Neutral Citation Number: [2019] EWHC 274 (Ch)

Case No: CH-2018-000255

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS
On appeal from the Property Trusts and Probate List (ChD) (Deputy Master Cousins)

Royal Courts of Justice
The Rolls Building London EC4A 1NL

Date: 15/02/2019

Before :

HHJ DAVID COOKE

- -

Between :

Asturion Fondation	**Claimant**
- and -	
Aljawharah Bint Ibrahim Abdulaziz Alibrahim	**Defendant**

- -
- -

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

Hearing date: 6 February 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ DAVID COOKE

HHJ David Cooke:

Introduction

1. The claimant appeals with the permission of Arnold J against the order of Deputy Master Cousins dated 11 September 2018, by which he struck out its claim on the basis that delays in its pursuit amounted to an abuse of process of the type that has become known as "warehousing". The Master's decision was given in a written judgment handed down on that date, and was to some extent expanded on in reasons he gave for refusing permission to appeal. The Defendant by her respondent's notice seeks to uphold the decision by relying on the matters referred to by the Master in his judgment at the handing down. Neither judgment appears to have been reported. For ease of reference I have attached the written judgment as an appendix to this judgment, and quoted the relevant paragraphs from the supplementary reasons below.

2. The claimant (which I will refer to as "the Foundation") is an entity established in Liechtenstein. It has separate legal personality and is controlled by a board, and was set up to hold and manage certain assets for the benefit of certain members of the Saudi Royal family. The defendant is one of the widows of the late King Fahd, who died in 2005. In 2011 Maître Faisal Assaly ("Mr Assaly"), who was one of the members of the board of the Foundation, executed transfers of four high value properties to the defendant. No consideration was paid. Mr Assaly claims to have acted on the basis of oral and written instructions given by the late King. Mr Assaly died in 2015.

3. These proceedings concern one of those properties, Kenstead Hall in London. It is a substantial property; the value stated when the transfer was registered was £28m. The claimant's allegations, very broadly, are that Mr Assaly did not have the power or authority to act on the part of the Foundation in making the transfer, and that in so acting he was in breach of the purposes of the Foundation and/or acting under a fundamental mistake. In consequence, it is said, the transfer is void or voidable. The claim is strongly disputed on all counts, but the application before the Master did not involve any consideration of its merits.

4. The other properties were in Germany, France and Spain (the last owned through a Spanish entity in which the Foundation has an interest). Similar proceedings, also strongly contested, have been issued in France and Spain. There is no claim in respect of the German property because, the claimant says, the defendant had disposed of it before proceedings could be begun.

5. The evidence before the Master consisted of two witness statements by the defendant's solicitor and one from the claimant's solicitor, with exhibits. In addition there was an agreed chronology which includes certain matters relating to the overseas proceedings, not all of which were expressly referred to in the witness statements.

6. In the first witness statement in support of the application the defendant's solicitor complains that the claimant "failed from July 2016 onwards to take any substantial steps to progress this litigation" and that the claimant had admitted in correspondence in August 2017 "that it had decided not to prosecute its claim in England because of existing proceedings in Liechtenstein. This unilateral decision to warehouse its claim had… never been communicated to the defendant, nor did the claimant ever seek to agree to stay these proceedings, nor … seek an order… for such a stay."

7. The Liechtenstein proceedings referred to were an application by the defendant made in December 2015 to remove the three members of the board of the Foundation on the basis, inter alia, that they were acting improperly by instituting and pursuing against her these proceedings and the similar claims in France and Spain. She complained forcefully about the costs being incurred in those proceedings, improperly as she alleged, both insofar as they depleted the assets of the Foundation and as they fell on her. Her application was thus a collateral attack by which the defendant sought to block or thwart the claims against her.

8. This claim was issued on 10 April 2015. The claimant immediately applied to register notice of a pending land action against the property, the effect of which, the defendant says, is to prevent any dealing with the property. A brief summary of the procedural history after that is as follows:

   i) The defendant was served at the end of June 2015. She filed an acknowledgment of service on 2 July. Her defence was filed on 18 September 2015, after a number of extensions of time by consent.

   ii) The claimant filed a Reply on 18 December 2015, again after a number of extensions of time by consent.

   iii) In correspondence in January and February 2016 the solicitors discussed directions. The claimant indicated an intention to amend its Particulars of Claim, and an agreed set of directions was lodged at court. The court did not however, for reasons unexplained, make those directions or list any CMC.

   iv) In March 2016 the claimant provided its draft amended Particulars of Claim. It did not seek an order permitting the amendment until September 2017.

   v) On 20 July 2016 the defendant provided a draft amended defence and indicated she would consent to the claimant's amended pleading if it consented to her amendments and paid her costs. The claimants solicitors objected on 12 August that not all the defendant's amendments flowed from the amendments to the claim, and discussing possible amendments to the Reply and when it would be appropriate to consider a Rejoinder.

   vi) On 9 November 2016 the defendant's solicitors pressed for a decision whether the claimant intended to proceed with its amendments and consent to those of the defendant, failing which she would make her own early application for a CMC.

   vii) On 24 November 2016 the claimant's solicitors replied that it did intend to amend its claim, and would respond on the question of consent to other amendments "at the beginning of December".

   viii) Thereafter there was no correspondence or progression of this claim until August 2017. The claimant did not respond as it had said it would and the defendant did not seek the CMC she had threatened.

   ix) On 15 August 2017 the defendant's solicitors wrote saying that in the circumstances the claim had been abandoned and inviting discontinuance.

x) The reply on 23 August 2017 is relied on as the admission of "warehousing". It said "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 be approved or… a case management conference be listed".

xi) On 8 September 2017 the defendant's solicitors wrote stating that this was an admission of warehousing such as would justify striking out the claim and threatening an application to strike out unless it was discontinued. They declined to agree any further directions but did not make the application threatened until 11 December 2017, three months later.

9. It is relevant also to note what was happening in the Liechtenstein proceedings during the period the defendant complains of:

i) The defendant's application was heard by the court of first instance on 11 May 2016. No decision was made immediately. The board members whose positions were challenged filed further submissions on 8 June.

ii) The court handed down its decision on 15 December 2016, dismissing the defendant's application.

iii) The defendant filed an appeal on 18 January 2017.

iv) The appellate court made a decision on 6 April 2017 that effectively removed all three members of the claimant's board. That order was (either then or shortly after) suspended in effect pending a further appeal, which was lodged on 5 May 2017.

v) On 7 September 2017 the Liechtenstein Supreme Court confirmed the dismissal of one board member but reinstated the other two.

vi) On 11 October 2017 cross appeals were lodged to the Liechtenstein Constitutional Court against that decision. Those appeals were still pending at the time of the Master's hearing. I have no information as to whether they have yet been resolved or whether there may be any still further avenue of appeal.

10. The defendant also applied in the alternative for security for costs. In the event, just before the Master's hearing, it was agreed that the claimant would provide security in the sum of £800,000. The correspondence also deals with requests by the defendant for security. I summarise that, again briefly, since it was relied on before the Master and on appeal in relation to striking out.

i) The defendant first raised the issue in October 2015, seeking information as to the assets of the Foundation, in default of which she would apply for security.

ii) Thereafter that request and threat was repeated on a number of occasions.

iii) The claimant declined to provide anything by way of information about its assets beyond its own "confirmation" that they were sufficient to meet any costs order. Although when the request was repeated it said it would respond further, it did not give any substantive information about its assets and did not offer any security. That remained the position until just before the Master's hearing.

The Master's judgment

11. In his written judgment the Master summarised the relevant law as follows:

> "THE PRINCIPLES OF LAW
>
> **Striking out the Claim as an abuse of process**
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> 20. The power of the Court to strike out a statement of case is set out in CPR.3.4. CPR r.3.4(2)(b) provides that the Court may strike out a statement of case if it appears to the Court that the statement of case is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings. The Defendant relies upon authority in support of the proposition that where a party commences or continues litigation with no intention to bring the matter to a conclusion, that can amount to an abuse of process. The case of *Grovit v Doctor* is cited in support of the proposition, *per* Lord Woolf:-
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> *"…I am satisfied that both the deputy judge and the Court of Appeal were entitled to come to the conclusion which they did as to the reason for the appellant's inactivity in the libel action for a period of two years. 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 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. 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. *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."*
>
> 21. The Defendant submits that it is an abuse of process to put litigation on hold pending the outcome of proceedings abroad. Reliance is placed upon the judgment of Popplewell J in *Société Générale v Goldas Kuyumculuk Sanayi Ithalat Ihracat A.S.* : -
>
> *"[60] The second abuse [of the claimant] lies in the decision to put the proceedings on hold. I reject Mr Moverley Smith's submission that Société Générale had decided to abandon the proceedings. None of the*

documents he referred to cast any serious doubt on what Mr Surgeoner said was the nature of the decision made. Nevertheless, that decision was abusive.

