

IN THE COURT OF APPEAL

Appeal No. CA-2026-000319

ON APPEAL FROM THE HIGH COURT OF JUSTICE

Claim No. CL-2019-000521

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMMERCIAL COURT (KBD)

Paul Stanley KC

B E T W E E N:

OPTIEMUS INFRACOM LIMITED

Appellant/Defendant

- and -

BLACKBERRY LIMITED

Respondent/Claimant

APPELLANT'S REPLACEMENT APPEAL SKELETON ARGUMENT

DATED 1 MAY 2026 WITH AUTHORITY BUNDLE REFERENCES

References in the form [C/X/Y] are to the tab and page of the core appeal bundle; and [S/X/Y] are to the tab and page of the supplemental bundle. References in the form [Au/X/Y] are to the authorities bundle

I. INTRODUCTION AND BACKGROUND

1. This is the skeleton argument of the Appellant/Defendant (“**Optiemus**”) in support of its appeal of the order of Paul Stanley KC (sitting as a Deputy High Court Judge) dated 19 December 2025 [C/6/74-77] (the “**Judge**” and the “**Order**”). The Judge handed down his judgment on the same date (the “**Jmt**”). The Judge refused Optiemus’s application dated 18 August 2025 to strike out the Claim under CPR 3.4(2)(b) on the grounds of *Grovit v Doctor* [1997] 1 W.L.R. 640 [Au/24/192-200] abuse of process by the Claimant (“**Blackberry**”) (often referred to as “warehousing”) (the “**Strike-Out Application**”). The Judge also allowed Blackberry’s application dated 18 July 2024 to lift an automatic stay imposed under CPR 15.11 on 14 July 2020 (the “**Stay**” and the “**Stay Application**”). The Judge himself granted permission to appeal by the same Order [C/6/76; C/10/114-115].
2. In reaching his decision, the Judge rightly held that Blackberry had abused the Court’s process ([80]); and that Blackberry had taken a deliberate decision not to pursue the Claim for more than four years: [72], [73]. The Judge concluded that Blackberry did not have an objectively good reason for this deliberate decision for just under four years of that period ([78]). The Judge nonetheless declined to strike-out the Claim ([111]-[112]). He also considered it

appropriate to lift the Stay, applying the well-known principles in *Denton v TH White* [2014] 1 W.L.R. 3926: [116]. [\[Au/33/329-349\]](#)

3. As a supposed means of “*address[ing] what has occurred*” ([111(h)]-[112]) Blackberry was made subject to a costs “penalty”, with the Judge requiring it to pay 30% of Optiemus’s costs of the Stay and Strike-Out Applications. He ordered a payment on account of £17,000 - scarcely a rounding error in the context of the value of the Claim; and, moreover, this sum was entirely set off by a costs order in Blackberry’s favour in respect of an amendment application heard at the same hearing (and resisted on the same basis).¹
4. The question on this appeal is therefore whether Blackberry should be allowed to get away, in effect scot-free, with its significant and prolonged abuse of the Court’s process – an abuse which it steadfastly refused to admit and for which it showed no contrition at the hearing. If the Judge’s decision were to stand, this would be by far the most extreme reported case in which strike out were refused in response to *Grovit* abuse. Indeed, if the Judge were right, what real reason would there be for another party, reading the judgment in this case, to decide not to commit *Grovit* abuse in future? There have been significant upsides for Blackberry, which has been allowed to misuse the Court’s processes at its whims, and no real downside. It is submitted that it is necessary for the Court to provide a meaningful censure and deterrent.
5. The outcome on this appeal should therefore be that the Claim should be struck out. Optiemus’s case is that the Judge’s decision to refuse to strike out for *Grovit* abuse was wrong (CPR 52.21(3)(a)) because the Judge: (1) erred in law (Grounds 1, 4B and/or 5); (2) erred in fact and/or in its evaluative decision (Grounds 3 and/or 5); and/or (3) erred in the exercise of his discretion both because the Court took into account irrelevant factors or failed to take into account relevant factors (Grounds 2-6) and because his decision was perverse (Ground 6). The same factors apply to the Stay Application as to the Strike-Out Application, but with all the more strength (see Ground 7), and with the consequence that, as the Stay should not be lifted, it follows that the Claim must be struck out for this further reason: *Bank of America Europe DAC v Citta Metropolitana Di Milano* [2022] 2 C.L.C. 205 at [36(i)]. [\[Au/40/507\]](#)

¹ In order to deal with what the Judge (wrongly) held was the only instance of “*concrete prejudice*” to Optiemus, Blackberry was also not permitted to claim interest for the period of its abuse of process on some (but not all) of the sums that it claims: see further Ground 3E below.

