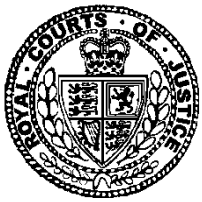

Neutral Citation Number: [2020] EWCA Civ 32

Case No: A3/2019/0595

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, CHANCERY DIVISION
His Honour Judge David Cooke
[2019] EWHC 274 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 January 2020

Before :

THE SENIOR PRESIDENT OF TRIBUNALS
LORD JUSTICE LEGGATT
and
LORD JUSTICE ARNOLD

- -

Between :

ALJAWHARAH BINT IBRAHIM ABDULAZIZ ALIBRAHIM	**Appellant**
- and -	
ASTURION FONDATION	**Respondent**

- -
- -

Rupert Reed QC and **Simon Atkinson** (instructed by **Simmons & Simmons LLP**) for the **Appellant**
David Mumford QC and **James Kinman** (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Respondent**

Hearing date: 15 January 2019

- -

Approved Judgment

Lord Justice Arnold:

Introduction

1. In these proceedings the Claimant ("Asturion") seeks to recover a property worth around £28 million which was gratuitously transferred to the Defendant ("Ms Alibrahim") by a member of Asturion's board, it is said without authority. Asturion's claim was struck out by Deputy Master Cousins ("the Master") on the ground that Asturion had abused the process of the court by "warehousing" its claim, that is to say, unilaterally placing the proceedings on hold for a substantial period of time without either the agreement of Ms Alibrahim or an order of the court. His Honour Judge David Cooke sitting as a Judge of the High Court ("the Judge") allowed an appeal against that decision by Asturion. Ms Alibrahim now appeals to this Court with permission granted by Asplin LJ. The appeal raises an issue of principle as to what amounts to an abuse of process in this context.

Background

The parties

2. Asturion is a Liechtenstein foundation which was founded in 1974 to hold and manage certain properties on behalf of Prince Fahd Bin Abdulaziz Al Saud of Saudi Arabia, who became King Fahd in 1982 and died on 1 August 2005. Ms Alibrahim is one of the widows of King Fahd.

The dispute in outline

3. In 2011 Maître Faisal Assaly ("Mr Assaly"), who was one of the members of the board of the Foundation at that time, executed transfers of four high value assets to Ms Alibrahim. No consideration was paid by her. Mr Assaly claimed to have acted on the basis of oral and written instructions given by the late King in 2001. Mr Assaly died in 2015.

4. These proceedings concern one of the four assets, namely a property known as Kenstead Hall, 52 Bishops Avenue, London N2 0BE ("the Property"). This was transferred by a TR1 executed by Mr Assaly on 14 October 2011 ("the Transfer"). Asturion alleges that Mr Assaly executed the Transfer without Asturion's authority, in excess of his internally specified competencies as a matter of Liechtenstein law and/or contrary to the purposes of Asturion and/or under some fundamental mistake. It is said by Asturion that Ms Alibrahim knew or ought to have known of these alleged irregularities by reason of her alleged knowledge of Shari'a law. Accordingly, Asturion claims that the Transfer was void both under English law and under Liechtenstein law, or was voidable.

5. Ms Alibrahim contends that the Transfer is neither void nor voidable for want of actual or apparent authority of Mr Assaly, nor for any lack of good faith on the part of Ms Alibrahim. As a matter of Liechtenstein law, alternatively English law, Mr Assaly had authority to effect the Transfer. Even if, however, he did not, then Ms Alibrahim relied in good faith on the publicly-registered power of Mr Assaly solely to represent Asturion in its dealings with third parties. As a further alternative, if the validity of the Transfer is to be determined according to principles of Shari'a law, then the Transfer

would be neither void nor voidable since the instructions of King Fahd amounted to an *inter vivos* gift to Ms Alibrahim, and those instructions were binding on Mr Assaly and Asturion both before and after King Fahd's death.

6. The other assets transferred by Mr Assaly to Ms Alibrahim were properties in Germany, France and Spain (in the last case through a Spanish company, Fasfunda SA, in which Asturion has an interest). Similar proceedings, also strongly contested, have been brought by Asturion and Fasfunda in France and Spain. There is no claim in respect of the German property because, Asturion says, Ms Alibrahim had disposed of it before proceedings could be begun.

Procedural history of this claim

7. The claim form in these proceedings was issued on 10 April 2015. Asturion immediately applied to register notice of a pending land action against the Property at the Land Registry ("the Notice"), thereby preventing Ms Alibrahim from disposing of the Property to a third party until resolution of the claim.