[61] Even before the introduction of the CPR and the overriding objective, a party was not allowed simply to put proceedings on hold and to await the outcome of developments or litigation abroad without the sanction of the Court. In Battersby v Anglo-American Oil Co Ltd *Lord Goddard giving the judgment of the Court of Appeal said 'It is for the court and not for one of the litigants to decide whether there should be a stay.' In* Arbuthnot Latham Bank Ltd v Trafalgar Holdings *Lord Woolf MR stated: -*

'[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 monies to initiate a great many actions and then select which of those proceedings to pursue at any particular time]. 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, where 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.

[62] The introduction of the CPR marked a change of emphasis in favour of attaching more importance to compliance with the rules, and furthering the overriding objective, with the impact on the court system and other court users in mind as well as that on the parties. Under CPR Rule 1.1(2)(d) and Rule 1.3 Société Générale was under an obligation to help the Court to ensure that the claim was dealt with expeditiously. This it singularly failed to do.

[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*....; see* Solland International Ltd v Clifford Harris & Co*...".*

22. In this context it is to be noted that the term *"warehouse"* or *"warehousing"* proceedings seems to have been used as a term of art for the first time in the case of *Arbuthnot [Latham] Bank Limited v Trafalgar Holdings.*

> 23. Thus, in essence warehousing is more than mere delay which in itself is not an abuse of process. On the contrary, warehousing is the issuing and maintaining of proceedings with no real intention of carrying them through to trial, save possibly at some unspecified future date of convenience to the claimant. "

[I have omitted the Master's footnotes, and included in the passage from *Arbuthnot Latham* cited by Popplewell J a preceding sentence that the Master provided in a footnote]

12. He then summarised the submissions of the parties, which I will not repeat, and set out his conclusion and reasons as follows:

> "THE DECISION
>
> 35. Having regard to the legal principles and the factual circumstances, to which reference has been made above, I have come to the conclusion that the Application should succeed, and the Claim should be struck out.
>
> 36. My reasons are 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 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 Asurion Fondation to proceed with the litigation."

13. In giving his reasons for refusing permission to appeal the Master amplified this somewhat and made specific reference to part of the witness statement of the claimant's solicitor, as follows:

> "5… In paragraph 36(1) of the Judgment, I acceded to the arguments promoted by Mr Reed QC that the words contained within that letter from Berwin Leighton Paisner meant that the view was taken that there was no immediate need to push ahead with the action to trial. In effect the Court found that this sentiment carries the same meaning as the manifestation of the intention to 'warehouse' the claim.
>
> 6. I therefore agree with Mr Reed that this in fact demonstrated a unilateral conscious decision on the part of the Claimant, Asturion Foundation, not to pursue its action. This, as the Court found, amounted to an abuse of process, entitling the Court to strike out the claim.
>
> 7. In support of that interpretation, the Court in the Judgment did make reference to the second witness statement of Mr Graham Shear dated 20th March 2018. Although the contents of paragraphs 21, 22 and 23 of his witness statement were not recorded, as such, in the Judgment, the evidence before the Court from Asturion was the following:

> "There was an assumption made, as a result of the circumstances set out above in paragraph 21, that the defendant was content that neither party should incur further costs in relation to the initial proceedings save to the extent that they were necessary."
>
> In paragraph 23, Mr Shear then goes on to say:
>
> "It is right that we did not write in terms confirming this but, given the substantial delays which there have been in correspondence from the defendant ..."
>
> The argument put forward by the Defendant is that she is not to blame in relation to the non-progress of litigation, which seemed to be the implication in the above statements. The assumption that Mr Shear had made about the stance taken by the Defendant was not justifiable in the circumstances.
>
> 8. Thus, I came to the conclusion in the Judgment that there was a demonstration of intention to warehouse, with no manifest desire to push ahead with litigation here in this country. This, as I have stated, is to be contrasted with the aspect in relation to litigation in other jurisdictions where there seemed to be some considerable degree of activity."

The Appeal

14. There are effectively three grounds of appeal:

    i) The Master erred in law in characterising the claimant's conduct as involving warehousing, as distinct from mere delay.

    ii) It was not open to the Master on the evidence to conclude that the claimant had decided to warehouse the claim.

    iii) The Master erred in the exercise of discretion by taking into account irrelevant matters and/or ignoring or giving too little weight to relevant ones.

Ground 1: Error of law

15. Mr Mumford submits that it was not alleged, and the Master had not found, that the claimant had no intention ever to proceed with its claim, but only to suspend progressing the English litigation until resolution of the Liechtenstein proceedings that challenged its competence to do so. A decision to suspend was not necessarily abusive. He suggested that cases could be categorised into four types:

    i) Type 1 in which the claimant had no intention ever to pursue the claim but failed to discontinue it- eg *Grovit v Doctor*.

    ii) Type 2 in which the claimant had no current intent to pursue the claim to trial but might seek to do so in future depending on future events or the outcome of other proceedings- eg *Arbuthnot Latham v Trafalgar* or *Societe Generale v Goldas.*

    iii) Type 3 in which the claimant did intend throughout to proceed but had decided temporarily to pause its progress, into which he submits this case falls.

iv) Type 4 in which the claimant fails to progress the case through inadvertence.

16. Types 1 and 2 he submitted were abusive, but types 3 and 4 amounted to mere delay, which of itself did not constitute abuse. The test for abuse could not depend on whether there was a conscious decision to pause the litigation; almost any case in which there was in fact delay was bound to involve some element of decision not to take further steps.

17. In his skeleton Mr Reed submitted that the Master had found as a fact that the claimant had "warehoused" its claim, and correctly held that this amounted to abuse. He does not however contend that the Master found, or could properly have found, that there was no intention ever to proceed with the claim, only that the claimant decided to pause proceedings pending those in Liechtenstein. He submitted there were only three categories of case; his first and third corresponded to Mr Mumford's Types 1 and 4; in between was a single category in which the claimant has no intention for the time being and/or pending some contingency to proceed to trial, but may do so in the future. A conscious decision not to pursue the English litigation pending the outcome of other litigation abroad was, he said, abusive as a matter of law.

18. In oral submissions he said that even if his middle category could be divided into two as Mr Mumford had submitted (a) this case fell into Mr Mumford's Type 2 because progress was halted pending on a contingency, ie the outcome of the Liechtenstein proceedings and (b) even if it fell into a separate Type 3, cases in that category might still be found to be abusive and the Master had correctly done so in this case.

Discussion

19. I start with a general point, which is relevant because of the extent to which the submissions focused on the term "warehousing" and whether any challenge to the Master's conclusion on that point involved a challenge to a finding of fact, with the additional hurdles that would present on appeal. It seems to me that logically the court's task on an application such as was before the Master can be divided into three stages; (a) finding the facts as to what has happened (b) determining whether those facts show an abuse of the court's process and (c) if so deciding whether in the circumstances it is just to strike out a case or impose some other (or no) sanction. I recognise that in many cases these considerations may be taken together- in a number of the cases cited to me the court's conclusion was expressed as being that it had not been shown there was a sufficient abuse to justify striking out, which elides the second and third stages.

20. The third stage is an exercise of discretion, and any appeal is subject to the well known limitations on interference by the appeal court. But the second stage it seems to me is neither fact nor discretion but a matter of law. The appeal court may reach its own conclusion on matters of law and overturn the decision under appeal if it differs. Mr Reed submitted to me that the Master's finding of abuse was an evaluative decision with which the appeal court should be slow to interfere, referring to *Datec Electronics Holdings Ltd v UPS Ltd* ([2007] UKHL 23) and the passage from the judgment of Clarke LJ in *Assicuranzioni Generali SpA v Arab Insurance Group* ([2002] EWCA Civ 1642) approved by Lord Mance at para 46. But that passage was related to decisions of fact, as Clarke LJ made clear in para 16 of his judgment. So was the question before the House of Lords in *Datec* itself (whether the most likely cause of non delivery of parcels was theft by the carrier's employees).

21. No doubt some conclusions on points of law involve multi factorial evaluations, based on the facts found, but that does not turn them in to determinations of fact. An appeal court, starting from facts that are either agreed or have been found by the trial judge, gives due regard to the conclusion of the trial judge but may be in just as good a position as he or she was to reach evaluative conclusions of law and is entitled, indeed bound, to overturn it if satisfied that it is wrong, see *Dinglis Management Ltd v Dinglis Properties Ltd* [2019] EWCA Civ 127 at para 26, for example.

22. "Warehousing" is a term that has come to be used to describe some circumstances that have been found to be abusive. Its use in relation to a particular set of facts seems to have been either as a shorthand description of the circumstances found, as a prelude to determining whether those facts constitute abuse, or a shorthand description of a type of abuse that has been found.

