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Case No: CH-2023-000176
CH-2023-000209

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

ON APPEAL FROM THE ORDER OF MASTER PESTER DATED 12 JANUARY 2023

Rolls Building
Fetter Lane
London, EC4A 1NL

13 May 2024

Before :

MR JUSTICE RICHARDS

- -

Between :

WATFORD CONTROL INSTRUMENTS LTD

Appellant/Respondent

- and –

COLIN BROWN

Appellant/Respondent

Richard Colbey for the **Claimant**
Niranjan Venkatesan (instructed by **Buckles Solicitors)** for the **Defendant**
Hearing dates: 19 and 20 March 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 13 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE RICHARDS:

1. Both Watford Control Instruments Ltd and Mr Brown appeal against orders made by Master Pester (the "Judge") following judgments of 12 January 2023 and 23 June 2023. So that this judgment can be easily read together with those of the Judge, I will, like the Judge, refer to Watford Control Instruments Ltd as the "Claimant".

2. The dispute between the Claimant and Mr Brown arose out of Mr Brown's actions as a director of a company now known as YZMA 0043453 Ltd ("YZMA"). YZMA went into administration in May 2016 and it is alleged (the "Colin Brown Claim") that Mr Brown acted in breach of fiduciary duties owed to YZMA in that he knowingly and dishonestly appropriated YZMA's money for his own purposes.

3. By a Sale and Purchase Agreement (the "SPA") dated 18 May 2016, the Claimant acquired the business of YZMA including its "Book Debts" as defined therein. A matter of dispute in this litigation is whether the SPA and/or a subsequent deed of variation of the SPA dated 9 May 2017 (the "Deed of Variation") and/or a "Deed of Declaration alternatively of Rectification" dated 9 October 2022 (the "Deed of Declaration") operated to transfer to the Claimant either legal or equitable title to the Colin Brown Claim.

4. On 15 June 2018, the Claimant, considering that it did have standing to bring the Colin Brown Claim, issued proceedings against Mr Brown. The first CMC took place on 29 July 2019 with some directions being made. However, the CMC was adjourned for further directions with an order that it be listed on the first open date after 30 September 2019 with a time estimate of two hours. Between September 2019 and March 2022, the Claimant did not take any steps to pursue the claim.

5. On 5 July 2022, the Claimant applied to "relist" the CMC. In response, Mr Brown applied to strike out the claim on the grounds that (i) the Claimant's "warehousing" of the claim amounted to an abuse of process and (ii) the Claimant did not have title to sue in respect of the Colin Brown Claim. These applications came before the Judge at a hearing on 1 November 2022 following which he gave judgment on 12 January 2023 (the "First Judgment"). There was then a further hearing on 30 March 2023 following which the Judge gave a further judgment (the "Second Judgment") on 23 June 2023. References in this judgment in the form "FJ[ ]" and "SJ[ ]" are to paragraphs of the First Judgment and Second Judgment respectively.

The First Judgment and the Second Judgment

6. By the First Judgment the Judge reached the following conclusions:

    i) The Claimant's failure to pursue its claim between September 2019 and March 2022 involved it taking a unilateral decision not to pursue a claim for a substantial period of time while maintaining an intention to pursue it at a later juncture. That was an abuse of process ("*Grovit* abuse") of the kind identified in *Grovit v Doctor* [1997] 1 WLR 640 ("*Grovit*") (FJ[41]).

    ii) Nevertheless, it would be disproportionate to strike out the Claimant's claim. The proportionate sanction for the Claimant's abuse of process was to require it to provide security for Mr Brown's costs of defending the claim and to provide that,

even if the claim ultimately succeeds, the Claimant cannot recover any costs incurred in the period from September 2019 to September 2022 (FJ[68] and [88]).

iii) The Claimant's claim should not be struck out for want of prosecution (SJ [71]).

iv) If the SPA had been left unamended, the Colin Brown Claim would "arguably" have fallen within the definition of "Book Debts" and so have been the subject of the agreement to transfer those "Book Debts" to the Claimant. However, the Deed of Variation altered that position and provided for legal ownership of the Colin Brown Claim to remain with YZMA (FJ[79]).

v) The Deed of Declaration manifested an intention for YZMA to assign the Colin Brown Claim to the Claimant. However, in order for the Claimant to be able to sue in its own name, by s136 of the Law of Property 1925 ("LPA"), notice of the assignment effected by the Deed of Declaration had to be given before the Claimant commenced proceedings (FJ [85(1)]).

vi) Notice of the assignment effected by the Deed of Declaration was not given to Mr Brown before the Claimant commenced the proceedings (FJ[86(3)]). Accordingly, there was no legal assignment of the Colin Brown Claim to the Claimant which complied with s136 of the LPA and so the Claimant could not bring the Colin Brown Claim in its own name.

vii) If the Claimant wished to maintain its action in respect of the Colin Brown Claim, it needed to make an application to amend so as to plead the assignment effected by the Deed of Declaration. It would also need to apply to join the administrators of YZMA (the "Administrators") to the proceedings.

7. Thus, following the First Judgment, the Claimant's claim had not been struck out but the Judge determined that the Claimant needed to apply both for permission to amend and to join the Administrators in order for the claim to continue. The Claimant duly made both applications which were dealt with in the Second Judgment. In SJ[7] and [30], the Judge explained that, by its proposed Amended Particulars of Claim (the "APOC"), the Claimant alleged misappropriation of YZMA's funds going back to 2004, whereas the unamended claim went back only to 2009. The Judge considered that the claim set out in amended Schedules to the APOC increased the total amount claimed from some £350,000 to approximately £645,000.