8. Ms Alibrahim was served with the claim form in late June 2015. She filed an acknowledgment of service on 2 July 2015. Her Defence was filed and served on 18 September 2015, after two agreed extensions of time which were approved by the court by way of a consent order.

9. On 6 October 2015 Ms Alibrahim's solicitors wrote to Asturion's solicitors, asking Asturion to confirm that it would in principle be willing to give security for costs. The letter pointed to the absence of any publicly-available information regarding the assets and liabilities of Asturion. On 16 October 2015 Asturion's solicitors replied declining to provide any security, offering an undertaking by Asturion that it would not object to any claim by Ms Alibrahim in Liechtenstein to enforce any judgment or costs order and asserting that Asturion had sufficient assets with which to satisfy any costs order or judgment.

10. Asturion filed and served a Reply on 18 December 2015, again after two agreed extensions of time which were approved by the court by way of a consent order.

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.

12. During the course of this correspondence, Ms Alibrahim's solicitors referred to the fact that proceedings were underway in Liechtenstein regarding the constitution of the board of Asturion, and said that in those circumstances Ms Alibrahim did not think that alternative dispute resolution would be productive at that time.

13. On 28 January 2016 Asturion's solicitors indicated that Asturion was considering making an amendment to its Particulars of Claim. After a couple of chasing letters from Ms Alibrahim's solicitors, Asturion's solicitors sent Ms Alibrahim's solicitors a draft Amended Particulars of Claim on 8 March 2016 requesting Ms Alibrahim's consent to the amendments.

14. On 22 April 2016 Ms Alibrahim's solicitors wrote again to Asturion's solicitors regarding security for costs, commenting on the proposed undertaking and inviting Asturion to provide sufficient information as to the nature and location of its assets to show that it could meet any costs order. The letter did not respond to the request to consent to the amendments to the Particulars of Claim.

15. After a chasing letter from Ms Alibrahim's solicitors threatening an application to the court for security for costs, Asturion's solicitors sent a holding response on 13 May 2016, promising that a substantive response to the letter dated 22 April 2016 would be provided as soon as possible.

16. On 20 July 2016 Ms Alibrahim's solicitors sent Asturion's solicitors a draft Amended Defence and indicated she would consent to Asturion's amendments of the Particulars of Claim if it consented to her amendments and paid her costs.

17. On 2 August 2016 Ms Alibrahim's solicitors requested a response regarding the amendments and also warned that, if Asturion did not provide a substantive response on the question of security soon, then Ms Alibrahim would make an application.

18. Asturion's solicitors replied on 12 August 2016 objecting that not all of the amendments to the Defence flowed from the amendments to the Particulars of Claim, and discussing possible amendments to the Reply and when it would be appropriate to consider a Rejoinder. The letter also reiterated Asturion's position concerning security which had been set out in the letter dated 16 October 2015.

19. On 9 November 2016 Ms Alibrahim's solicitors pressed for confirmation by 25 November 2016 as to whether Asturion intended to proceed with its amendments and consent to those of Ms Alibrahim, failing which she would make an application for permission to amend her Defence and list a CMC. The letter also demanded further information and undertakings in relation to security for costs by the same date, failing which Ms Alibrahim would apply to the court.

20. On 24 November 2016 Asturion's solicitors replied that Asturion did intend to amend its Particulars of Claim, and would respond on the question of consent to Ms Alibrahim's amendments to her Defence and on the question of security for costs at the beginning of December.

21. Between 24 November 2016 and 15 August 2017 there was no activity by either side. Asturion did not respond as it had said it would and Ms Alibrahim did not make the applications for permission to amend her Defence or for security for costs that she had threatened.

22. On 15 August 2017 Ms Alibrahim's solicitors wrote asserting that in the circumstances it was clear that Asturion had abandoned the claim and inviting it to discontinue.

23. On 23 August 2017 Asturion's solicitors replied as follows:

> "Our client has not abandoned its claim. As you are no doubt aware, the court has not listed a case management conference or approved directions to trial. Given that the parties have been involved in separate court proceedings in Liechtenstein regarding the composition of our client's Board, we were of the opinion that unless your client requested, there was no immediate need to push ahead with directions to trial.
>
> It appears your client now wishes the formal court proceedings to be progressed. We will accordingly write to the court and request that directions to trial be approved or, if necessary, a case management conference be listed. We will also provide a substantive response in relation to your client's Amended Defence and security for costs."

24. On 8 September 2017 Ms Alibrahim's solicitors responded alleging that this was an admission of "warehousing" which constituted an abuse of process and threatening an application to strike out unless the claim was discontinued by 15 September 2017.

