini* , that it will be "relatively rare" that the court will respond in the first instance by striking a claim out; I should be equally reluctant to call strike-out the "normal" approach. Sometimes it will be the just and proportionate response and sometimes it will not be. This is a matter for the court in the light of all the circumstances of the case. In my respectful view, the judgment of Clarke LJ in *Asiansky,* with its reference to *Biguzzi* and to the observations on that case by May LJ in *Purdy v Cambran,* shows how the matter ought to be dealt with.

Discussion

Is there abuse of process?

69. I find that the conduct of the claim is not and has not been an abuse of process.

70. By way of preliminary observation, I note that the defendants have counterclaimed in these proceedings and are to be regarded as claimants for the purpose of the counterclaim. Any points that can be taken against the claimant in respect of delay or warehousing can, as it seems to me, be taken equally against the defendants. When I asked Mr Healey to tell me his position on this, he asked to take instructions. The response, as I understood it, was that the defendants accept

that, if the claim were to be struck out, so should the counterclaim be; though the defendants have not gone so far as to concede that, if it were inferred that the claimant's subjective intentions gave rise to abuse of process, it ought also to be inferred that their intentions did also. In my view, however, if the claimant's conduct of the claim were found to constitute an abuse of process, the corresponding inactivity of the defendants would at least be relevant to a consideration of the sanction that would be appropriate to impose upon the claimant.

71. The period of inactivity that could itself constitute abuse of process has to be post-commencement. Although the defendants complain of delay, or at least lack of promptness, between the issue of the claim form and service on the defendants, the period requiring serious consideration is between May 2021 and December 2023. That was an inordinate period of delay or procedural inactivity. The basic question is whether the reason for it was that the claimant lacked an intention to bring the proceedings to a conclusion. I agree with Mr Healey that the reason for this period of delay is the "key to this application" (skeleton argument, paragraph 40).

72. Any pre-commencement delay (that is, prior to April 2020) is relevant at this stage of the enquiry only insofar as it is of assistance in enabling the court to draw inferences as to the subjective intentions of the claimant during the period of post-commencement delay. I do not consider that the pre-commencement delay in this case is evidence from which subsequent lack of the intention to pursue the claim can properly be inferred, though it could perhaps support such an inference drawn on other grounds. The parties maintained an amicable working relationship until September 2017, so it is hardly surprising that no proceedings were brought before then. Further, Mr Healey conceded that, for the purposes of this application, the court ought to proceed on the assumption that the claimant's case as to the termination of the partnership or joint venture (namely, that it occurred in September 2017 at the earliest) is correct. Thereafter the claimant took prompt steps to obtain documents in support of a prospective claim. The period of inactivity between October/November 2018 and April 2020 is relevant, and it does appear to indicate some nervousness about incurring costs in the pursuit of the proposed claim. Such nervousness is, however, understandable in the light of the defendants' initial estimate of the costs of disclosure. (In the defendants' Precedent H dated 4 March 2024, the total under the Disclosure phase was £22,290. I cannot avoid the suspicion that the estimate in the pre-action disclosure provisions was given *in terrorem.*) Anyway, the claimant did eventually decide to commence the claim.

73. Once the proceedings had been commenced, the claimant gave proper indications of an intention to pursue them. After April 2021, however, the claimant did nothing of a procedural nature to advance the claim until December 2023. I do not find that this was due to an intention not to pursue the claim to a conclusion.

1) As Eyre J observed in *Morgan Sindall* at [35]-[36], the distinction between

warehousing and undue delay, though fine, is real and turns on the claimant's intentions; the court must guard against making undue assumptions.

2) The court failed in its responsibility to list a CCMC. This does not excuse the claimant's inaction, because the claimant could have queried the position with the court and requested it to list a CCMC well before he actually did so in December 2023. (So too, of course, could the defendants.) Nevertheless, it was the court that was required to list the CCMC; the court's failure to do so, coupled with its failure in the order dated 7 January 2021 to make any provision for what should happen at the end of the stay, meant that the proceedings were actually in limbo. If the court had actively managed the case from the outset, as it was obliged to do, the procedural delay could not have occurred. I accept that there is some force in Mr Healey's point that the opportunity for *Grovit* abuse will commonly only exist where there is some failure by the court to keep a firm hold of the management of the case. Even so, the court's failure in this case provides at least a context for considering the claimant's procedural inaction and it is, in my view, relevant to a consideration of the inferences as to the claimant's subjective intentions properly to be drawn from that inaction.

3) Also relevant is that the defendants were not pressing for the proceedings to be taken forward. Indeed, for a period of nearly two years, between April 2021 and April 2023, they appear to have (so to speak) pulled down the shutters; more than that, they left a threat of an application for summary disposal hanging in the air, at least so far as the claimant was concerned. The defendants' unresponsiveness during this period seems to me to be relevant when deciding what may properly be inferred about the claimant's intentions at the time.

4) In her witness statement, Ms England states (paragraph 43):

> "Mr Redfern had been so adamant that a strike out application would be forthcoming that we did wait to receive this before taking any additional steps in order to avoid costs being incurred."

That is to put the matter too strongly—Mr Redfern's letter of 23 April 2021 implied the possibility that the defendants would backtrack on their stated intention; anyway, Ms England could always have asked for confirmation whether the application would be made—but I do accept that the intimation of an application for summary determination probably led the claimant to a "wait and see" approach. Ms England further states (paragraph 41):

> ”Following a further period of silence on the part of the Defendants’ solicitors, from about August or September 2022, we went about collecting evidence from a number of different witnesses on behalf of the Claimant. That witness evidence forms the basis of the evidence that the Claimant will rely on. We also regularly consulted counsel during that period.”