8. In the Second Judgment, the Judge refused the Claimant's application for joinder and permission to amend. The Judge's conclusion was based to a significant extent on his findings on matters of limitation in the Second Judgment to the following effect:

i) The Claimant's unamended claim was brought in 2018 and sought restitution of sums that Mr Brown was said to have misappropriated from YZMA going back to 2009. The primary limitation period for the claims was, by s21(3) of the Limitation Act 1980, six years from the date of payment subject to the extensions of that period set out in sections 21(1)(a), 21(1)(b) and 32 (SJ[27]). Therefore, some of the causes of action in the unamended claim were already statute-barred at the time the original claim was brought (SJ[31]).

ii) The proposed APOC significantly expanded the claims and extended the period for which they were brought going all the way back to 2004. Accordingly, all claims in the APOC were, at the time of the Second Judgment, time-barred under s21(3) or Mr Brown had at the very least an arguable case that that was so (SJ[29]).

iii) The limitation issue meant that CPR 19.5 (since renumbered as CPR 19.6) was of potential relevance. That provision was relevant only to the application to join, not the application to amend. CPR 19.5(2) imposed an absolute bar on the Administrators being joined if the limitation period had expired at the time the proceedings were started. The Judge identified what he considered to be some tension in the authorities as to whether CPR 19.5(2) would apply if Mr Brown had an arguable defence that the limitation period had expired when the proceedings were commenced or whether it would be sufficient for the Claimant to show that it had an arguable case that the limitation period had not expired (SJ[15]).

iv) The Judge did not consider it necessary to decide how that tension in the authorities should be resolved. He concluded that, even if there was jurisdiction under CPR 19.5 to permit the Administrators to be joined, he would exercise discretion to refuse to allow that joinder so as not to run any risk of depriving Mr Brown of a limitation defence (SJ[32]). He concluded at SJ[33] that the proper way to determine the parties' respective arguments on limitation was to leave the Claimant to issue fresh proceedings, rather than to permit the Administrators to be joined and the existing particulars of claim to be amended.

9. The conclusions set out in paragraph 8 related largely to the joinder application. The failure of the joinder application necessarily meant that the application to amend would also fail. It is, however, worth noting that the Judge concluded at SJ[30] that in both substance and form, the Claimant was, by its amendments, bringing new claims.

10. As a consequence of the Second Judgment, the Judge decided that the Claimant could not regularise the position so as to enable the Colin Brown Claim to go ahead. Accordingly, in the Judge's order of 7 August 2023 (the "Second Order"), the entire claim was struck out.

The two appeals and their grounds

11. Both the Claimant and Mr Brown have permission to appeal against the Judge's orders made following his two judgments.

Mr Brown's appeal

12. Mr Brown appeals with the permission of Zacaroli J on the single ground that, having correctly found that the Claimant was guilty of *Grovit* abuse, the Judge applied the wrong test in deciding what sanction to apply which resulted in him failing to strike out the claim when he should have done.

13. Mr Brown pursues this point, not as a Respondent's notice that sets out a further basis on which the Judge's decision can be supported, but as a true appeal. He is not content with the Claimant's claim being struck out in the Second Order on the basis summarised in paragraph 10 above. That is because he considers that, if the claim had been struck out

as an abuse of process, he would have a good prospect of striking out the further proceedings that the Claimant has now brought.

14. During the hearing before me, Mr Brown made a renewed application for permission to appeal on a ground that Zacaroli J had refused, namely that the Judge erred, when exercising his discretion whether to strike out the claim, by failing to take into account a relevant factor namely the impact of the Claimant's conduct of the claim on Mr Brown's mental health. During the hearing, I gave an oral decision refusing that renewed application for permission to appeal with reasons.

The Claimant's appeal

15. The Claimant does not seek to challenge the Judge's finding that it was engaged in *Grovit* abuse.

16. The initial focus of the Claimant's appeal is on the Judge's conclusions as to its standing to bring the Colin Brown Claim. Its grounds of appeal in this regard are as follows:

    i) Ground 1 - the Judge should have concluded that the Deed of Variation effected a valid legal assignment of the Colin Brown Claim.

    ii) Ground 2 - alternatively, the Judge should have determined that the Deed of Variation effected an equitable assignment of the Colin Brown Claim.

    iii) Ground 3 - in the further alternative, the Judge should have concluded that the Deed of Variation did not vary the position under the SPA which itself effected a legal assignment of the Colin Brown Claim.

17. According, by its Grounds 1 and 3, the Claimant argues that there was no need for it to apply to amend in the first place since it could rely on either the SPA or the Deed of Variation as establishing its standing to bring the Colin Brown Claim. If that is wrong, and the Claimant needs to rely on the Deed of Declaration, the Claimant raises the following challenges to the Judge's refusal in the Second Judgment to give it permission to amend on the following grounds:

    i) Ground 4 – the court should have allowed the joinder and amendments sought on the same basis as was done in *Finlan v Eyton Morris Winfield* [2007] EWHC 914.

    ii) Ground 5 - the new Schedules to the APOC did not create any new cause of action. Accordingly, the Claimant's application for permission to amend was made in circumstances where it gave notice of the assignment of the Colin Brown Claim very shortly after it commenced proceedings. In those circumstances, the application to amend should have been allowed.

    iii) Ground 6 - even if the new Schedules did create a new cause of action, any such cause of action arose out of the same facts or substantially the same facts as the original cause of action with the result that the application to amend should have been allowed under CPR 17.4(2).

    iv) Ground 7 - alternatively if the Claimant had sought, in its APOC to bring a new cause of action arising out of different facts as the original cause of action, the

Judge should have exercised discretion to refuse only those parts of the APOC which involved new causes of action and not all the amendments sought.

18. During his oral submissions, Mr Colbey, counsel for Claimant, sought to make two further arguments that fall outside the scope of his permissible grounds of appeal:

    i) Even if the Judge was correct to find that there was no legal assignment of the Colin Brown Claim perfected under s136 of the LPA before proceedings were commenced, it still was not necessary for the Claimant to join the Administrators in order for its claim to proceed.

    ii) The Judge was wrong to conclude that the limitation period had even arguably expired at any material time because the claims against Mr Brown were based on fraud to which no limitation period applies by virtue of s21(1) of the Limitation Act 1980.

19. The argument summarised in paragraph 18.i) emerged for the first time in oral submissions during the hearing itself. It raised a point of some complexity as to the circumstances in which an equitable assignee of a claim needs to join the assignor as a defendant. At [64] of *Roberts v Gill & Co* [2011] 1 AC 240, Lord Collins said that the "starting point" in such a case is that the assignee would need to join the assignor as defendant. However, their Lordships did not speak entirely with one voice as to the rationale for the rule or the point in the proceedings at which the assignor must be joined.