25. On 12 September 2017 Asturion's solicitors replied disputing that the claim was liable to be struck out. Among other things, this letter stated:

> "… the further delay by our client has been caused by your client actively seeking to disrupt our client's ability to continue these proceedings by commencing proceedings in Liechtenstein to replace the Board of our client. It was entirely reasonable not to seek directions in circumstances in which your client was contesting our client's Board's authority to do so. As soon as your client intimated that it wished the claim to proceed, our client agreed to do so."

The letter went on to state that Asturion consented to the amendments to the Defence, asked Ms Alibrahim to confirm that she consented to the amendments to the Particulars of Claim and proposed revised directions.

26. On 21 September 2017 Asturion issued an application for permission to amend its claim form and Particulars of Claim.

27. On 29 September 2017 the parties agreed a standstill in relation to Asturion's proposed amendments to its claim form and Particulars of Claim.

28. On 11 December 2017 Ms Alibrahim issued an application to strike out the claim on the ground of abuse of process, alternatively seeking an order that Asturion provide a cross-undertaking in damages in respect of the Notice and security for costs in a sum exceeding £1 million.

29. In a witness statement made in opposition to the application Graham Shear of Asturion's solicitors stated:

> "21. … there followed a hiatus where no steps were taken in relation to the English Proceedings. This was not in any sense a cessation of hostilities in the English proceedings, nor was there a conscious decision on the part of the Board not to progress matters in England. Rather, the hiatus was a consequence of (a) there being no court-approved directions order requiring immediate steps be taken; and (b) the fact of the Liechtenstein Proceedings, in which the Defendant was arguing that the English proceedings were a gross breach of duty and abusive, and that they were generating vast costs to no proper end for which the Defendant should be compensated.
>
> 22. I assumed that as a result of these circumstances the Defendant was content that neither party should incur further costs in relation to the English proceedings save to the extent that they were necessary. Not only would this avoid the risk of the Board further committing the Foundation to courses of action in circumstances where their authority to act was in doubt, but it also saved costs which may be wasted depending on the outcome of the Liechtenstein Proceedings.
>
> 23. It is right that we did not write in terms confirming this, but given the substantial delays which there had been in correspondence from the Defendant, and given that she took no steps to list a CMC as she had said that she would, that assumption appeared to me to be a valid one until the correspondence below. ..."

30. The application was heard by the Master on 16 May 2018. Shortly before the hearing, it was agreed between the parties that Asturion would provide security for costs in the sum of £800,000 and a prospective cross-undertaking in damages in respect of the Notice capped at £1 million.

Proceedings in Liechtenstein

31. On 11 December 2015 Ms Alibrahim and her son issued proceedings in Liechtenstein to remove Asturion's board. The alleged basis for her doing so was that the board's attempt to recover the properties transferred to her was a "gross breach of duty and abusive". Ms Alibrahim also complained of the costs which were being incurred in the proceedings against her:

> "In the proceedings in London alone, the foundation is incurring yearly costs of over GBP 1 million."

32. On 15 December 2016 the Liechtenstein Court delivered its judgment, dismissing the application.

33. On 18 January 2017 Ms Alibrahim and her son appealed to the Liechtenstein Court of Appeal.

34. On 6 April 2017 the Liechtenstein Court of Appeal allowed the appeal and ordered that the entire board of Asturion be removed. In the case of one board member (Prince Mohammed bin Fahd, who is a son of another widow of King Fahd) this was on the ground of conflict of interest, while in the case of the other two members (Dr Beck and Dr Kolzoff) it was on the ground that they had not been validly appointed. While this order was stayed pending further appeal, it had obvious ramifications for the proceedings in England: as matters then stood, the board was not entitled to prosecute the proceedings at all.

35. On 5 May 2017 the members of the board of Asturion appealed to the Liechtenstein Supreme Court.

36. On 7 September 2017 the Liechtenstein Supreme Court allowed the appeal in respect of two members of the board of Asturion (Dr Beck and Dr Kolzoff) but dismissed it in respect of the third (Prince Mohammed).

37. On 11 October 2017 both sides challenged the decision of the Liechtenstein Supreme Court before the Liechtenstein Constitutional Court. We were informed that the Liechtenstein Constitutional Court has dismissed these challenges. As I understand it, there may yet be a dispute as to whether, in the light of the decision of Liechtenstein Supreme Court, the commencement and/or pursuit of these proceedings was and/or is properly authorised.