23. Consequently the submission that the Master had found as a fact that there had been warehousing cannot assist, since, to the extent he stated such a conclusion it would at most be an elision of his conclusions on the facts and his decision as a matter of law that those facts amounted to abuse.

24. As to the relevant law, counsel are agreed on many issues:

    i) A court may strike out a claim for want of prosecution on the well known principles set out in *Birkett v James* ([1978] AC 297), in particular requiring inordinate and inexcusable delay such as to cause a real risk of prejudice to the defendant or to the ability to conduct a fair trial.

    ii) Short of that, a finding of abuse of process may itself be sufficient to justify striking out, as in *Grovit v Doctor*. The finding of abuse does not itself require that prejudice to the defendant has been caused (see *Arbuthnot Latham* at p1436H), but it will be relevant to the discretionary question of sanction whether any and if so what prejudice has been caused.

    iii) Launching or continuing proceedings that the claimant has no real intention of ever continuing to trial can be an abuse (*Grovit v Doctor*).

    iv) Mere delay on its own, however long, is not in itself abuse; some additional factor is required to show that it amounts to abuse (*Icebird Ltd v Winegardner* [2009] UKPC 24).

25. I am not however persuaded that the authorities establish any principle that delay that might be described as warehousing is always and necessarily an abuse of process. The starting point for such a proposition seems to be the passage quoted by the Master from the judgment of Lord Woolf MR in *Arbuthnot Latham*, but that is in very general terms, and does not set out any comprehensive consideration of what would or would not amount to "a party on in its own initiative… in effect 'warehous[ing]' proceedings until it is convenient to pursue them". If one looks back at the facts of the case for the context of that statement, the claimant bank had sued a principal debtor company and two individual guarantors. The company entered no defence. It is not clear if it was ever pursued further. The claim against the guarantors proceeded to disclosure, and then no further steps were taken for almost 5 years. When it was taken up again, it was by an assignee of the debt (apparently a second assignee, see p 1429H). That company had acquired a large portfolio of the bank's bad debts and prioritised other claims among them, see p 1430C. So the reference to having a

multitude of debtors and selecting which to pursue at a particular time was aimed at parties with large volumes of bad debts to collect who issued many claims and pursued only some of them, in that case leaving others in abeyance for many years.

26. It would not in my view be possible to derive anything more from this than that in some circumstances long delay may amount to abuse of process without it being necessary to show prejudice to a defendant, and that the sort of mass acquisition of bad debt portfolios and selective pursuit of debtors as and when it suited the creditor was one such circumstance. It could not be said that by describing this as "warehousing" Lord Woolf MR was creating or defining any precisely identifiable term or set of circumstances that inevitably amounted to abuse. Further, it was plainly regarded as relevant that in the case before the court a substantial time had elapsed without progress; it must I think be unlikely the same conclusion would have been reached if the delay had been only weeks or months while the assignee took reasonable steps to get to grips with the volume of cases it had acquired. If that is right, the mere decision to pause progress on a particular claim would not necessarily abusive, but it might become so if maintained for an unreasonable time.

27. It is true that in *Societe Generale* Popplewell J said (at para 63, cited by the Master) "For a party 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…". But he was not thereby stating that some hard edged category of circumstances called warehousing existed, into which that case fell, rather it seems to me he was describing the circumstances of the case that he held to amount to abuse. Those circumstances can be seen from his judgment to be:

> "24 At about this time [May 2008] SocGen decided not to progress the English proceedings, at least for the time being… The decision is described in these terms: "In the light of the advice from Pekin, SocGen subsequently took the decision to advance matters by instituting bankruptcy proceedings against Goldas in Turkey. The intention in relation to the English claims was to keep the position under review and revisit the matter once the outcome of the Turkish bankruptcy proceedings was known."
>
> 54 SocGen then took a conscious decision to try to recover what it claimed was due not in England, but in Turkey by means of insolvency proceedings, again in the knowledge that Turkish service was disputed and Dubai service had not been effected. That involved a delay of some 8 years which was only brought to an end by the defendant's applications…
>
> 56 Moreover SocGen's conduct of the proceedings has amounted to an abuse in three separate respects…
>
> 60 The second abuse lies in the decision to put the proceedings on hold. I reject Mr Moverley Smith's submission that SocGen had decided to abandon the proceedings... Nevertheless that decision was abusive."

28. The abuse in relation to delay therefore consisted of taking no steps to progress the proceedings for over 8 years (in which, it was accepted, they had not been validly served) pursuant to a conscious decision to try and recover the same loss through alternative proceedings in Turkey. The English proceedings were a fallback, only to

be pursued if the preferred route failed. The Judge identified other abuses in the conduct of the proceedings, including the maintenance in force of a worldwide freezing order of Draconian effect, which he found to have been in effect improperly obtained for the benefit of the Turkish proceedings and not those in England.

29. I note the decision in the case was not in fact that the proceedings should be struck out because of these abuses, but that the abuses were factors against granting relief from the failure to serve the claim in time. Having refused that relief, such that the defect in service was incurable, the claim was struck out for non- service (see para 73).

30. That decision shows therefore circumstances of deliberate delay, short of an intention to abandon the claim, that were held to be abusive and were described as warehousing. It does not establish any "test" for what is or is not warehousing, or that anything which is described as warehousing is necessarily an abuse.

31. I note also that in *Grovit v Doctor*, a stronger case in that it was found that the claimant had not merely paused proceedings but had no real intention ever to pursue them, Lord Woolf MR said only that continuing the proceedings in such circumstances "can" amount to an abuse of process. It would be strange if he intended in *Arbuthnot Latham* to hold as a general proposition that the less strong situation of a decision to pause progress *must* lead to a finding of abuse.

32. In *Solland International Ltd v Clifford Harris & Co* ([2015] EWHC 3295 (Ch)) Arnold J upheld on appeal the order of Master Bowles striking out a professional negligence claim, inter alia on the ground that delay in pursuing it for two periods totalling about 3 ½ years amounted to an abuse of process. The Master rejected submissions that this delay was satisfactorily explained or excused by the claimants being "distracted" by pursuit of other unrelated litigation. It was contended that the Master had wrongly found that the claimants had formed the intention to abandon the proceedings, but should instead have found that they only intended to "put them on hold". In relation to that Arnold J held:

> "69 Turning to the second contention, the 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).
>
> 70 So far as the second period is concerned, the Master accepted that the Appellants were giving some consideration, albeit upon a desultory basis, as to whether, or when, they might elect to continue

> the claim. Again, this is essentially the finding that the Appellants say that he should have made: as the Appellants themselves put it on this appeal, "nothing had changed" during this period. In other words, having unilaterally warehoused the litigation (for a period of 9 months), the Appellants had gone no further than thinking about unwarehousing it (for a period of 17 months and without actually doing so)…
>
> 73 *Conclusion.* I therefore conclude that the Master was entitled to find that the Appellants were guilty of an abuse of process on the basis that, during the period from 27 April 2012 until at least 13 August 2014, they did not intend to pursue this claim to trial or other proper resolution. That was on any view a substantial period, but all the more so having regard to how stale the claim already was at the beginning of that period."

33. Arnold J thus held that delay while having no present intention to pursue a claim for an indeterminate period (without having decided to abandon it) could be described as warehousing and *can* constitute an abuse, and that in the circumstances of the case (a period of over two years where the claim was already stale) the Master was entitled to conclude it was an abuse. His decision does not support any clear test of what circumstances would justify a conclusion of abuse, rather it shows that the court will evaluate the circumstances in which the delay occurred and the reasons for it and in appropriate cases may conclude they do show abuse.

34. In *Braunstein v Mostazafan & Janbazan Foundation* ([2000] EWCA Civ 123) the Court of Appeal heard a second appeal on an application to strike out a solicitor's claim for fees in circumstances where there had also been a delay in pursuing proceedings for about 3 ½ years in all. Mr Reed points out the application was made on the basis of want of prosecution under *Birkett v James*, but that is not the whole position; the court dealt with a second basis in which abuse of process was alleged relying on *Arbuthnot Latham* and *Grovit*. One unusual fact was that the claimant said he had refrained from pursuing the proceedings because for most of the period he had been negotiating settlement with a Mr Jafari, whom he understood to be a representative of the defendant, though that was subsequently denied. Harrison J (with whom Mance LJ agreed) said:

> "26. However, before I come to deal with the issue of prejudice I should first deal with an abuse of process argument which was raised on behalf of the defendant. It was based on the deliberate decision of the plaintiff to put his action on ice, or to "warehouse" the proceedings, from mid-1995 to April 1997 during which time he was negotiating with Mr Jafari in the belief that Mr Jafari was acting on behalf of the defendant. According to the plaintiff, Mr Jafari told him on several occasions that the defendant had requested that the action should not be progressed whilst negotiations were continuing. He therefore took no further steps to progress the action as he had no reason to doubt Mr Jafari's word…
>
> 32. For my own part, 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 3 1/2 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.
>
> 33 It follows that this appeal must be decided under the second limb of *Birkett v [James]…"*

35. Harrison J was content to apply the term "warehousing" to the fact that progress was suspended for a period, but he did not treat that label as determinative; he went on to consider whether the conduct was sufficiently serious to amount to an abuse. Taking account of the circumstances of the delay, he concluded it was not, and accordingly the applicant would have to satisfy the *Birkett v James* criteria.