6. As to point (2), the appeal Court is entitled to reverse findings of fact (and the evaluation thereof) made at first instance where the appeal Court is in as good a position as the Judge below to assess the evidence: *Manning v Stylianou* [2006] EWCA Civ 1655 [Au/20/138]. That is the case here as the evidence was provided by way of witness statement and exhibit on an interim application. As to point (3), it suffices if “*the decision of the judge was wrong by reason of some identifiable flaw in the judge’s treatment of the question to be decided, “such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion”*” *Re Sprintroom Ltd* [2019] B.C.C. 1031 at [76] [Au/36/426]; or else that the decision was perverse as it was outside the generous ambit allowed to the Judge: *Tanfern Ltd v Cameron-MacDonald* [2000] 1 WLR 1311 at [32] [Au/30/259].
7. There are two points that arise from the Jmt that show just how central the errors were to the Judge’s decision, with the result being that, now these errors have been identified, they must lead to the Court striking out the Claim. The first is that the Judge accepted in terms that if he was wrong about the legal test, then the Claim would need to be struck out: see [82]. The second is that the Judge stated that he declined to strike out the Claim only “*By a narrow margin*”: [111]. In circumstances where, as the Judge made clear, the decision was on a knife-edge, any real error in the exercise of discretion must inevitably have caused the Judge to fall on the wrong side of the line.
8. **The Background** Blackberry is a Canadian company that used to be a market leader in mobile handsets but which, in 2022, exited that market.² Optimus is a publicly listed Indian company. BlackBerry and Optimus entered into a contract on 1 February 2017 (Jmt [34]), by which the parties established a framework for Optimus to design and manufacture mobile devices using software provided by BlackBerry, with BlackBerry’s assistance, and for BlackBerry to receive licence fees from Optimus. The Agreement envisaged a duration of five annual periods, from 2017/2018 through to 2021/2022 inclusive (each a “**Period**”).
9. The Claim as originally brought was for c. USD 6.5m plus interest. A significant element of that Claim relates to “minimum licence fees” (“**Minimum Fees**”) that Blackberry says are owed for 2017/2018 and 2018/2019 (Optimus disputes this). By the Order, Blackberry was granted permission to rely on Amended Particulars of Claim (“**APOC**”). It now claims further Minimum Fees for 2019/2020, 2020/2021 and 2021/2022 totalling c. USD 16m, which

² Confirmed by Blackberry’s Mr Murtha in his statement (“**Murtha 1**”) ¶14 [S/4/17].

Blackberry says in the APOC became due in mid-2020, mid-2021 and mid-2022 respectively (the “**New Fees**”). Optimus disputes the claim for the New Fees for additional reasons including that the contract was terminated in December 2018 (and/or the parties proceeded on this basis), but accepts it did not serve an unequivocal termination notice. Blackberry did not invoice for the majority of the New Fees when they are said to have become due (invoices were issued in October 2025 [S/28/210-211]). It was on 19 June 2025 that Blackberry first suggested that the New Fees were due [S/26/202].

10. The Judge dealt with the history of the matter in what he called five periods ([33]), the first being the pre-action stage. In summary, there was pre-action correspondence between the parties, with the final shot coming from Blackberry on 19 August 2019: [34]-[40]. The Judge’s second period was from the issue of proceedings on 20 August 2019 up to March 2020: [41]-[51]. Optimus remained a litigant in person throughout this period. Blackberry obtained permission to serve out of the jurisdiction (on 23 August 2019). Blackberry thereafter sought to and did serve Optimus in India under the Hague Service Convention (“**HSC**”) on 10 December 2019, albeit due to confusion arising on the receipt of documents at Optimus, in early 2020 *“both parties were assuming (a) that Optimus had not yet been validly served and (b) that valid and formal service would take place later”*: Jmt [46]. On 2 March 2020, Blackberry realised that valid service had been effected. On 17 March 2020 Blackberry wrote to Optimus stating that Optimus was *“out of time”* to serve an acknowledgement of service (“**AoS**”) or Defence, and that Blackberry intended to seek summary judgment (“**SJ**”) (it was common ground that Blackberry could not have enforced a default judgment in India). It was also common ground that Blackberry would have been required to effect service of a SJ application in India, through the HSC.
11. Blackberry’s letter of 17 March 2020 was the final step it took in the proceedings prior to issuing the Stay Application on 19 July 2024, four years and four months later.
12. The Judge’s third period (Jmt [52]-[53]) was between March 2020 and August 2020, on the basis that (as was common ground) the Foreign Process Section (“**FPS**”) was closed due to Covid until 28 July 2020. It was common ground that it would not have been possible to serve Optimus at this time – albeit Blackberry was able to prepare and issue a SJ application but did not do so. As stated at Jmt [53], once the FPS reopened on 28 July 2020, *“the evidence does not show anything standing in the way of BlackBerry attempting [service] from around August 2020, or that it would not have been achieved”*.