20. Given that the point is of some complexity, I do not consider it would be fair to require Mr Brown or his legal team to meet it without adequate notice. Moreover, as will be seen from the discussion below, the correct analysis of this issue will not affect the outcome. I therefore consider it disproportionate to give the Claimant permission to raise this argument on terms that Mr Brown is given further time to prepare a response to it. I accordingly refuse permission to raise the argument set out in paragraph 18.i).

21. The argument referred to in paragraph18.ii) was at least briefly trailed in Mr Colbey's skeleton argument served a few days before the hearing. However, it remained a new point that Mr Brown was not given sufficient time to meet. I refuse permission to raise this argument for reasons that are essentially the same as those set out in paragraph 20 above.

MR BROWN'S APPEAL

The law on sanctions for *Grovit* abuse

22. Even before the judgment of the House of Lords in *Grovit*, the court had power, in accordance with the principles formulated in *Birkett v James* [1978] AC 297 to dismiss a civil action for want of prosecution. However, in the absence of "intentional and contumelious default" or conduct amounting to an abuse of process, that power could be exercised only where there had been inordinate and inexcusable delay on the part of a claimant with that delay giving rise to either (i) a substantial risk that a fair trial is not possible or (ii) serious prejudice to the defendant.

23. Those requirements meant that, prior to *Grovit*, it was perceived that in a strike-out application based on the *Birkett v James* principle, the court could not take into account

certain objectionable consequences of a claimant's non-progression of a claim. At 639B to F of his speech in *Grovit*, foreshadowing an approach that would ultimately be reflected in CPR, Lord Woolf MR pointed out that delay on the part of a claimant did not just affect the defendant, but also affected other court users. First, it could result in other users having to wait longer for their own actions to be dealt with. Second, widespread delay gives rise to the undesirable general impression that litigation is a long drawn-out process with which they should try to avoid becoming involved. Lord Woolf also considered that the *Birkett v James* approach applied too narrow a concept of what amounts to "prejudice" suffered by a defendant in cases of undue delay, with the increased anxiety inevitably caused by a protracted action often falling out of account.

24. Accordingly, in *Grovit*, their Lordships quite deliberately and consciously extended the law so that a claimant's unilateral decision not to progress a civil claim could result in that claim being struck out in a wider category of circumstance. They did so by means of the law on abuse of process with their reasoning captured in the following extract from page 243 of the speech of 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 over 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 is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in Birkett v. James [1978] A.C. 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.*

25. Lord Woolf thereby held that it "can" be an abuse for a claimant to commence and continue litigation without having an intention to bring that litigation to a conclusion. The existence of that intention alone can therefore in principle be sufficient to constitute the abuse irrespective of whether the defendant has suffered any prejudice.

26. That raised the natural question when the formation of that intention "would", rather than "could", cause the claim to become abusive. Some guidance on that question was given by the Court of Appeal in *Asturion Fondation v Alibrahim* [2020] 1 WLR 1627. At [55] of his judgment, Arnold LJ noted that:

> *It is clear from what Lord Woolf MR said that it is likely to be an abuse of process for the claimant unilaterally to decide not to pursue a claim for a substantial period of time, even if the claimant remains intent on*

> *pursuing the claim at some future point. In my view Lord Woolf MR cannot have meant that this will always constitute an abuse of process …*

27. This introduced the conclusion that the relevant intention was not to pursue a claim for a "substantial" period of time. At [61], after considering *Grovit* and other authorities, Arnold LJ explained that the dividing line between "abuse" and "non-abuse" involves a consideration of the reason why the claimant decided unilaterally to put the proceedings on hold for a substantial period of time and on the strength of that reason, objectively considered, having regard to the length of the period.

28. Pursuant to CPR 3.4(2)(b), a court "may" strike out a statement of case if it appears to be an abuse of the court's process. On a literal reading, CPR 3.4(2)(b) could perhaps be thought to be dealing with situations where there is something about the claim itself that is abusive (for example if it seeks to re-litigate matters already determined). Arnold LJ did not, however, apply this literal interpretation, concluding that CPR 3.4(2)(b) applies to cases of *Grovit* abuse as well.

29. At [64] of his judgment, Arnold LJ held that an allegation of *Grovit* abuse requires the court to undertake a two-stage analysis:

    i) First, it must decide whether the claimant's conduct was an abuse of process in the sense explained above.

    ii) Second, if it is, the court must decide what sanction to impose.

30. In *Board of Governors of the National Heart and Chest Hospital v Chettle* (1998) 30 HLR 618 the Court of Appeal gave some guidance on how to approach the second question relating to sanctions for *Grovit* abuse. The parties referred to this authority as "*Chest Hospital*" before me and I will do the same.

31. In *Chest Hospital*, the claimant had started proceedings in 1987 and had pursued them up until disclosure was given in September 1990. However, between 1990 and 1996 the claimant took no steps to prosecute its claim. The defendant (Mr Chettle) sought to have the claim struck out under *Birkett v James* principles. However, that approach failed for the reasons alluded to in *Grovit* itself: he could not point to any prejudice that he had suffered, beyond the "normal anxiety of an action for possession" which was insufficient and nor could he establish that a fair trial would be impossible. However, the Court of Appeal held that *Grovit* abuse was made out.