36. Mr Reed submitted this argument had only been raised on appeal and there was no evidence of a deliberate decision to put the proceedings on hold, so it was understandable the argument had been rejected. I do not accept that; if the Court of Appeal allowed the argument to be run for the first time they plainly dealt with its merits, and either found or assumed in favour of the appellant that there had been a deliberate decision to put the claim "on ice", as recorded in the passage cited.

37. In *Wearn v HNH International Holdings Ltd* ([2014] EWHC 3542 (Ch)) Barling J found that long delay, which he found to be inordinate and inexcusable, was transformed into abuse of process by a number of factors, including wholesale disregard of the Rules and directions, reliance on inappropriate "expert" advice, maintaining allegations of fraud and forgery over a long period which were later abandoned (see paras 111-112 of the judgment). He concluded however that the claimant could not be said to have "warehoused" the claim:

> "113 HNH has submitted that there is a further such factor, in that the claimant has "warehoused" his claim until it is convenient for him to pursue it. Mr Nathan argued strongly that this is very far from true, and that the claimant has at all times been seeking to advance the proceedings. In my view the claimant has generally been reluctant to take the matter forward until his expert had completed investigations to his and the claimant's satisfaction, and was in a position to present a winning hand to HNH and the court. The claimant's conduct in this regard, although not consistent with the aims of the CPR, is not the same as warehousing a claim without any firm intention of proceeding, or until convenient. Although I do not say that the claimant's approach could not constitute the "extra ingredient" required to transform delay into an abuse, it is not necessary to decide this point, as there are other factors present here."

38. This appears to have been a case of a claimant who at all times intended to proceed with his claim but delayed in progressing the court proceedings for reasons connected with the litigation. He was in the meantime pursuing actions relevant to the claim, such as allowing his expert to pursue investigations intended to establish the alleged fraud. The Judge held that those reasons and his conduct amounted to abuse of process, but not on the grounds of "warehousing" as he had not intended to put the claim on hold "until convenient to pursue it".

39. In *Grenda Investments Ltd v Barton* ([2017] EWHC 2371 (Comm)) the reason for failing to proceed with the action was said to be the desire of the claimant to retain the defendant's cooperation in other unrelated litigation. In an extempore judgment Picken J said:

> "29 It is Mr Hext's submission that in the present case there was a significant period of delay and that that period of delay is explicable (as he would suggest, only explicable) from at the latest November 2015 onwards as a result of a deliberate decision on part of Grenda not to proceed with litigation in order not to discourage Mr Barton from providing the assistance that was required from him in relation to the Orb Litigation. During that period, Mr Hext submits, Grenda did not have an intention to bring the proceedings to a conclusion and, accordingly, an abuse has been committed by Grenda. Mr Hext observes that it does not assist Grenda that subsequently, once Mr Barton's help was no longer needed, the Orb Litigation having settled, Grenda changed its position and sought to revive the proceedings…
>
> 31 The Court is… being invited to draw the inference that Mr Ruhan (and, accordingly Grenda) made a decision not to pursue the proceedings in order to retain Mr Barton's co-operation. The difficulty with this is that Mr Ruhan's (and Grenda's) conduct in not progressing the proceedings between late 2015 and October 2016 is as consistent with a decision to suspend proceedings as it is with deciding not to pursue the proceedings forever and a day...
>
> 32 … I do not consider that this is a case where what has happened is the type of warehousing of proceedings described by Lord Woolf in the ***Arbuthnot Latham*** case. Mr Slade in his witness statement has described how Mr Ruhan was heavily involved in the Orb Litigation in the relevant period. That plainly was the position. It seems to me that, in the circumstances, it is not altogether surprising that the present proceedings were not his main priority. In those circumstances, I struggle to see that what has happened in relation to the present proceedings amounts to any type of warehousing…
>
> 34 I am clear from this evidence is that this is not a case where there has been warehousing of the sort described. In short, I am not satisfied in the present case that there has been significant delay, which can only be explained by a clear intention, supported by evidence, not to pursue the proceedings against Mr Barton and, accordingly, that Grenda's inactivity is capable of amounting to an abuse of process. I am not able, in the circumstances, to draw the inference that the inactivity was consistent, and only consistent, with a decision not to pursue the Grenda proceedings."

40. Mr Reed submits that this is wrong, and fails to recognise that the decision in *Arbuthnot Latham* was not based on a finding of an intention that the proceedings would never be pursued. I agree that Picken J did not acknowledge that point, but it is in my view also clear from his judgment that he had regard to the circumstances in which and the reasons why the litigation was not progressed and did not regard them as either indicative of abuse or comparable to those in *Arbuthnot Latham*.

41. 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.

42. The cases do not support the classifications put forward by counsel, whether into three or four groups. There is no mention of any such classification or the distinctions it implies, and the number of cases is too few to enable them to be sorted helpfully into any such hierarchy. They are better approached as requiring an overall assessment of the circumstances than an attempt to sort the facts of a particular case into this category or that.

43. The cases do not in my judgment establish the proposition that Mr Reed relies on, that any decision to pause proceedings dependant on a contingency, or dependant on the outcome of other litigation, amounts to abuse of process as a matter of law. That proposition in my view could not be justified, for many reasons, but I would observe in particular:

    i) It takes no account of the nature of the contingency (or other litigation) in question, and how related or otherwise it is to the claim or issues in it.

    ii) It takes no account of the length of the delay, either as anticipated at the time the decision is taken or as it unfolds.

44. Of the three cases relied on in which abuse, short of a decision to abandon, has been found, only one (*Societe Generale*) involved any such identified contingency, in that the claimant held the English proceedings in reserve while it pursued its claims in Turkey. But the circumstances of that case were very different from this; the claimant had elected to pursue the same relief in Turkey as was sought here, and did so for a very extended period during which it maintained in force a Draconian freezing injunction imposing significant restrictions on the defendant's business effectively, as the court found, in improper aid of the Turkish proceedings. Concluding the Turkish proceedings was not a step required for or related to the conduct of the English proceedings, but only provided the circumstances in which the claimant might or might not have resumed the English claim if it was then expedient to do so.

45. In contrast, the contingency relied on here is directly relevant to the English proceedings, since the Liechtenstein litigation seeks to undermine entirely the legitimacy of pursuing the English claim, and to criticise, in vehement terms, the

conduct of the claimant in bringing it and the costs it incurred in doing so. No doubt the fact that that challenge was on foot did not have the effect that the board members were constitutionally unable to act until it was resolved, but it is very understandable that they might be reluctant to take steps they did not have to, and which might (as their witness noted) have led to increased criticism of them in the Liechtenstein court.

46. The other cases were *Arbuthnot Latham* and *Solland*. In the former, there was no contingency identified, the claim and many others lay fallow simply on the basis the bank (or the debt recovery company that purchased the portfolio) might or might not pursue them as and when it was convenient to do so. There was no reason connected with the claim for putting it on hold in this way, and the result was that it hung over the defendants indefinitely. That was what Lord Woolf MR declared to be an abuse, but it has very little relation on the facts to this case.

47. Nor does *Solland*. The claimant there simply ceased progressing the claim without any reason relevant to the claim itself for doing so. There was no particular end point in sight for that delay, and the excuse given, that the claimant was concentrating on unrelated litigation, was not a good reason. No particular "decision" to delay was identified, and it would have been artificial to do so. The length of the delay and the absence of good reason for it were what made it abusive, not any question whether the delay did or did not commence with a subjective decision by the claimant.

48. In contrast where there was an understandable reason, connected with the litigation, for pausing progress, even where it was not held to be a good reason it has not been found to be abusive warehousing- see *Grenda* and *Wearn*.

Consideration and conclusion on Ground 1

49. The Master gave a composite set of reasons for his conclusions both on the question whether there had been an abuse of process and whether it justified striking out. Those that relate directly to the decision not to progress the claim are in subparagraphs (1) and (8)-(10) of para 36 of his judgment.

50. As to para (1) the Master concluded that the letter stating that "there was no immediate need to push ahead with directions to trial" meant the same as "warehousing" and amounted to an abuse. With respect, I disagree. Those words themselves show only a decision not for the time being to progress the claim, which on its own is only delay. It would only be possible to characterise that as "warehousing" and/or abusive if some additional factors were considered, including the reasons for delay and the length of it.