Proceedings in France and Spain

38. As noted above, proceedings have been brought and are being pursued by Asturion and Fasfunda in France and Spain respectively. For the most part, the history of these proceedings does not matter for present purposes. The one point which is of some relevance is that on 5 September 2016 Ms Alibrahim applied for a statement of nullity in respect of Asturion's claim in France on the basis that its representative had not been properly authorised by Asturion's board to file the claim and, in the alternative, claimed that the board's lack of authority meant that the proceedings should be stayed pending the outcome of her Liechtenstein proceedings. In its written submissions, Asturion opposed both these applications on the basis that its representative did not lack authority and the stay proposed was moot, as the Liechtenstein proceedings would not affect the position in France. Nevertheless, Asturion indicated to the judge in charge of the French proceedings that it would be happy to postpone the French proceedings for a couple of months pending the Liechtenstein proceedings, as this would make the situation more straightforward, and asked for a longer period of time for written submissions so as to give the Liechtenstein Supreme Court time to make its judgment before the French Court had to rule on Ms Alibrahim's application for a statement of nullity.

The Master's judgment

39. The Master handed down a reserved judgment on 11 September 2018. In it he concluded that the claim should be struck out for reasons he expressed in [36] as follows:

> "(1) In my judgment, although Berwin Leighton Paisner writing on behalf of the Asturion Fondation in their letter dated 23rd

August 2017 did not actually use the word to '*warehouse*' its claim, I find that the words '*... there was no immediate need to push ahead with directions to trial*' carries the same meaning. I therefore agree with Leading Counsel for the Defendant that this was, in effect, a unilateral decision on the part of the Asturion Fondation, and that such action amounted to an abuse of process entitling the Court to strike out the claim.

(2) There was a long period of inactivity on the part of the Asturion Fondation as to the conduct of the litigation. The Claim Form and the original Particulars of Claim were issued as long ago as 10th April 2015, and almost 2½ years later there had been virtually no progress in the conduct of the litigation by the Asturion Fondation.

(3) It is also to be noted that it took more than 12 months for the Asturion Fondation to provide the information as to whether or not it consented to the Defendant's filing and serving the amended Defence.

(4) As to the question of providing information as to the nature and location of the Asturion Fondation's assets, again as long ago as 16th October 2015 Berwin Leighton Paisner on behalf of the Asturion Fondation declined to provide any meaningful information as to request made for security for costs. It failed to deal constructively with the requests made. There was no meaningful engagement. It merely stated that the Fondation had sufficient assets with which to satisfy any costs order or judgment.

(5) No particulars of the Asturion Fondation's assets and liabilities have ever been provided. The Defendant was in effect left to infer the standing or otherwise of the Asturion Fondation's assets. This approach is to be contrasted with that adopted in the other European litigation.

(6) In the evidence filed in response to the Application in March 2018 the Defendant was little the wiser with regard to the issue of security for costs, as demonstrated in the Witness Statement of Mr Shear.

(7) The point should also be made that the Notice has effectively prevented any dealings with the Property in the meantime.

(8) The decision to place the English proceedings on hold for a substantial period of time is, in my judgment, amply demonstrated when regard is had to the factual circumstances. I do not accept the reason put forward that the Defendant was somehow at fault in issuing her proceedings in Liechtenstein. The reason given somewhat belatedly that the Asturion Fondation's authority to conduct the current proceedings was

> coming under sustained attack in that jurisdiction cannot, in my judgment, be justified as a reason why there was no progress in the current litigation.
>
> (9) To echo the words of Lord Woolf in *Grovit v Doctor*, '*...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 are 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.*'
>
> (10) In my judgment these words are entirely apposite to the current circumstances.
>
> (11) Finally, I should state that in the circumstances I do not consider that it is unjust and disproportionate [f]or the Court to strike out the Claim in its entirety at this stage. I do not accept the reasons put forward by Leading Counsel that in the alternative the Court could adopt another approach so as to enable the As[t]urion Fondation to proceed with the litigation."

40. The Master went on to state at [37] that he therefore did not need to consider the question of security for costs.

41. After the judgment had been handed down, Asturion sought permission to appeal. The Master refused permission to appeal. One of the grounds of appeal which had been advanced by Asturion was that, in exercising his discretion, the Master had taken into account factors which were irrelevant, one of which was Asturion's failure to provide information about its assets. The Master rejected this contention, stating at [11] of his extempore judgment on consequential matters:

> "I also make reference to the fact that in the Judgment (and again I cite this in support of the reasons why there should be no permission to appeal granted by this Court) that, on a number of occasions, Asturion was asked to provide evidence of means and that was never forthcoming. I appreciate that, as was said by Mr Mumford QC, in effect, there was no duty on the part of Asturion Fondation to give such information. However, in my judgment, it weighs strongly in the exercise of discretion, as it places the Defendant in a difficult position and she was justified, in my judgment, in seeking to strike out the claim. So, in the exercise of my discretion, I came to the conclusion that the matter should be struck out."