32. At page 628 of the report, Aldous LJ summarised the nature of *Grovit* abuse, and the sanction for it, as follows:

> *As stated by Lord Woolf M.R. in Grovit, the Courts exist to enable parties to have their disputes resolved. It follows that any proceedings not started for that purpose or, which once started are not maintained for that purpose, abuse the system. Such proceedings will normally be struck out as being an abuse of process.*

33. Thus far, Aldous LJ said only that proceedings involving *Grovit* abuse would "normally" be struck out. However, in the passages that follow, he went further. He concluded, first, that after discovery in September 1990 the claimant "allowed the action to drift pending

new facts coming to light". The claimants had decided that their chances of success were so poor that their action could not succeed without fresh evidence and so that they would not prosecute the action unless new facts came to light. Aldous LJ held that this on its own did not involve an abuse of process. Although he did not use the language of an "objectively good reason" that Arnold LJ used in his later judgment in *Asturion Fondation*, Aldous LJ foreshadowed that approach by looking at the reason why the claimant put the proceedings on hold concluding that "delay to enable fresh investigations to be made does not in itself amount to an abuse". Aldous LJ concluded, however, that this adequate reason eventually ran out in a passage that is instructive:

> *One year passed, then another, another, another and another. The result was that the action passed from being a genuine action to resolve a dispute over possession of a house into one which was moribund and only to be* re-*activated if something turned up. It is right to infer that at least by 1992, the plaintiffs had no real intention of bringing the action to trial, or even progressing it for purposes of settlement. They had had ample time to investigate and had found nothing. At that stage the action became an abuse of the process of the Court. It was an action kept hanging over the head of Mr Chettle without any intention of bringing it to trial either upon the facts known in or upon the facts known after a reasonable time had elapsed to enable further investigations to be made. I therefore would strike the action out upon the basis that it came to be an abuse of the process of the Court. I realise that the plaintiffs can and may well start a fresh action, but that is to my mind not determinative.* ***Once the action came to amount to an abuse of the process of the Court, it required to be struck out unless compelling reasons to the contrary could be demonstrated. There are no such reasons in this case.***

34. I add the emphasis to the passage quoted above to bring out what Mr Brown submits is a statement of principle, binding on this court and on the Judge.

35. The Claimant does not suggest that Aldous LJ was expressing an evaluation only on the facts of the case before him. Accordingly, I take the Claimant to accept that the highlighted passage is capable of amounting to a binding statement of principle although it does not accept that it actually does so.

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

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

38. The Claimant's first argument is based on [79] of Arnold LJ's judgment in *Asturion Fondation*. In that paragraph, having concluded at [78] that the judge at first instance was

entitled to find Asturion's conduct fell short of amounting to *Grovit* abuse (because it had an objectively good reason for not pursuing its claim for 10 months), Arnold LJ said:

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

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

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

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

42. Mr Marshall QC did not refer to *Chest Hospital*, no doubt because it was not cited to him, and concluded, following his review of the authorities at [17]:

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

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

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

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

46. I am reinforced in that conclusion by the fact that the Court of Appeal has already considered the role of *Grovit* abuse in a post-CPR world. In *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426, in a section of his judgment headed "The Future", Lord Woolf MR emphasised the consistency between the recognition in *Grovit* that delay has consequences that affect court users generally, and not the particular parties to the action, and the "change of culture" that CPR sought to effect. If CPR truly were intended to water down the proposition set out in *Grovit* that strike-out would "frequently" follow in cases of such abuse, the comments he made in that section would be misplaced.

47. In conclusion, therefore, I consider that the proposition in *Chest Hospital* that "compelling reasons" are needed to prevent a claim involving *Grovit* abuse from being struck out remains good law. It is true that CPR stresses the proportionality of any sanction that the court imposes. *Chest Hospital* does not cut across that, but rather decides that in cases of *Grovit* abuse, strike out will be a proportionate sanction unless "compelling reasons" to the contrary are shown. After all, two obvious points that might be made in objection to strike-out in cases of *Grovit* abuse are that the defendant has suffered no severe prejudice and that a fair trial remains possible. However, as *Grovit*

itself stresses, the abuse can still be present in these cases. While it is not for me to expand on the reasons that Aldous LJ gave in *Chest Hospital*, I respectfully consider that the approach of requiring "compelling reasons" to enable a defendant to resist strike out is consistent with the nature of the abuse identified in *Grovit*.

Whether the Judge applied the correct test

48. I have had the luxury of full written and oral submissions on both the nature of *Grovit* and the appropriate sanctions where it is present. The Judge did not have that luxury. The entire hearing before him on 1 November 2022 lasted some four hours in which he had to deal with a number of other difficult questions, including questions of construction of the SPA. Most of the argument on *Grovit* abuse before the Judge concerned the question whether the abuse was present and not the sanction that should be applied if it was. *Chest Hospital* was cited in a footnote to counsel's skeleton argument and the Judge was not referred to the other authorities on sanction to which I have been referred.

49. With the benefit of the fuller submissions that I have had, I conclude that the Judge did not apply the correct test. That is evident first from FJ[49] in which the Judge explains that the starting point for his analysis "is that it is always a draconian step to strike out an apparently arguable claim". However, as *Chest Hospital* demonstrates, having found that there was *Grovit* abuse, the Judge should have proceeded from the starting point that the claim would be struck out unless "compelling reasons" could be shown for a different course.

50. The same error is demonstrated at FJ[61] in which the Judge directs himself that, before deciding what sanction to impose, he first needed to consider whether "there is some more appropriate alternative to striking out". In the light of *Chest Hospital*, that was not correct: the Judge should instead have asked whether there were "compelling reasons" that would make the sanction of strike-out inappropriate. FJ[68] is to similar effect. In that paragraph, the Judge considered that his task was to see if there was a "more proportionate and less draconian sanction" than strike-out whereas he should, instead, have been seeking to apply the sanction that the Court of Appeal has determined, in *Chest Hospital*, to be proportionate at least in the absence of compelling reasons to the contrary.

Re-exercising the discretion

51. Having concluded that the Judge followed the wrong approach, it is appropriate for me to re-exercise the discretion. I have the materials necessary to enable me to do so and no one suggested that the matter should be remitted back to the Judge. Given my conclusions in the two previous sections of this judgment, my task is to identify whether there are "compelling reasons" why the claim should not be struck out.

52. The Claimant argues that one "compelling reason" why the claim should not be struck out arises out of Deputy Master Henderson's case management order of 29 July 2019. After dealing with matters of disclosure in paragraphs 3 to 7, paragraph 8 provided that:

> *The CCMC shall be adjourned to the first open date after 30 September 2019 with a time estimate of 2 hrs.*

53. At the time that order was made, the Claimant was not legally represented. It argues that paragraph 8 of the order was unclear as it did not say in terms that the Claimant positively needed to apply to relist the CCMC. The Judge accepted that there was something in that

point at FJ[20]. I agree, but it only takes the Claimant so far. As the Judge found at FJ[21], while it was perhaps excusable for the Claimant to think for a while that the court would itself relist the CCMC, that excuse ran out. Indeed on the Judge's unchallenged conclusion as to the presence of *Grovit* abuse, the Claimant's belief that the court would itself relist the CCMC came to be replaced by a unilateral decision on the part of the Claimant, without an objectively good reason, not to continue to pursue the claim for a period of over two years. A slightly unclear formulation of a case management direction, the effect of which was undone in a relatively short period, does not begin to constitute a "compelling reason" why the claim should not be struck out.