51. The Master does not say that he interprets the decision as one to await events in the Liechtenstein proceedings, but I infer that is what he meant, since it is the tenor of the letter quoted. If so, it was not a decision comparable to any of the circumstances previously characterised as abuse, whether or not labelled as warehousing. As Mr Mumford submits, it was no part of the defendant's case that the claimant had permanently decided not to proceed with the claim (notwithstanding the assertion in correspondence that it had been "abandoned") and if it had been, a letter referring to "no immediate need" could not justify a finding of permanent abandonment. It was the claimant's evidence that it at all times intended to pursue the English claim, unless it was prevented from doing so by the defendant's application in Liechtenstein, and it was vigorously contesting that application precisely so that it would be able to pursue its claims in England and elsewhere.

52. The Liechtenstein proceedings were, for the reasons given above, directly relevant to carrying on the English claim, even if not an essential prerequisite to doing so. Accordingly, there was understandable reason to await their outcome. Such a decision does not put the claim to one side until the claimant decides for its own reasons it is convenient to pursue it, but until a serious objection by the defendant to its doing so is resolved. Nor was the litigation in Liechtenstein an alternative way of achieving the same end such that the English claim was kept as a fallback or collateral aid to those proceedings.

53. In para (8) of his reasons, and again in his judgment at the handing down, the Master said he did not accept as a reason that the defendant was at fault by issuing the Liechtenstein proceedings, but fault on her part had never been suggested by the claimant. He also stated that the reason had been given "somewhat belatedly" that those proceedings attacked the authority to conduct the English case, but that was in my view unjustified; it was the reason set out in the letter of 23 August 2017 in immediate response to the allegation of abandonment.

54. He went on to say it could not be justified as a reason why there was no progress in the English litigation. If he meant only that it was not a good reason for suspending progress without the express agreement of the defendant or approval of the court, I would agree. But I do not agree that it demonstrates abuse of process on the claimant's part.

55. In paras (9) and (10) he quoted again from *Grovit v Doctor* and said that the reference to commencing or continuing litigation with no intention to bring it to a conclusion was "entirely apposite to the current circumstances". But, with respect, it was not; those remarks were directed to a finding of a permanent intention not to proceed, which as noted above the defendant had not alleged and the Master had not found.

56. I would accept that the Master was entitled to have regard to other circumstances surrounding the claim in considering whether the delay complained of amounted to abuse in context (and, if it did, whether striking out was justified). Those may include any previous periods of delay, particularly if they have occurred in breach of directions or have been such that the claim is stale. But in my view it was overstating the facts to say that by August 2017 there had been a "long period of inactivity" by the claimant or "virtually no progress" in the litigation. The period complained of was since July 2016, but before that date, and between July and November, there was correspondence relating to progressing the claim which, while not exactly displaying urgency, could not in my view be regarded as seriously out of the ordinary in its pace. The parties were not in breach of any directions, and good parts of the time taken might equally be laid at the defendant's door in that she took extended periods to formulate her defence and then put forward amendments.

57. The real period of inactivity was between November 2016 and August 2017. I do not seek to condone it, and no doubt the proper course would have been to seek to agree a pause with the defendant pending the outcome in Liechtenstein, or an order from the court. But it was not a particularly long period and there was good reason to believe the defendant was content not to press on; it was the avowed object of her Liechtenstein claim to stop the English proceedings (and she applied for a formal stay herself of the French claim, though the claimant resisted that) and although she professed concern at delay she did not herself make the application for directions she threatened in November 2016.

58. The Master adversely compared the level of activity in progressing the English claim with that in the proceedings in France and Spain, but that was in my view unjustified; to the extent those proceedings are dealt with in the evidence it is mainly in the agreed chronology, from which it appears that such steps as the claimant took in those claims during this period were almost entirely either (a) necessary to deal with court orders or (b) responses to appeals and applications made by the defendant, in both cases being steps necessary to preserve the claimant's ability to proceed if her Liechtenstein application failed. There were no comparable developments in the English claim that required action (or reaction) on the claimant's part.

59. The Master referred in paras 4, 5 and 6 to the lack of constructive response by the claimant to requests for information about its assets and security. But I agree with Mr Mumford that these were not matters that related to any delay or could elevate delay into abuse. First, the claimant's position on these requests was made clear long before the delay complained of and did not change in the period of delay complained of. Second, it was entitled to take the stance it did, albeit that may have enhanced the prospects of the defendant obtaining security if she made an application for it (see *Sarpd Oil International Ltd v Addax Energy SA* [2016] EWCA Civ 120). The defendant may have regarded that stance as obstructive, but if the claimant was not obliged to cooperate by disclosing its assets that non cooperation could not itself be an abuse or turn its other actions into abuses.

60. At para (7) the Master stated that the Notice at the Land Registry had prevented any dealings with the land in the meantime. Mr Reed's submission was that that notice should be regarded as akin to a freezing injunction, which was one of the factors establishing abuse in *Societe Generale*. The Master did not draw that analogy, and it would be a weak one. The Notice only has the effect of preserving the claim against the asset that is the subject of it. It is justified as long as it is to protect a claim the claimant intends to proceed with. It does not interfere with the defendant's assets or rights in any other way and is much less Draconian than the worldwide freezing order affecting the business and all assets of the defendant in the *Societe Generale* case which, the court found, was effectively maintained in aid of the Turkish proceedings. I accept that having lodged such a Notice a claimant should get on with its claim, but because of the relatively lower level of interference with the defendant's rights the imperative to do so is not as strong, and the potential implication that delay is abusive is much weaker, in my judgment, than in the case of a freezing order. The seriousness of any restricting effect in this case is also lessened by the fact there is no evidence of any transaction the defendant contemplated that might have been frustrated by the existence of the Notice.

61. Taking account of all these circumstances, in my judgment neither the decision of the claimant to pause proceedings nor the delay that in fact followed it could properly be regarded as amounting to abuse of process.

62. For these reasons, in my judgment the Master's conclusion that the decision to pause progress was an abuse of process was wrong as a matter of law, whether he is taken as so deciding as the inevitable consequence in law of such a decision or by evaluating that decision together with the surrounding circumstances, and the appeal should therefore be allowed on that ground.

Ground 2- erroneous finding of fact

63. In light of my conclusion on Ground 1 it is not strictly necessary to deal with this, but I do so in case I am found wrong on the first ground.

64. I can deal with this shortly; insofar as the Master found as a fact that the claimant had decided in or about November 2016 not for the time being to take any further steps to progress the English claim, pending the outcome of the Liechtenstein proceedings and unless the defendant pressed it to do so, in my judgment he was entitled to do so as a matter of inference from the letter of 23 August 2017. The witness statement of Mr Shear before him was to similar effect. It was a "unilateral" decision insofar as it was not agreed with the defendant or approved by the court. I do not accept the submission that the letter shows only a mistaken assumption that the defendant would be content with this course; that would be only a reason why the claimant took its decision.

65. As stated above I do not consider para (1) of the Master's reasons to be a finding that the claimant had decided never to proceed with the English claim. Nor is that the tenor of the additional reasons he gave at the handing down. For the reasons given above I do not consider that the Master's conclusion that the decision to pause was the same as "warehousing" was a finding of fact.

Grounds 3 and 4- Exercise of discretion

66. Nor is it strictly necessary to deal with the grounds related to discretion as to sanction, but in case the matter goes further and I am held to be wrong on the question of the existence of abuse, I should say that I accept the submission that the Master had regard to matters irrelevant to the exercise of his discretion and/or erred in principle in the exercise of that discretion in so far as (a) he took into account the lack of information provided about assets and failure to offer security and (b) he appears to have indicated he regarded the decision to pause as showing no intention to bring the claim to a conclusion, or being equivalent to such an intention.

67. The former seems to me an entirely separate matter to the question of abuse by pausing progress; the defendant was at all times entitled to apply for security and eventually did so as an alternative to her striking out application. As to the latter, as indicated above it was not alleged there was no intention ever to proceed, and I do not consider the Master made (or could properly have made) a finding of such an intention. Reference to it was therefore irrelevant or an error of principle. I would set aside the exercise of discretion, and if undertaking it myself I would conclude striking out was not justified, for essentially the same reasons I have set out above in evaluating the question of abuse. If (contrary to my conclusion above) there was an abuse, it was of a relatively minor nature. In addition, the question of prejudice is relevant at this stage, and no real prejudice to the defendant has been shown. Further, striking out the English claim would create an unjustified anomaly between the position here and in other jurisdictions where what is fundamentally the same claim against her is proceeding (or has proceeded) to determination on the merits.