The Judge's judgment

42. Asturion appealed to the Judge on four grounds with permission granted, as it happens, by myself. Ground one was that the Master had erred in law in characterising Asturion's conduct as an abuse of process. Ground two was that the Master's finding that Asturion had decided to "warehouse" the claim was not open to

him on the evidence. Ground three was that in exercising his discretion the Master took into account matters which he should not have done. Ground four was that in exercising his discretion the Master failed to take into account matters which he should have done.

43. The Judge rejected ground two, but upheld the other grounds and allowed the appeal for the reasons he gave in a reserved judgment handed down on 15 February 2019 ([2019] EWHC 274 (Ch)).

Abuse of process: the law

44. Abuse of process can take many forms. This case concerns the form which has become known as "warehousing". While that is no doubt a convenient label, as counsel for Asturion submitted, it is necessary to be more precise in specifying what conduct amounts, or may amount, to abuse of process.

45. The parties are sharply divided on this issue. Counsel for Ms Alibrahim submitted that it is always an abuse of process for a claimant unilaterally – that is to say, without either the consent of the defendant or the approval of the court – to decide not to pursue its claim for any period which is more than insignificant. He contended that this principle applied if the claimant decided not to pursue the claim for as little as a month, since a month was a not insignificant period, although he accepted that a day would be insignificant. He accepted, however, that a finding of abuse of process would not automatically lead to the conclusion that the claim should be struck out. I shall return to that point later.

46. Counsel for Asturion disputed that a mere unilateral decision by a claimant not to pursue its claim for a period of time constituted, or was even capable of constituting, an abuse of process. He submitted that it was necessary to distinguish between four classes of case. The first was where the claimant had no intention ever to pursue the claim to trial (or other proper resolution, such as a settlement). The second class was where the claimant had no current intention to pursue the claim, but might pursue it in the future depending on contingencies which were extraneous to the claim (such as the claimant's pursuit of other claims against other defendants). The third class was where the claimant always intended to pursue the claim, but decided temporarily to pause its progress for reasons legitimately connected with the claim. The fourth class was where the claimant always intended to pursue the claim, but failed to do so through incompetence (whether the claimant's or its lawyers'). He submitted that the first and second classes of case would generally constitute abuse of process, but not the third and fourth. He further submitted that the present case fell into the third class.

47. In considering these submissions, the starting point is that it is well established that mere delay in pursuing a claim, however inordinate and inexcusable, does not without more constitute an abuse of process: see *Icebird Ltd v Winegardner* [2009] UKPC 24 at [7] (Lord Scott of Foscote delivering the judgment of the Privy Council).

48. In *Grovit v Doctor* [1997] 1 WLR 640 the claimant had commenced wide-ranging proceedings against the defendants in August 1989, but by March 1990 all that remained was an allegation of libel. The last activity of the claimant prior to the application to strike out had been on 20 September 1990. On 21 March 1991 and 23 September 1991 the defendants' solicitors wrote to the claimant's solicitors inviting

the claimant to proceed with or abandon the claim. By the time of the application, the claimant had done nothing for over two years. In those circumstances the judge found that the claimant had no interest in actively pursuing the litigation: so far as he was concerned, it was dead in the water. The claimant did not challenge that finding before the Court of Appeal. The House of Lords held that this conduct constituted an abuse of process for reasons which Lord Woolf expressed at 647G-H as follows (emphasis added):

> "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 a 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."

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.

51. In *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426 the Court of Appeal considered two appeals concerned with striking out on the ground of want of prosecution. The facts of the cases and the individual decisions do not matter for present purposes. What do matter are the statements of Lord Woolf MR delivering the judgment of the Court of Appeal in two passages.

52. The first passage is as 1436F-H (emphasis added):

> "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 the 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 [of] questions of prejudice, and allow the striking out of actions whether or not the limitation period has expired."

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.

54. The second passage is at 1437B-E (emphases added):

> "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' 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."

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 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 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 was differentiating between counsel for Asturion's second and third classes of case.

56. In *Realkredit Danmark A/S v York Montague Ltd* (*The Times*, 1 February 1999) the claimant lenders had brought a claim against the defendant valuers for alleged negligent valuation of seven hotels. The claim was struck out for alleged non-compliance by the lenders with an unless order for discovery even though the lenders had served in time a list of documents listing over 2,500 documents. Unsurprisingly, the Court of Appeal allowed the lenders' appeal. The valuers had also applied to strike out the claim as an abuse of process, but the judge had dismissed that application and this was the subject of a cross-appeal. The valuers argued that there was an abuse of process because the lenders had taken a deliberate decision not to pursue the litigation, and to ignore the timetable laid down by the court in an order dated 24 July 1996 which was designed to lead to a trial which was later fixed for 2 June 1998. The lenders had taken no step after that order until they served a notice of intention to proceed on 21 November 1997. The lenders' evidence was to the effect that the reasons for the delay were, first, a concern as to the valuers' professional indemnity insurance, secondly, the fact that the valuers were placed into administrative receivership on 28 January 1997, and thirdly, the failure of the administrative receivers to respond to a query about the insurance position at a creditors' meeting on 14 May 1997.