54. Next the Claimant submits that it started the proceedings with the intention of continuing them up to trial if necessary. Therefore, this is not a case where there was never an intention to prosecute the claim. I accept that. However, *Grovit* abuse can consist of forming an intention, after proceedings have commenced, to put the claim on hold for a lengthy period without good reason, just as in *Chest Hospital* itself. There is no suggestion in the authorities that any distinction is to be made between cases where the intention is formed initially and cases where it is formed subsequently. Both types of conduct involve *Grovit* abuse and both attract the sanction of strike-out unless there are compelling reasons to the contrary.

55. The Claimant argues that Mr Brown's conduct has resulted in a viable company that provided employment for a number of individuals going into administration. It submits that he should not be able to get away with such conduct on a "technicality". Of course the fundamental difficulty with that argument is that those assertions about Mr Brown's conduct have not yet been proved or disproved at least partly because the Claimant has chosen to put its claim on hold for such a long period of time. However, even putting that point to one side, the argument involves nothing more than an assertion that if the claim is struck out, the Claimant will not be able to pursue it. That is true whenever a claim is struck out and is not indicative of a compelling reason why the claim should not be struck out in this case.

56. Next the Claimant argues that Mr Brown was partly to blame as he should himself have applied for an "unless" order rather than simply allowing the delay to mount up and applying to strike out the claim once he considered that the delay was sufficiently long. It argues that, under CPR, Mr Brown was under an obligation to cooperate with the Claimant in bringing the matter to trial efficiently and, as was said at paragraph [47] of *Asiansky Television* it was not permissible for him simply to "let sleeping dogs lie".

57. The narrow objection to that point is that *Asiansky Television* was concerned with the power of the court to strike out a claim under CPR 3.4(2)(c) where there has been a breach of the rules, an order or a practice direction and is not concerned with strike out under CPR 3.4(2)(b) in cases involving an abuse of process. CPR 1.3 imposes on the parties a duty to help the court to further the overriding objective of dealing with cases justly and at proportionate cost. It can readily be seen that a party who "lets sleeping dogs lie" in the hope that its opponent will in due course breach a rule or order which can then justify a strike-out application may well not be complying with that duty. However, the present case is concerned with the Claimant forming an objectionable unilateral subjective intention to put the proceedings on hold for a substantial period without any good reason. Mr Brown had no control over whether the Claimant formed that intention. There was not any upcoming case management milestone which Mr Brown was obliged to help to achieve. The principles set out in *Asiansky Television* are not engaged.

58. Nor do I consider the argument in paragraph 56 to disclose a "compelling reason" why the claim should not be struck out. Cases of *Grovit* abuse necessarily involve a claimant failing to progress a claim for a significant period of time. That lack of progress will necessarily be apparent to the defendant. If a defendant's perceived culpability in allowing the delay to mount up is a "compelling reason" why the claim should not be struck out, that reason would be present in most cases. It would be difficult to see how claimants engaging in *Grovit* abuse would "frequently" see their claims struck out (as Lord Woolf MR held in *Grovit* itself that they should be).

59. The wider objection to the point is that it focuses entirely on the actions of Mr Brown and so ignores the emphasis in *Grovit* on the implications of delay for court users generally.

60. I am unable to see any "compelling reason" why the claim should not be struck out given the Judge's finding that it involved *Grovit* abuse.

61. Mr Brown urges me to go further and points out factors that he suggests amply justify the claim being struck out. I consider, however, that it would be undesirable for me to engage in a weighing up of the various points on which Mr Brown relies. That would involve me performing the kind of analysis that the Judge performed, in my view following an application of the wrong test. That said, Mr Brown's points do satisfy me that the abuse in this case is not of the "relatively minor nature" that Arnold LJ identified in his obiter comments in *Asturion Fondation*. If it went to trial, the claim against Mr Brown would require a detailed examination of a large number of payments made on YZMA's credit card. It may also require an examination of whether particular payments were made for the business purposes of YZMA. Mr Brown's pleaded case is that others had access to the YZMA's credit card. Therefore, in addition to considering what a large number of payments made up to 15 years ago were spent on, it may be necessary to consider whether Mr Brown, or someone else, actually used YZMA's credit card on the relevant occasion. Matters such as this cannot simply be answered by reference to entries on YZMA's credit card statements which set out the familiar details of date, amount and payee in relation to each transaction. Therefore, while I do not disagree with the Judge's assessment at FJ[58] and [59] that a fair trial remains possible, I do conclude that the Claimant's delay has made it materially more difficult for Mr Brown to advance his defence. I also consider that the delay has had a material effect on Mr Brown's mental health. While I agree with the judge's conclusion at FJ[56] that the delay did not <u>cause</u> the mental health problems, that delay certainly meant they persisted for longer.

62. My conclusion that there are no compelling reasons why the claim should not be struck out disposes of the matter. Mr Brown's appeal succeeds.

THE CLAIMANT'S APPEAL

63. Given my conclusion on Mr Brown's appeal, there is no need to consider the Claimant's appeal. Even if the Claimant is correct in all seven grounds of appeal it advances, the Claimant's *Grovit* abuse means, in my judgment, that the claim must be struck out.

64. However, since I have heard full argument on matters going to the correct construction of the SPA, the Deed of Variation and the Deed of Declaration I will express some conclusion on those matters in case that is of assistance should this matter go further. The

conclusions that I express will enable me to determine Grounds 1 and 3 of the Claimant's which would render academic any need to consider Grounds 4 to 7.

The correct interpretation of the various documents

The SPA

65. Clause 2.1 of the SPA provided for YZMA to sell, and the Claimant to buy, the assets of YZMA's business (defined as the "Business") that were set out in Clauses 2.1(a) to 2.1(p). That transfer was expressed to take effect on the "Transfer Date", namely 18 May 2016.