APPENDIX

[The Master's judgment handed down on 11 September 2018]

IN THE HIGH COURT OF JUSTICE **HC-2015-001414**

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

PROPERTY TRUSTS AND PROBATE LIST (ChD)

Before: Deputy Master Cousins

B E T W E E N:-

ASTURION FONDATION

Claimant/Respondent

-and-

ALJAWHARAH BINT IBRAHIM

ABDULAZIZ ALIBRAHIM

Defendant/Applicant

JUDGMENT

Mr David Mumford QC, and Mr James Kinman, Counsel, instructed by Bryan Cave Leighton Paisner LLP (formerly Berwin Leighton Paisner LLP) appeared for the Claimant/Respondent.

Mr Rupert Reed QC and Mr Simon Atkinson, Counsel, instructed by Simmons & Simmons LLP, appeared on behalf of the Defendant/Applicant.

THE APPLICATION

1. By a notice of application dated 11th December 2017 ("the Application")[1] Ms Aljawharah Bint Ibrahim Abdulaziz Alibrahim ("the Defendant") seeks the following relief:

    (1) To strike out the claim in its entirety pursuant to CPR 3.4 on the ground of abuse of process; or alternatively

[1] The Application is supported by the first witness statement of Mr David Sandy dated 11th December 2017.

(2) That the Asturion Fondation do provide security for the Defendant's costs of the action in the sum of £1,293,555.00 on the basis that the Asturion Fondation is a body corporate resident in Liechtenstein, and (a) there is reason to believe that the Asturion Fondation will be unable to pay her costs pursuant to the provisions of CPR 25.13(2)(c), and/or (b) that the Asturion Fondation is resident outside the jurisdiction, pursuant to the provisions of CPR 25.13(2)(a).

2. There is a further application made by the Defendant in that she seeks an order that the continuance of the notice of a pending land action registered against the Title to the Defendant's property relating to the proceedings ("the Notice") be made conditional upon a cross-undertaking in damages.

THE BACKGROUND

3. The substance of the Claim made by the Asturion Fondation concerns a transfer from the Asturion Fondation to the Defendant dated 14th October 2011 ("the Transfer") of a property known as Kenstead Hall situate at 52 Bishops Avenue, London N2 0BE, and registered at HM Land Registry under Title No. AGL97703 ("the Property").

4. The Asturion Fondation is a Liechtenstein foundation established in the 1970s to hold and manage certain properties situated outside Saudi Arabia on behalf of Prince Fahd Bin Abdulaziz Al Saud (later to become King Fahd). The Defendant is a widow of King Fahd who died on 1st August 2005. The Transfer was effected after the death of King Fahd, but it is said that it was made on an instruction given during his lifetime for the benefit of the Defendant, as his wife.

5. The Asturion Fondation by its present Board now claims that the Transfer was void, or alternatively voidable. The basis for this claim is that Maître Assaly ("Me Assaly") who was then a Board Member of the Asturion Fondation body, when purportedly executing the TR1, acted without the Asturion Fondation's authority, and in excess of his internally specified competencies under Liechtenstein law, and/or contrary to the purposes of the Asturion Fondation, and/or under a fundamental mistake. It is further said that the Defendant knew or ought to have known of these alleged irregularities by reason of her alleged knowledge of Shari'a law.

6. Accordingly, the Asturion Fondation claims that the Transfer was void, or voidable, or both, under English law and under Liechtenstein law.

7. The Claim Form and the original Particulars of Claim were issued on 10th April 2015 and served in June 2015. The Defence was filed and served on 18th September 2015. Shortly after the issue of the Claim the Asturion Fondation then issued notice of a pending land action entered against the Title to the Property at HM Land Registry ("the Notice"). It is submitted by the Defendant that this action in effect was issued as a pretext to prevent any dealings with the Property. It is further submitted by the Defendant that a substantial period has passed with little or no action having been taken by the Asturion Fondation to progress the Claim.

8. The essence of the Defence is that the Transfer is neither void nor voidable for want of actual or apparent authority of M[e] Assaly, nor for any lack of good faith on the part of the Defendant. It is submitted that as a matter of Liechtenstein law, or alternatively English law, M[e] Assaly had authority to effect the Transfer. However, even if he did not have such authority, it is submitted that the Defendant relied in good faith on the publicly-disclosed power of M[e] Assaly solely to represent the Asturion Fondation in his dealings with third parties. As a further alternative, if the validity of the Transfer is to be determined according to the principles of Shari'a law, then the transfer is neither void nor voidable since the instructions of King Fahd amounted to an *inter vivos* gift to the Defendant, his wife. It is submitted that those instructions were binding on M[e] Assaly, and the Asturion Fondation, both before and after the death of King Fahd.

9. On 18th December 2015 the Asturion Fondation's Reply was filed and served. In that pleading the Asturion Fondation denies that M[e] Assaly had either actual authority under Liechtenstein law, or apparent authority under English law to execute the Transfer. The Asturion Fondation denies that the Defendant acted in good faith or was entitled to assume that M[e] Assaly had authority to represent the Asturion Fondation.

Procedural events since September 2015

10. The issue of security for costs was first raised by the Defendant's solicitors in a letter dated 6th October 2015. The request was made to the Asturion Fondation's solicitors that the Asturion Fondation confirm that it would in principle be willing to give security. In support of this request reference was made to the fact that there was no publicly-available information regarding the assets and liabilities of the Asturion Fondation.

11. In its response, dated 16th October 2015, Berwin Leighton Paisner declined to provide any security. It did no more than confirm the following: -

> *"That [the Asturion Fondation] has sufficient assets with which to satisfy any costs order or judgment."*

No particulars of the Asturion Fondation's alleged assets and liabilities were provided. However, Berwin Leighton Paisner did state that the Asturion Fondation was willing to provide some form of undertaking that it would not object to any claim brought by the Defendant in Liechtenstein to enforce a costs order or a judgment granted by the English Court. For reasons provided by the Defendant, such an undertaking was considered to be of minimal value.

12. In a further letter dated 28th January 2016 Berwin Leighton Paisner indicated that the Asturion Fondation was then considering seeking to make an amendment to its Particulars of Claim. Following this the Defendant's solicitors requested confirmation of its decision in this regard, and in a letter dated 1st February 2016 sought a copy of the draft Particulars of Claim. Following this further correspondence ensued which resulted in a copy of the Asturion Fondation's draft Amended Particulars of Claim being provided under cover of a letter dated 8th March 2016. One of the proposed

amendments included an allegation that M[e] Assaly had acted in breach of his duties to the Asturion Fondation, and also sought a claim in restitution.

13. The Defendant's solicitors then on 22nd April 2016 wrote again to the Asturion Fondation's solicitors regarding security for costs. The Asturion Fondation was expressly invited to provide sufficient information as to the nature and location of its assets in order to demonstrate that it could meet any costs order. No response was ever received to this request. Following further correspondence in May 2016, Messrs Berwin Leighton Paisner sent a holding response dated 13th May 2016 which indicated that a substantive response would be provided *"as soon as possible"*. However, no substantive response was ever received.

14. Thereafter, in July 2016 a draft Amended Defence was provided by the Defendant consequent upon the various amendments contained in the draft Amended Particulars of Claim, and the Asturion Fondation's case on foreign law as pleaded in the Reply. In a letter dated 2nd August 2016 Messrs Simmons & Simmons stated that the Defendant would make an application to court seeking security for costs unless a substantive and satisfactory response was received. In their letter of response dated 12th August 2016 Berwin Leighton Paisner repeated the Asturion Fondation's *"confirmation"* that it had sufficient assets. However, no information was provided as to the nature, amount or location of such alleged assets, nor any information about the Asturion Fondation's liabilities.

15. Thereafter desultory correspondence then ensued between the solicitors for the parties over the succeeding months with Simmons & Simmons repeatedly requesting that information be provided as to the provision of security and information about the Asturion Fondation's assets and liabilities. Apart from a holding response dated 24th November 2016 indicating that a substantive response would be received in December 2016 no substantive response was received thereafter from Berwin Leighton Paisner, or at any time during the first seven months of 2017.

16. Accordingly, on 15th August 2017 the Defendant's solicitors wrote to the Asturion Fondation's solicitors noting that the Asturion Fondation had taken no substantive steps to progress the litigation since July 2016 and inviting confirmation that the Asturion Fondation would discontinue the Claim. Subsequently, in a letter dated 23rd August 2017 Berwin Leighton Paisner responded in the following terms: -

> *"Given that the parties have been involved in separate court proceedings in Liechtenstein[2] regarding the composition of our client's Board, we were of the opinion that unless your client request it, there was no immediate need to push ahead with directions to trial."*

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[2] The witness evidence filed on behalf of the Defendant makes reference to the details of the proceedings commenced in Liechtenstein, and elsewhere in Europe. See the evidence of Mr Sandy in his first witness statement at [54] – [56]; Mr Shear in his second witness statement at [11] – [15]; and in Mr Sandy's third witness statement at [7] – [16]. In summary, the proceedings in Liechtenstein had been commenced in December 2015 by the Defendant and her son, Prince Abdul Aziz, seeking, inter alia, the removal of the then Board members of the Asturion Fondation on the basis that they were acting in contravention of regulations.