57. The judge accepted that the lenders had warehoused the proceedings and that this was not permissible, but nevertheless concluded that it would not be right to strike out the claim on the ground of abuse of process. It is not clear whether he held that there was no abuse or whether he held that there was an abuse but nevertheless decided not to strike the claim out. Tuckey LJ, with whom Morritt LJ agreed, held that there was no reason to think that the judge had exercised his discretion in a wrong way, still less that he was plainly wrong. He added:

> "What happened could be characterised as warehousing but one can well understand the lenders' concern about the valuers' insolvency. Had the administrative receivers responded to the request for information about the insurance position the delay would probably not have been such as to jeopardise the trial date. But the message in *Arbuthnot* that in such a circumstance, the authority of the court should be obtained for delay, particularly where this involves ignoring directions for trial which the court has already given, needs to be emphasised. Had the court been asked to sanction the delay in this case at an early stage it would, I think, certainly have done so. But more probably the application would have resulted in the lenders discovering, as is the case, that the valuers are insured against this claim."

58. In *Braunstein v Mostafazan* (unreported, 12 April 2000) the plaintiff was a solicitor who claimed for fees for work done for the defendant. The defendant denied that the plaintiff had acted as its solicitor. The writ was issued on 8 October 1992. After service of Further and Better Particulars of the Defence in November 1995, the

plaintiff took no steps until service of notice of intention to proceed on 8 April 1997. The plaintiff's evidence was that, during this period, he was negotiating a settlement with a Mr Jafari who he believed was acting on behalf of the defendant, although it subsequently transpired that Mr Jafari was not, and Mr Jafari had told him on several occasions that the defendant had requested that the action should not be progressed whilst negotiations were continuing.

59. Although the defendant's principal ground for applying to strike out the claim before the master, and its only ground before the judge, was inordinate and excusable delay causing serious prejudice to the defendant, on appeal to the Court of Appeal the defendant also contended that the claim should be struck out as an abuse of process. This contention was based on what Harrison J described at [26] as "the deliberate decision of the plaintiff to put his action on ice, or to 'warehouse' the proceedings, from mid-1995 to April 1997" while negotiating with Mr Jafari.

60. The Court of Appeal rejected this contention for reasons which Harrison J, with whom Mance LJ agreed, expressed at [32] as follows:

> "… I am not persuaded that the conduct of the plaintiff was sufficiently serious as to amount to an abuse of process. The length of time for which the negotiations were carried on by the plaintiff without progressing the action from mid-1995 to April 1997 was less than half the time involved in the case of *Cooperative Retail Services Ltd v Guardian Assurance plc*, and the overall period of inordinate and inexcusable delay in that case was 5 years and 5 months compared to the period of 3½ years in this case. Furthermore, it is implicit in the findings of the judge that the plaintiff believed that Mr Jafari was acting on behalf of the defendant, albeit that he can quite properly be criticised for failing to check the authenticity of Mr Jafari's authority to negotiate, either with the defendant or with the defendant's solicitor. Looking at the matter in the round, however, I do not consider that, as a matter of fact and degree, this is a case where it can be said that the plaintiff's conduct was such as to amount to an abuse of process so that it should be struck out without prejudice having to be shown."

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.

62. Although we were referred to a number of decisions of High Court Judges, both sitting at first instance and on appeal from Masters, it is only necessary briefly to

mention two of these. The authority which comes closest to supporting the contention advanced by counsel for Ms Alibrahim is *Société Générale v Goldas Kuyumculuk Sanayi* [2017] EWHC 667 (Comm), in which Popplewell J (as he then was) held that the claimant's conduct was an abuse of process for three reasons, one of which was that it had decided to recover the sums it claimed were due from the defendants not in the English proceedings, but in proceedings in Turkey, leading to a delay of some eight years which was only brought to an end by the defendants' strike out applications. In that context (which is unaffected by the subsequent decision of the Court of Appeal [2018] EWCA Civ 1903, [2019] 1 WLR 346) Popplewell J stated at [63]:

> "For a claimant unilaterally to warehouse proceedings is therefore an abuse of process, and may be a sufficiently serious abuse to warrant striking out the claim in appropriate cases under the line of authority from *Grovit v Doctor* [1997] 1 WLR 640; see *Solland International Ltd v Clifford Harris & Co* [2015] EWHC 3295 (Ch) at [54]. It is not necessary to decide in this case whether if Goldas had been validly served, the warehousing of the proceedings was an abuse of sufficient gravity to warrant striking out the claim. What is clear is that the decision to put the proceedings on hold for such a long period was an abuse, and a serious abuse, which militates against there being a good reason for granting the relief sought on this application."