66. As Mr Brown argues, the list of assets to be transferred to the Claimant was exhaustive rather than illustrative in the sense that if an asset was not on the list, it was not to be transferred. The exhaustive nature of the list of assets is emphasised by Clause 6.1 which defines a list of "Excluded Assets" of the Business and so retained by YZMA. One such Excluded Asset was:

> *any … asset or right not expressly included in Clause 2*

67. One category of asset to be transferred was the "Book Debts" defined in the SPA as meaning:

> *all book and other debts, choses in action and rights of action whatsoever accrued or accruing due to [YZMA] and/or the Administrators as at or prior to the Transfer Date, irrespective of their due date for payment, including, without limitation, claims for damages or other remedies, or under any policy of insurance, in respect of matters occurring at any time at all prior to the Transfer Date*

68. It is common ground that the natural meaning of these words, read entirely in isolation, includes the Colin Brown Claim.

69. By Clause 4.1(m) of the SPA, the consideration payable for the sale of the Book Debts was the "Book Debt Consideration". That was defined as 70% of the amount that the Claimant was able to realise from the Book Debts and Clause 4.5.2 of the SPA required the Claimant to pay 70% of any Book Debt successfully collected within five business days of receipt. Clause 13.2 of the SPA required the Claimant to use its reasonable endeavours to collect the Book Debts.

70. Clause 4.5.5 provided that if, a particular Book Debt had not been collected in full within 90 business days of the Transfer Date, despite the Claimant using reasonable endeavours to do so, the Claimant had to notify YZMA and the Administrators in writing whereupon the Administrators could request the Book Debt in question to be assigned to either YZMA or the Administrators for a consideration of £1.

71. Clause 4.5.3 provided that, if YZMA (otherwise than with the consent of the Administrators) offered any discount or accepted "any payment for Book Debts at a value less than that owed as at the Transfer Date", the Claimant had to pay the Administrators the difference between 70% of the sum actually received and 70% of the "Book Debt value stated at the Transfer Date". The purpose of that provision was obviously to ensure

that any discounts that the Claimant offered as an incentive to secure payment of Book Debts within the 90 business-day period were to be funded out of the Claimant's share of those book debts rather than out of YZMA's share.

72. The Judge found at FJ[76] that, at the time of the SPA, the Administrators were unaware of the possible Colin Brown Claim. It can be inferred that the Claimant was not aware of that possibility either. Mr Brown argues that this finding is significant. He says that, notwithstanding the apparently clear meaning of the concept of Book Debts explained in paragraph 67, when the SPA is read as a whole it becomes clear that book debts of which the parties were unaware of the Transfer Date were not "Book Debts" as defined and so would not pass to the Claimant.

73. Mr Brown justifies that interpretation by reference to the following indicators:

    i) The obligation to use reasonable endeavours to collect Book Debts in Clause 4.5.3 would make no sense if "unknown" book debts were included. It is not possible to use reasonable endeavours to collect a book debt without knowing that it exists.

    ii) Clause 4.5.3, when dealing with discounts offered by the Claimant asks whether the Claimant is accepting payment for Book Debts at a value "less than that owed as at the Transfer Date". That provision would not be workable if "unknown" book debts were included in the sale because such book debts could not have any value "owed at the Transfer Date".

    iii) In a report prepared in June 2016 (after the sale of the Business), the Administrators reported that the element of consideration received attributable to Book Debts was around £111,000. That estimate can only have been prepared on the basis of "known" book debts. It would make no sense for the Administrators to include "unknown" book debts in the sale as otherwise the value of the assets transferred to the Claimant was potentially unlimited, as was the consideration payable. For example, if the Claimant, five years after the Transfer Date, found a book debt worth £10 million and collected it, it could keep 30% for itself even though the Administrators' estimate of the consideration attributable to book debts was just £111,000.

74. I do not accept these submissions. I see no difficulty with the point identified in paragraph 73.i). If the Claimant was not aware of a particular book debt, then it could fairly say that, even if it did nothing to collect it, there was no breach of its obligation to use reasonable endeavours.

75. I see no problem arising out of the point in paragraph 73.ii). By definition, YZMA can have been ascribing no value to a book debt of whose existence it was unaware. Anything that the Claimant was able to collect in respect of such a book debt would represent a windfall. The bargain between YZMA and the Claimant would not be disturbed, even if the Claimant agreed to accept payment at a significant discount. Once YZMA received its 70% share, it would still have made a windfall profit consisting of the realisation of an asset of which it was previously unaware. Clause 4.5.3 works perfectly well if the value of an "unknown" book debt as at the Transfer Date is treated as nil.

76. In a similar vein, I see no problem arising out of the point arising in paragraph 73.iii). It is entirely natural that the Administrators should report to stakeholders on the likely

amount of deferred consideration that could be expected from book debts and that estimate necessarily had to be prepared by reference to "known" book debts. However, that says relatively little about the proper construction of the SPA. The eventuality described in paragraph 73.iii) would be unlikely to arise in practice since the Claimant would be unwise to devote too much effort in seeking to collect a previously "unknown" book debt since if it had not been collected in full within 90 business days, the Administrators could require it to be transferred for £1. Moreover even if, on the 89th business day after the Transfer Date, the Claimant successfully collected an "unknown" book debt of £10 million, YZMA's administrators would probably be delighted as they would receive £7 million of pure windfall in connection with an asset that they had not previously known about.

77. In addition, the proposed interpretation of "Book Debts" for which Mr Brown argues would be difficult to apply. There is an obvious question as to how a Book Debt should be characterised as "known" or "unknown". No doubt the Claimant would find it objectionable for a Book Debt to be categorised as "known" if only YZMA knew about it about it, but the Claimant did not. Such an approach could operate to the Claimant's clear disadvantage as having expended time and effort to collect a particular Book Debt, the Claimant could be told that YZMA had never known about it with the result that it remained entirely YZMA's property so that the Claimant should account for 100% of the proceeds and not just 70%. Therefore, it might be thought that if a Book Debt is to be categorised as "known" both YZMA and the Claimant would need to know about it. However, in that case, one would expect the parties to record in a contractual document which Book Debts were "known" to avoid disputes later. The fact that they have not done so suggests that the term "Book Debts" is not limited to those which both parties knew about.