17. It is therefore an essential plank of the Defendant's case that such sentiments, in effect seeking to place the responsibility upon the Defendant, amounted to the fact that the Asturion Fondation had decided to *"warehouse"* its claim, thereby amounting to an abuse of process. Indeed, Simmons & Simmons indicated in its letter dated 8th September 2017 to Berwin Leighton Paisner that the Asturion Fondation had, in effect, taken the unilateral decision to "*warehouse*" the English Proceedings. It is submitted that such action amounted to an abuse of process entitling the Court to strike out the action.

18. However, subsequently, the Asturion Fondation's solicitors then seemingly sought to re-trench from the position manifested in their letter dated 23rd August 2017 in the following respects: -

    (1) In a letter dated 12th September 2017 it was denied that the Asturion Fondation had failed to progress the proceedings, and it was confirmed that the Asturion Fondation consented to the Defendant's filing and serving the amended Defence. It is submitted by the Defendant that it had taken more than 12 months for the Asturion Fondation to provide that conformation.

    (2) In a letter dated 21st September 2017 it was confirmed (somewhat belatedly, so it is said by the Defendant) that the Asturion Fondation agreed to pay the Defendant's costs of and occasioned by the Asturion Fondation's amendments to the Particulars of Claim.

    (3) The Asturion Fondation on the same day issued an application seeking permission to amend the Claim Form and the Particulars of Claim. This was served on the Defendant on 22nd September 2017. It was stated as being on an urgent basis in order (so it was said) "*to protect [the Asturion Fondation's] position*". It is submitted by the Defendant that this reference could relate to a possible limitation defence for the Defendant available from 14th October 2017.

    (4) Following this, there was further correspondence between the Solicitors for the parties. In a letter dated 22nd September 2017 the Defendant's solicitors again requested information as to the nature and location of the Asturion Fondation's assets and sought undertakings from the Asturion Fondation. In their response dated 26th September 2017 Berwin Leighton Paisner stated that the firm was still taking instructions as to this point.

    (5) Eventually the parties entered into a *"standstill"* agreement. However, it is submitted that no substantive response was ever received from the Asturion Fondation as to the other issues, in particular those relating to the security for costs and *"warehousing"* of the proceedings.

    (6) On 11th December 2017 the Defendant issued the Application.

19. The Asturion Fondation filed its evidence in response to the Application in March 2018. Its evidence regarding the issue of security is referred to in four paragraphs of Mr Shear's witness statement. Its assets are mentioned in one paragraph.

THE PRINCIPLES OF LAW

Striking out the Claim as an abuse of process

20. The power of the Court to strike out a statement of case is set out in CPR.3.4. CPR r.3.4(2)(b) provides that the Court may strike out a statement of case if it appears to the Court that the statement of case is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings. The Defendant relies upon authority in support of the proposition that where a party commences or continues litigation with no intention to bring the matter to a conclusion, that can amount to an abuse of process. The case of *Grovit v Doctor*[3] is cited in support of the proposition, *per* Lord Woolf:-

> *"…I am satisfied that both the deputy judge and the Court of Appeal were entitled to come to the conclusion which they did as to the reason for the appellant's inactivity in the libel action for a period of two years. 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 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. 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.[4] *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."*[5]

21. The Defendant submits that it is an abuse of process to put litigation on hold pending the outcome of proceedings abroad. Reliance is placed upon the judgment of Popplewell J in *Société Générale v Goldas Kuyumculuk Sanayi Ithalat Ihracat A.S.* [6] : -

> *"[60] The second abuse [of the claimant] lies in the decision to put the proceedings on hold. I reject Mr Moverley Smith's*

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3 [1996] 1 WLR 640.
4 [1978] AC 297.
5 At 647F - 648A.
6 [2017] EWHC 667 (Comm).

submission that Société Générale had decided to abandon the proceedings. None of the documents he referred to cast any serious doubt on what Mr Surgeoner said was the nature of the decision made. Nevertheless, that decision was abusive.

[61] Even before the introduction of the CPR and the overriding objective, a party was not allowed simply to put proceedings on hold and to await the outcome of developments or litigation abroad without the sanction of the Court. In Battersby v Anglo-American Oil Co Ltd[7] *Lord Goddard giving the judgment of the Court of Appeal said* [8] *'It is for the court and not for one of the litigants to decide whether there should be a stay.' In* Arbuthnot Latham Bank Ltd v Trafalgar Holdings[9] *Lord Woolf MR stated* [10]*: -*

> *'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, where 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.*

[62] The introduction of the CPR marked a change of emphasis in favour of attaching more importance to compliance with the rules, and furthering the overriding objective, with the impact on the court system and other court users in mind as well as that on the parties. Under CPR Rule 1.1(2)(d) and Rule 1.3 Société Générale was under an obligation to help

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7 [1945] KB 23.
8 At page 32.
9 [1998] 1 WLR 1426.
10 At page.1437.

the Court to ensure that the claim was dealt with expeditiously. This it singularly failed to do.

[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….;[11] *see* Solland International Ltd v Clifford Harris & Co... *".*[12]

22. In this context it is to be noted that the term *"warehouse"* or *"warehousing"* proceedings seems to have been used as a term of art for the first time in the case of *Arbuthnot Laytham Bank Limited v Trafalgar Holdings.* [13]

23. Thus, in essence warehousing is more than mere delay which in itself is not an abuse of process. On the contrary, warehousing is the issuing and maintaining of proceedings with no real intention of carrying them through to trial, save possibly at some unspecified future date of convenience to the claimant.

DISCUSSION

The Defendant's position

24. Clearly, the burden lies on the Defendant in the present case to demonstrate that the conduct of the Asturion Fondation has, in effect, amounted to warehousing the English proceedings. It is submitted by the Defendant that this is amply demonstrated when regard is had to the factual circumstances over the period of time to which detailed reference has been made above. It is submitted that the Asturion Fondation's decision unilaterally placed the English Proceedings *"on hold"* pending the outcome of litigation in Liechtenstein, and accordingly was abusive. It is apparent from the letter from Berwin Leighton Paisner dated 23rd August 2017 that the decision to warehouse the English proceedings had been made by the Asturion Fondation. It is urged upon the Court that the wording contained in the letter *"that there was no immediate need to push ahead with the directions to trial"* given the proceedings in Liechtenstein was sufficient to demonstrate that this decision to warehouse had been made. It is submitted that this is a clear abuse of process according to the principle laid down in the *Société Générale* case by Popplewell J.

25. It is further submitted that it is the fact of such an abusive approach in bringing but failing to pursue proceedings that attracts the sanction of the Court. Such abuse is not mitigated by arguments as to the length of a period of time over which the abuse occurred or the particular prejudice caused to the Defendant. Further, there is no

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11 Lord Woolf in *Arbuthnot* preceded the quotation cited in the *Société Générale* case as follows – *"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 monies to initiate a great many actions and then select which of those proceedings to pursue at any particular time…" Ibid* at 1437B.

12 [2015] EWHC 3295 (Ch), at [54].

13 *Arbuthnot v Laytham Bank Limited v Trafalgar Holdings* at 1431F-H, and 1432H-1433B; *Iceberd Limited v Winegardner* [2009] UKPC24 at [7]; *Wearn v HNH International Holdings Limited* [2014] EWHC 3542 (Ch) at [65] – [72], and [111]; and *Kaplen v Super PCS LLP* [2017] EWHC 1165 (Ch) at [44].

relevant obligation on the part of the Defendant to continue to press the Asturion Fondation to prosecute its own proceedings or to warn the Asturion Fondation of the risks of its conduct.

26. In his written and oral submissions Leading Counsel for the Defendant provided five reasons which demonstrated that the abuse of process in the present case is sufficiently serious to justify the Court striking out the claim.

27. In summary the reasons given are as follows:-

(1) The Asturion Fondation's decision was unilateral. No indication was given by Berwin Leighton Paisner, either to Simmons & Simmons, or to the Court that the Asturion Fondation had decided to *"pause"* the litigation. The Asturion Fondation simply left it to the Defendant to infer that the Asturion Fondation had decided for the time being not to pursue the litigation. Such an approach is contrary to both the spirit and the letter of the overriding objective. Particular reference is made to CPR r.1.11(2)(d) (ensuring that a case is dealt with expeditiously and fairly); and to the breach of the Asturion Fondation's duty under CPR r.1.3 (to help the Court further the overriding objective).

(2) The Asturion Fondation's decision to warehouse the proceedings has necessitated this application and the expenditure of court time and resources in dealing with the Asturion Fondation's default. The Asturion Fondation's conduct is antithetical to the concern expressed in CPR r.1.1(2)(e) that there should be allotted to a case an appropriate share of the Court's resources, while considering the need to allot resources to other cases.