Some additional support for this is provided by the claimant’s Precedent H, which shows that by 29 February 2024 the claimant had incurred costs of £121,000, including £11,000 in respect of disclosure (as against £8,000 for estimated costs) and £22,000 in respect of witness statements (as against roughly the same amount for estimated costs). The incurred costs for these phases included disbursements in respect of counsel: £1,087.50 for disclosure, and £5,312.50 for witness statements. By themselves, the figures in the Precedent H do not prove precisely when the costs were incurred; even so, they are consistent with the evidence in Ms England’s witness statement. Although the use of this period to collect evidence does not justify a failure to take steps to obtain the listing of a CCMC, it does suggest that the procedural inaction was not due to a lack of intention on the claimant’s part to take the claim to final resolution. Mr Healey submitted that to use the period to gather evidence made matters worse: he said this was a case of stealing a march on the defendants (skeleton argument, paragraph 43). There is nothing in that objection: the defendants were just as able as the claimant to ask the court to list a CCMC, and if they chose to use the interim to sit on their hands without doing anything to prepare their case that is their own lookout. Further, *Grovit* abuse is not about stealing a march: it is about not wanting to march at all.

5) During the period of inordinate delay (May 2021 to December 2023) the claimant was not entirely silent vis-à-vis the defendants. Ms England wrote regarding mediation on 28 June 2021 but received no reply. She wrote again on 7 March 2022 and received a fairly impolite reply. The claimant’s solicitor wrote, without prejudice save as to costs, in April 2023. By themselves, these (somewhat desultory) communications do not prove an intention to progress the case. It would be wrong, however, to take the period as one of pure silence, and the silence was only ever broken by the claimant.

6) In December 2023 the claimant asked the court to list a CCMC. That is itself evidence of an intention to pursue the claim. It is possible that such an intention could have supervened upon a prior intention not to pursue the claim. However, the claimant’s conduct in and after December 2023 does not itself support an inference that the claimant had previously not intended to pursue the claim. Further, the claimant’s request for a CCMC was of his own volition: he was not being pressed by the defendants or threatened with an application to strike out for abuse of process. This piece of positive evidence of an intention to pursue the claim is available courtesy of the defendants’ wholescale inaction, in that it would not have been available if they had made the application in, say, November 2023; to that extent, the defendants might be said to be

hoist by their own petard.

If there were an abuse of process, what should be the response?

74. If I thought that the claimant's conduct did amount to abuse of process, I would not strike out the claim. My views as to the correct approach in law appear sufficiently from what I have already written. In considering all the circumstances of the case, I mention in particular the following matters.

1) Any *Grovit* abuse and post-commencement delay have occurred because of the court's failure actively to manage the case and to list a CCMC. Even assuming that the claimant's conduct was nevertheless abusive, this factor is of considerable significance in considering what response is just and proportionate.

2) If the claimant abused the process of the court, so did the defendants, who stood as claimants on their counterclaim.

3) Further, the defendants' conduct of the proceedings, in respect in particular of the extended disclosure exercise, the response to communications from the claimant's solicitors and the response to the court's failure to list a CCMC, has been both dilatory and poor. Even if the counterclaim is ignored, the very best that could possibly be said for the defendants is that they were content to let sleeping dogs lie—something that is no longer acceptable.

4) The present application was not made promptly; indeed, it was made so late as to cause the CCMC to be abortive. (Cf. *Morgan Sindall* at [104].)

5) Even if it were to be accepted that the claimant formerly lacked the intention to pursue the proceedings, the evidence is that he now has that intention and, indeed, has spent a considerable amount of money on the litigation. That would not mean that there was no abuse of process at the former stage. But it is relevant to a consideration of the just and proportionate response to any such abuse in the altered circumstances, particularly where the claimant's change of mind must be considered spontaneous and is not a mere reaction to an initiative taken by the defendants.

6) There is no real evidence of prejudice by reason of the delay. If the defendants' ability to deal with witness evidence is harmed by their own inaction in 2022 and 2023, that is the consequence of their own choice. Lack of prejudice is not relevant to the existence of abuse, but it is capable of being relevant to the exercise of the court's discretion in the face of abuse and in my view it would be relevant here.

7) The court now has a hold of these proceedings and can manage them in a way that ensures their prompt and efficient progression to trial. Had it not been for the present application, the CCMC would have taken place and the necessary directions would have been given.

Conclusion

75. The application is refused.

76. I shall direct that the costs and case management conference be re-listed.

Footnotes

1 The courts regularly refer to "warehousing", and so shall I. In *Morgan Sindall Construction and Infrastructure Ltd v Capita Property and Infrastructure (Structures) Ltd [2023] EWHC 166 (TCC), at [10]* , Eyre J said that it is "not a technical term" but, rather, is "a useful shorthand description of a range of conduct where an action is deliberately not being pursued." In *Freed v Saffron Management Ltd [2023] EWHC 1919 (Ch)* , Mr Nicholas Thompsell, sitting as a deputy High Court judge, said at [88] that "warehousing" "carries with it the connotation that [the claimants] had no genuine interest in pursuing the claim but were keeping it on foot, without prosecuting it, in pursuit of some other illegitimate objective."

2 This is the judgment of Lindsay J in *Re Vitara Foods Ltd [1999] BCC 315* .