78. I therefore conclude that, ignoring for the time being the provisions of the Deed of Variation, the SPA set out an agreement under which the Colin Brown Claim was to be transferred to the Claimant with effect from 18 May 2016.

The Deed of Variation

79. The Deed of Variation was entered into on 9 May 2017 after YZMA and the Claimant became aware of the existence of the Colin Brown Claim. Clause 1 of the Deed of Variation stated that the Deed of Variation operated as a variation to the SPA. Clause 1.3 stated that if there was any discrepancy between the SPA and the Deed of Variation, the provisions of the Deed of Variation were to prevail.

80. Clause 1.5 inserted a new definition into the SPA of the "Colin Brown Claim" in the following terms which, it is common ground, cover the claim that is advanced in these proceedings:

> *"**Colin Brown Claim**" means the potential claim, being considered by and conducted by the [Claimant], in relation to allegations of the mis-appropriation of money belonging to [YZMA] in relation to actions taken by ex-employee/director Colin Brown, together with any other claim, right of action or other litigation as may arise in relation to it. Any right of action or proceedings in relation to the Colin Brown Claim relates solely to those of the [Claimant].*

81. Clause 1.5 amended the definition of "Book Debts" by expressly excluding the Colin Brown Claim.

82. The Deed of Variation also inserted a new Clause 4.6 into the SPA. Salient features of the new Clause 4.6 were as follows:

    i) Clause 4.6.1 provided that with effect from 18 May 2016, the Claimant should have "full conduct and control of all matters and administration relating to the Colin Brown Claim". Also by Clause 4.6.1, the Administrators were entitled, but not obliged, to provide assistance to the Claimant in connection with the Colin Brown Claim. Clause 4.6.1 concluded by stating that:

    > *It is acknowledged by the parties that whilst the Administrators may provide assistance in relation to the Colin Brown Claim, pursuant to this clause 4.6.1, neither [YZMA] nor the Administrators shall be party to nor joined in or named in any proceedings in relation to the recovery of monies or other claim connected with the Colin Brown Claim.*

    ii) Clause 4.6.2 provided for the Claimant to pay the Administrators, within 5 business days of receipt, an amount equal to 40% of any award, damages or payments received in relation to the Colin Brown Claim.

83. Mr Brown argues that by excluding the Colin Brown Claim from the definition of "Book Debts", the Deed of Variation was providing for the Colin Brown Claim to remain the property of YZMA.

84. I do not accept that interpretation. The Deed of Variation has to be construed by reference to the position that existed at the time. By the SPA, there was already a binding contract in place for the transfer of the Colin Brown Claim – see my conclusion in paragraph 78 above. In my judgment, the purpose of excluding the Colin Brown Claim from the definition of "Book Debts" was not to undo the effect of an agreement to assign that had already become binding. Rather, the purpose was to prevent the provisions of the SPA that applied to "Book Debts" from applying to the Colin Brown Claim and to provide instead that the new Clause 4.6 would apply to the Colin Brown Claim.

85. The correctness of this interpretation is demonstrated by the circumstances in which the Deed of Variation was entered into. The parties had, by then, discovered the existence of the Colin Brown Claim. However, the contractual machinery in the SPA dealing with "Book Debts" was not adequate to the task of dealing with the Colin Brown Claim. First, it had not been collected in full within 90 business days of the Transfer Date. Therefore, on the face of matters, the Administrators were entitled to require the Claimant to assign the Colin Brown Claim to YZMA for £1 pursuant to Clause 4.5.5 of the SPA. However, the Administrators and YZMA did not desire that result since if YZMA acquired the Colin Brown Claim, it would need to spend time and money in order to realise it. Since YZMA was in administration, it might not have the necessary funds and, even if it did, expenditure on a speculative claim would have to be carefully justified.

86. Therefore, it can be inferred that it suited YZMA for the Claimant to spend the necessary time and money in seeking to realise the Colin Brown Claim. However, it would make no sense for the Claimant to do so given YZMA's ostensible entitlement to purchase that

claim for just £1. Even if that point could be addressed, it would not make commercial sense for the Claimant to retain just 30% (the percentage it was generally permitted by the SPA to retain of "Book Debts" it collected) of any amount realised from the Colin Brown Claim. That was inadequate given the costs that would need to be incurred in pursuing the Colin Brown Claim and the risk that the Claimant would be running of an adverse costs order if the claim failed.

87. In short, the Deed of Variation was, construed objectively, intended to achieve the following:

    i) The Colin Brown Claim that was already the subject of a binding contractual obligation of sale and purchase would remain subject to that contractual obligation.

    ii) The existing regime applicable to "Book Debts" set out in Clause 4.5 of the SPA would continue to apply to book debts other than the Colin Brown Claim. The existing regime under which the Claimant would retain 30% of the amount of those book debts and pay the remaining 70% over to YZMA would remain in force. Any such Book Debts that had not been collected in full 90 business days after the Transfer Date had to be transferred to YZMA for £1, at the Administrators' request.

    iii) A new regime applicable to the Colin Brown Claim would be set out in Clause 4.6 of the SPA. Under that regime, the Claimant would retain 60% of any successful realisation of the Colin Brown Claim and would have to fund the costs associated with that claim albeit with the Administrators having the option of providing assistance if they wished to.

88. Mr Brown's contrary interpretation involves the assertion that the Deed of Variation was intended to re-transfer the Colin Brown Claim back to YZMA. That interpretation makes no sense from a business perspective given the points made in paragraphs 85 and 86 above. Nor does it make any sense having regard to the provisions of the SPA. If the parties truly intended that, now that they had discovered the Colin Brown Claim, YZMA should take ownership of it, they did not need a Deed of Variation to achieve that result. The Administrators could simply have exercised their right under Clause 4.5.5 of the SPA. Moreover the very definition of "Colin Brown Claim" that I have set out in paragraph 80 above envisaged that the Claimant did have a right of action in relation to it.