(3) The Asturion Fondation's decision to warehouse the English proceedings is further symptomatic of its failure to date not only (a) to advance this litigation but also (b) to respond constructively to the substantive issues raised in correspondence. There has been a series of holding responses from Berwin Leighton Paisner, and a paucity of substantive responses. The Asturion Fondation issued its claim in April 2015, more than 3 years ago. Yet pleadings have not closed, and there has been no directions hearing in this matter.

(4) The Asturion Fondation's decision to warehouse the English proceedings is in marked contrast with the assiduousness with which it has engaged in various sets of proceedings in other jurisdictions. An agreed chronology shows the numerous steps that have been taken by the Asturion Fondation and its board members in Liechtenstein and France (and also by Fasfunda, an entity half owned by the Asturion Fondation in Spain).

(5) Since April 2015 the Property has been subject to the Notice. The practical effect of the Notice is similar to that of a proprietary injunction: it effectively prevents the Defendant from dealing with the Property. The Asturion Fondation has enjoyed the continuing benefit of the Notice, including throughout the period during which the proceedings were warehoused, without being subject to any cross-undertaking.

28. Further, it is submitted by Leading Counsel for the Defendant that the evidence given by Mr Shear in opposition to the Application is defective in the following respects: -

    (1) He repeats the confirmation previously given that the Asturion Fondation has sufficient assets to pay any costs ordered against it;

    (2) He refers to £1.3 million set aside in an (unidentified) bank account, but provides no particulars as to the location of that bank account, nor whether the sums in the said account can be drawn upon by the Asturion Fondation for purposes other than this litigation;

    (3) He gives no indication as to the amount of equity (if any) the Asturion Fondation has in the real estate identified in France and Spain, nor when these properties can be realised in the event that a costs order is made against the Fondation;

    (4) He gives no information whatsoever about the liabilities of the Asturion Fondation;

    (5) He exhibits no accounts showing the financial position of the Asturion Fondation generally, the location and nature of its assets or the extent of and nature of its liabilitie;.

    (6) It is also to be noted that none of the board members of the Asturion Fondation has provided a witness statement evidencing its financial position.

29. In essence, Leading Counsel urges the Court that this is a proper case where it is proportionate and justified to strike out the claim for abuse of process on the basis that the Asturion Fondation has shown no intention of advancing the Claim in accordance with the overriding objective.

The position of the Asturion Fondation

30. Essentially the position manifested on behalf of the Asturion Fondation is that the *dicta* referred to above in the Authorities does not mean that any litigant who pauses in the prosecution of his or her proceedings is liable to have them struck out. The Courts recognise that there can be many reasons for delay, even substantial delay, which do not warrant the conclusion that the Asturion Fondation is abusing the Court's process or require that the Asturion Fondation be barred from the Court.

31. Leading Counsel for the Asturion Fondation has set out in paragraph 45 to 57 of his skeleton argument a number of reasons as to why striking out for an abuse of process in the present case is unjustified. Those written submissions were developed at some length by Leading Counsel during the course of oral argument. In summary the Asturion Fondation's position is as follows: -

(1) The Asturion Fondation has always intended to take the current proceedings to trial, and no complaint could be made of its conduct of the proceedings until after the Defendant issued her proceedings in Liechtenstein, and then provided her draft amended Defence. Once proceedings had been issued in Liechtenstein by the Defendant, the Asturion Fondation's authority to conduct the current proceedings was coming under sustained attack from the Defendant in Liechtenstein which needed to be addressed as a matter of urgency.

(2) It is said that the Defendant appeared to be content not to list a case management conference in the present case. There appeared to be little immediate impetus to press forward with these proceedings pending the resolution of the authority of the Asturion Fondation's Board to conduct these proceedings.

(3) This was a reasonable, or at least an understandable, response to the position in which the Asturion Fondation and its Board found themselves. As Leading Counsel put it, the Asturion Fondation, and its Board, had been distracted by proceedings brought against them by the Defendant in Liechtenstein. The nature of the Liechtenstein proceedings was an attack on the Board's actual right to commence the current proceedings.

(4) Indeed, far from demonstrating a lack of intent to maintain the current proceedings to trial, it is submitted that the Asturion Fondation's conduct demonstrated precisely the reverse. It is submitted that the Asturion Fondation was engaged in litigation in Liechtenstein in an attempt to preserve its ability to prosecute the claim in this jurisdiction.

(5) It is also submitted that the Asturion Fondation's intention to maintain the current proceedings is demonstrated by the fact that as soon as the Defendant complained that matters had been left to drift in August 2017, the Asturion Fondation offered to write to the Court requesting directions immediately. It also applied to amend its Particulars of Claim. It is said that the Defendant had no interest in the Asturion Fondation actually progressing these matters on the basis that it *"sensed a litigation advantage"*. In essence, it is the Defendant's responsibility for the proceedings having been (as it is put) *"locked in stasis"* for 9 months, a large part of which, it is submitted, is down to the inexplicable delay on the part of the Defendant in making the Application.

(6) It is also submitted that if the Asturion Fondation had applied for a stay pending resolution of whether or not the Board had authority to bring and maintain the current proceedings, that application would almost certainly have been granted. It is recognised by Leading Counsel that it was unfortunate that no such application for a stay was made, but it would be altogether unjust to shut the Asturion Fondation out of its ability to progress this litigation altogether. It was considered by the Asturion Fondation that the Defendant herself did not wish for further costs to be incurred in advancing the English proceedings whilst she was contending in Liechtenstein that such proceedings had been brought by the Board in breach of their duties.

(7) There has been no conscious decision to warehouse these proceedings. That decision was not therefore unilateral. Instead it is submitted that what delay there has been was a foreseeable reaction to the Defendant's own actions which appear to have been acquiesced in by the Defendant.

(8) As to the submission made by the Defendant that the Asturion Fondation had failed repeatedly to engage in correspondence, and in particular failed to provide information about the Asturion Fondation's assets, it is submitted by the Asturion Fondation that it was under no obligation to provide the Defendant with that information, and its decision not to do so cannot be described as an abuse.

(9) As to the fact that the Notice has been left on the Register of Title, it is submitted that this has caused no discernible prejudice to the Defendant – nor has she ever sought to state this. Indeed, in any event it would have been open to the Defendant to apply to have the Notice removed or varied at any time by making an appropriate application to HM Land Registry and/or the Land Registration Division of the Property Chamber, but such an application for removal or variation has never been made.

32. Three authorities are then cited by Leading Counsel as examples of where (in two cases) the Court of Appeal upheld the decision of the judge at first instance not to strike out the claim.[14] It is also submitted that even if the Court finds there has been abuse of process it should have regard to a range of sanctions that it can impose. It is not faced with a binary choice between striking out proceedings and allowing them to continue.

33. For all these reasons the Asturion Fondation urges the Court to dismiss the Application on the basis that the circumstances do not amount to an abuse of process.

34. Alternatively, even if the Court were to conclude that there had been an abuse, it is submitted by the Asturion Fondation that striking out the claim would be an unjust and disproportionate response to it, for the reasons set out in paragraph 57 of Leading Counsel's Skeleton Argument, as supplemented by oral submissions during the course of the Hearing. In essence, these are the following:

(1) the period during which no steps to progress the proceedings were taken was not inordinate;

(2) the Defendant has herself been guilty of periods of unexplained delay in her defence of the action;

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[14] See *Realkredit Danmark A/S v York Montague Limited* (unreported), 26th November 1998; *Leon Braunstein v Mostazafan & Janbazan Foundation* (unreported) 12th April 2000; and *Grend Investments Limited v Barton* [2017] EWHC 2371 (Comm).

(3) the Defendant has not been prejudiced by the period of inactivity on the part of the Asturion Fondation;

(4) the Asturion Fondation asserts that it has real prospects of success in its claim in particular that M^{e} Assaly acted without authority or in breach of duty in transferring the Property to the Defendant; and

(5) the Asturion Fondation has now evinced a clear intention to progress the action.

THE DECISION

35. Having regard to the legal principles and the factual circumstances, to which reference has been made above, I have come to the conclusion that the Application should succeed, and the Claim should be struck out.

36. My reasons are 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 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 Asurion Fondation to proceed with the litigation.

37. Accordingly, in my judgment, this is a proper case for the claim to be struck out in its entirety on the grounds of abuse of process pursuant to the provisions of CPR 3.4. I therefore do not need to consider the question of security for costs. In such circumstances, I also direct the Chief Land Registrar to delete reference to the Notice registered against the title of the Property.

38. An appropriate order should be drawn up by Counsel to reflect this judgment.

EDWARD F COUSINS
Deputy Chancery Master

20th August 2018