63. Notwithstanding the phrasing of the first sentence, I do not think that Popplewell J can have meant to say that unilaterally putting proceedings on hold is always an abuse. Such a statement of the law would not be supported by his citation from *Solland International Ltd v Clifford Harris & Co* [2015] EWHC 3295 (Ch) at [54], where I said that "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 [emphasis added]" (and see also [69]). Furthermore, Popplewell J evidently regarded the length of the delay as germane to this question.

64. Finally on the law, I should address a more minor dispute between the parties. Counsel for Ms Alibrahim suggested that an application to strike out on the ground of abuse of process by "warehousing" fell to be analysed in three stages. The first stage was to consider whether the claimant's conduct was an abuse of process. The second stage, if an abuse of process was found, was to consider whether the abuse was sufficiently serious to entitle the court to strike out the claim. The third stage, if the abuse was sufficiently serious, was for the court to exercise its discretion as to whether in all the circumstances striking out was the appropriate remedy. In the course of argument, however, he accepted that an alternative view was that there were only two stages to the analysis: first, the court should determine whether the claimant's conduct was an abuse of process; and if so, secondly, the court should exercise its discretion as to whether to strike out the claim. Counsel for Asturion supported a two-stage analysis. In my judgment the better reading of the authorities is that the analysis falls into two stages, and not three. Furthermore, this is supported by the structure of CPR rule 3.4(2)(b), which provides that the court "may" strike out a statement of case if it "is an abuse of the court's process" (it is perhaps worth noting

that the authorities have added the gloss "in all the circumstances of the case", particularly the claimant's conduct).

Was the Judge entitled to interfere with the Master's decision?

65. Ms Alibrahim contends that the Master directed himself correctly as to the law and exercised his discretion to strike out the claim in a manner which is not impeachable by an appellate court. Accordingly, she contends that the Judge was not entitled to interfere with that decision.

66. The principal basis upon which the Judge held that he was entitled to intervene was Asturion's ground one, namely that the Master had erred in law in concluding that Asturion had abused the process of the court. Accordingly, the principal question for this Court is whether the Judge was right to reach that conclusion.

67. In my judgment it is clear from the Master's reasons that he did misdirect himself as to the law in three linked respects. The first is that in [36(1)] he held that Asturion's unilateral decision not to pursue the claim during the period between 24 November 2016 and 15 August 2017 amounted to an abuse of process without at that stage considering the reason for that decision or the strength of that reason objectively considered. Nor indeed did he consider the length of the delay at that stage. Thus he proceeded on the basis that any decision by a claimant unilaterally to put proceedings on hold for a significant period of time is *ipso facto* an abuse of process. For the reasons explained above, that is not the law.

68. The second respect is that, when he did come to consider the reason at [36(8)], he appears only to have done so for the purposes of exercising his discretion as to whether to strike the claim out. Although this is a factual rather than a legal matter, it is convenient to add at this point that he also mischaracterised the reason. Asturion did not suggest that "the Defendant was somehow at fault in issuing the proceedings in Liechtenstein". Asturion's explanation for its conduct was that (a) if Ms Alibrahim's case in Liechtenstein was well founded, then it necessarily followed that Asturion had no authority to pursue this claim, (b) it was Ms Alibrahim's own position in the Liechtenstein proceedings that Asturion should not be wasting large sums of money in the pursuit of this claim and (c) in those circumstances Asturion had assumed that she would be content for it not to pursue the claim for the moment. Moreover, the reason was not given "somewhat belatedly", but immediately Asturion's conduct was challenged.

69. The third respect is that in [36(9) and (10)] the Master held that Lord Woolf's words in *Grovit* were "entirely apposite" to the present case, but failed to recognise that *Grovit* was a case in which the claimant had no intention ever to bring the claim to trial, something that was not even alleged against Asturion. Asturion also attacks this as a finding by the Master that Asturion had no intention ever to bring its claim to trial which was not open to him on the evidence, but, like the Judge, I do not consider that the Master made any such finding. Rather, the Master treated the two types of case as being the same, which is legally erroneous. As I understand it, this is the point which the Judge made at [67].