89. Any suggestion that YZMA was to be the owner of the Colin Brown Claim is clearly negatived by the tailpiece to Clause 4.6.1 that I have quoted in paragraph 82.i) above. On Mr Brown's interpretation, the Claimant could not take action in connection with the Colin Brown Claim because it no longer owned it following the Deed of Variation. However, the tailpiece to Clause 4.6.1 would mean that YZMA could not take action either. Having discovered a potentially valuable claim against Mr Brown, the parties can scarcely have intended that the claim should be put into limbo with neither the Claimant nor YZMA able to pursue it.

90. Mr Brown argues that it is significant that, following the Deed of Variation, the Colin Brown Claim became an "Excluded Asset" since it no longer fell within the definition of "Book Debts". He submits that since the SPA expressly provided for "Excluded Assets" not to be transferred, this aspect of the Deed of Variation was consistent with the Colin Brown Claim remaining, or becoming, the property of YZMA. I do not accept that. As I

have explained, the function of the Deed of Variation was not to undo agreements to transfer that had already become binding, but rather to set out a new regime applicable to a newly discovered asset, the Colin Brown Claim, that had transferred. Nor do I accept Mr Brown's submission that the interpretation above involves a "rectification" of the SPA or the Deed of Variation under the guise of construing them. The principles applied in reaching the above interpretation are orthodox principles of contractual construction that involve construing the contracts with due regard to the factual matrix within which they were concluded.

91. Finally, I deal with two points that found some favour with the Judge. At FJ[79], the Judge commented that the first sentence of Clause 4.6.1, which provides for the Claimant to have "full conduct and control" of all matters relating to the Colin Brown Claim, suggested that the Claimant did not have ownership of that claim. In essence, he reasoned that if the parties were proceeding on the basis that the Claimant was the owner of the Colin Brown Claim, there would be no need to state that the Claimant had conduct of that claim as the Claimant could simply deal with its own property as it saw fit. With the benefit of the fuller submissions on the terms of the contract that I have received, I respectfully disagree with the Judge's conclusion. YZMA was to receive 40% of whatever was ultimately realised from the Colin Brown Claim. It might well have, or develop, views on how the claim should be pursued given its interest in the outcome. Even if the parties were proceeding on the basis that the Claimant owned the Colin Brown Claim, there was some utility in spelling out that the Claimant could pursue it as it saw fit.

92. I also respectfully disagree with the Judge's conclusion that it was significant that, in Clause 4.6.2, the Claimant was obliged to pay 40% of any proceeds of realisation of the Colin Brown Claim to the Administrators "as agents for [YZMA]". Even if the Claimant was the owner of the Colin Brown Claim, it made sense to stipulate that the 40% share in the proceeds of realisation of that claim that were paid over to the Administrators were not the Administrators' own money but rather were to be held for YZMA.

93. My conclusion, therefore, is that the Colin Brown Claim was assigned to the Claimant pursuant to the SPA and the Deed of Variation did not undo that assignment. It follows that there is no question of Clause 4.6.1 of the Deed of Variation itself effecting an assignment of the Colin Brown Claim. In my judgment, it did not do so since the transfer had already been effected.

Perfection of the transfer of the Colin Brown Claim pursuant to s136 of the LPA

94. By a letter dated 7 September 2017, the Claimant gave Mr Brown written notice that the Colin Brown Claim had been transferred to the Claimant pursuant to the SPA. That was a valid notice pursuant to s136 of the LPA. Mr Brown's arguments to the contrary relied on the proposition that any assignment of the Colin Brown Claim was effected by the Deed of Variation or the Deed of Declaration and that, since the letter did not refer to either of those documents, it was not an effective notice of assignment. Those arguments fall away given my conclusion that the assignment of the Colin Brown Claim was effected by the SPA.

The Deed of Declaration

95. The Deed of Declaration was executed on 9 October 2022. The parties to it were YZMA, the Administrators and the Claimant. The Deed of Declaration purported to "rectify" the Deed of Variation "to reflect the parties' intention" at the time that it was entered into by adding words into Clause 4.6.1 of the Deed of Variation. The words added are shown underlined in the following extract from Clause 4.6.1:

> *with effect from Completion [the Claimant] shall have full conduct and control of all matters and administration relating to the Colin Brown Claim and shall now (and at all times since Completion) be (and has been) able to bring such claim in their own name and that the right to bring the Colin Brown claim is assigned absolutely to the [Claimant]*

96. The Deed of Declaration was executed because Mr Brown was taking the position that the Claimant did not have title to sue on the Colin Brown Claim. Those concerns were without foundation for the reasons that I have given. Nothing in the Deed of Declaration alters the conclusion that I have expressed in the sections above. Following execution of the Deed of Declaration, the Claimant remained the owner of the Colin Brown Claim in both equity and law since the assignment had been perfected pursuant to s136 of the LPA.

The Claimant's appeal - conclusions

97. On my interpretation of the various contracts that are set out above, the Claimant's appeal would have succeeded on Ground 3 had it been necessary to consider that appeal. Grounds 1 and 2 would have failed.

98. I do not need to consider the Claimant's Grounds 4 to 7 and I will not do so. I will say only that it strikes me as well within the bounds of the Judge's discretion to refuse to join the Administrators as party given that (i) he had concluded at FJ[29] that there was an arguable case that all claims were time-barred by the time of the Second Judgment and (ii) he had concluded that some claims at least were time-barred when the Claimant first issued proceedings (FJ[31]). Declining to permit the Administrators to be joined did not preclude the Claimant from trying again and bringing a fresh claim with the Administrators named as parties. I would have needed some persuading that it was disproportionate for the Judge to require the Claimant to follow that course in the light of identified concerns about the currency of the limitation period. Following the Court of Appeal's judgment in *Cameron Taylor Consulting v BDW Trading Ltd* [2022] EWCA Civ 31, it could even be argued, though I make no finding since I do not need to, that the Judge was bound to refuse the joinder application.

DISPOSITION

99. Mr Brown's appeal succeeds. The order of the Judge should be substituted with an order that the Claimant's claim be struck out. I hope that the parties can agree on other aspects of the appropriate order, including a variation to costs orders that the Judge made, in the light of my judgment.