70. The secondary basis upon which the Judge held that he was entitled to intervene was on Asturion's grounds three and four. The Judge held that the Master's exercise of his

discretion was flawed for two reasons, one of which I have addressed in the preceding paragraph. The other point which the Judge relied upon was that in [36(4), (5) and (6)] the Master had taken into account, when exercising his discretion, Asturion's failure to provide information about its assets. Indeed, it can be seen from the passage I have quoted from the Master's judgment on consequentials that he considered that this weighed "strongly" in the balance. The Judge held that this was irrelevant to the question of whether, even if it was an abuse of process, Asturion's conduct in putting the proceedings on hold for 10 months warranted striking out the claim. I agree with the Judge on this point. Asturion was not obliged to disclose any information about its assets, although its failure to do so might well have assisted Ms Alibrahim to obtain an order for security for costs: see *Sarpd Oil International Ltd v Addax Energy SA* [2016] EWCA Civ 201, [2016] CP Rep 24 at [19]. Moreover, Asturion's failure to provide such information has nothing to do with the alleged abuse of process. Furthermore, the Master failed to recognise that it took Ms Alibrahim a long time to make her threatened application for security or that, when she did so, Asturion agreed to provide security.

71. It is convenient next to deal with three additional matters relied upon by Asturion in this Court by way of respondent's notice. First, Asturion contends that the Master was wrong to find that Asturion unilaterally decided not to pursue this claim pending the outcome of the Liechtenstein proceedings unless Ms Alibrahim pressed it to do so and that the Judge was wrong to hold that the Master was entitled to make that finding. Counsel for Asturion did not press this point. In any event, in my judgment the Master was fully entitled to draw that inference from what Asturion's solicitors said in their letter dated 23 August 2017 and from Mr Shear's evidence.

72. Secondly, Asturion contends that the Master was wrong, when exercising his discretion as to whether to strike out the claim, to take into account Asturion's service of the Notice and its effect. Asturion argues that he should not have done so, because it merely prevented transfers of the Property and there was no evidence from Ms Alibrahim that it had inhibited any dealings in the Property by her. I do not accept this argument. In my judgment the Master was entitled to take the Notice into account. It was a relevant consideration because it inhibited Ms Alibrahim's freedom to deal with the Property while the claim was pending. Given that the pendency of the claim was increased by Asturion's unilateral decision not to pursue it for a period, her freedom was inhibited for a longer period. The weight to give this factor was a matter for the Master, but in any event there is nothing to suggest that the Master gave this factor undue weight.

73. Thirdly, Asturion contends that in [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.

74. For the reasons given above, I conclude that the Judge was entitled to set aside the Master's order and to consider the matter afresh.

Is this Court entitled to interfere with the Judge's decision?

75. Ms Alibrahim contends that, even if the Judge was entitled to set aside the Master's order and consider the matter afresh, the Judge's decision is also flawed.

76. The first question under this heading is whether the Judge applied the correct legal test. The Judge expressed the test at [41] as follows:

> "What these cases show, in my judgment, is that it is now established that delay may amount to abuse of process in circumstances short of a finding that the claimant has permanently abandoned any intention to pursue them, but that the court will examine all the circumstances in which the delay occurred, including the length of the delay, the degree of the claimant's responsibility for that delay and the reasons given for it, and assess whether they amount to abuse of process, as distinct from 'mere' delay. 'Warehousing' may be descriptive of some circumstances that show abuse, primarily where for an extended period the claimant has no present intention of pursuing the claim but keeps it going in case it decides to do so in the future, but application of that term is not determinative one way or the other. If abuse is found, the question then arises whether striking out is an appropriate sanction."

77. In my view this statement of the law is substantially correct, although I would prefer to express the test in the manner in which I have done in paragraph 61 above.

78. The next question is whether, applying that test, the Judge was entitled to conclude that Asturion's conduct was not an abuse of process. The Judge's assessment, in brief summary, was that Asturion's reason for not pursuing the claim for 10 months was an objectively reasonable one, namely that the authority of the board of Asturion to bring the proceedings was under attack by Ms Alibrahim in Liechtenstein and in that context she had complained about the costs being incurred by Asturion in these proceedings. In my view that was an evaluative assessment which the Judge was fully entitled to make. As has been emphasised in a number of decisions now, Asturion should not have proceeded unilaterally. It should have sought Ms Alibrahim's consent to a stay and, in the absence of consent, applied to the court. (If it had done so, it would have been very likely to succeed in obtaining a stay.) Nevertheless, the fact that Asturion did not take the proper course does not, in the circumstances of this case, necessarily lead to the conclusion that its conduct was an abuse of process.

79. 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.

Conclusion

80. For the reasons given above, I would dismiss this appeal.

Lord Justice Leggatt:

81. I agree.

The Senior President of Tribunals:

82. I also agree.