13. The fourth period was said by the Judge to be from September 2020-July 2024, a period of some three years and 10 months. As stated at Jmt [54], *“In terms of what steps were taken, formally or in correspondence, to progress the action during this period, the answer is simple: there were none. BlackBerry did not issue its intended summary judgment application. It did not issue any other application (for instance for judgment in default of acknowledgement of service or defence). It did not apply to the court to stay the action, or for directions.”* It is right that Optiemus did not acknowledge service; that Optiemus did not reply to BlackBerry’s letter of 17 March 2020; and BlackBerry did not press for an answer. Notably, also *“On BlackBerry’s interpretation of the contract, further payments of minimum fees fell due on 30 June 2020 (USD 4.70m), 30 June 2021 (USD 5.37m), and 30 June 2022 (USD 5.95m), but BlackBerry did not demand them, or send invoices for them”* (ibid).
14. The Judge’s final period was from July 2024-September 2025. On 19 July 2024, the Stay Application was issued; it was served in India under the HSC on 15 October 2024. In mid-October 2024, English lawyers were instructed by Optiemus and by 6 January 2025 Optiemus indicated that it intended to strike out the Claim if it were to be pursued [S/24/194-197; S/25/198]. BlackBerry indicated that it would be pursued, and a draft Defence and Counterclaim was provided by Optiemus, and the Strike-Out Application was issued thereafter.
15. **The Judge’s decision** In reaching his decision, the Judge asked himself five questions: [15]. (1) Did BlackBerry deliberately decide not to pursue the Claim? (2) If so, what delay did it cause? (3) What were the reasons for it? (4) Do those reasons objectively justify the delay? Finally (5) if there was an abuse, is the appropriate response to strike out the Claim?
16. The Judge correctly concluded that the answer to (1) was “yes”. He explained that, *“At some point in 2020, BlackBerry took what Mr Murtha accepts was a “deliberate decision not to pursue a summary judgment application or default judgment application”*”: [72]. As to (2), he found the delay to be four months and four years, from March 2020 to July 2024. In respect of points (3) and (4) the Judge held that there were two reasons for the delay. The first was the inability to serve under the HSC while the FPS was closed *“until the end of July 2020”*. The Judge stated that this was *“a very good reason”* and *“the court would have sanctioned a delay until such time as more-or-less normal service resumed”*, such that there was no abuse.
17. The position was different after the FPS reopened, and *“from around September 2020...BlackBerry’s deliberate inaction was not justified by the procedural obstacles thrown*

in its way by Covid-19” and, “If it had a justification, it must have been BlackBerry's perception that even a legally enforceable judgment was likely to miss its target, because Optiemus might not have sufficient assets to meet it”: [75]. The Judge held that there was not “an objectively strong reason for four years' delay”: [78]. The Judge correctly held that issuing and serving a SJ application “would not have entailed massive expense” and would have been “modest in proportion to the amount at stake”: [78(a)]. He also held that “BlackBerry's concerns about Optiemus's financial position were general and impressionistic” – and that “Optiemus did not present a sure-fire target, but it never had”: [78(b)]. The Judge also held that “Whatever Optiemus's condition, a judgment... would have become capable of effective enforcement if Optiemus's financial position improved. It would, at any time, have strengthened BlackBerry's negotiating position. It would have provided Optiemus (and its other stakeholders) with reliable and definite information about its true financial obligations”: [78(c)]. The Judge also correctly held that, “There is no evidence that BlackBerry systematically investigated Optiemus's financial status or kept it under regular review. The delay long outlasted Covid-19, and the low point in Optiemus's financial condition (which was 2019/20), the restructuring of its operations in 2020/21, and its increasing revenues and return to profitability thereafter”: [78(d)]. The Judge rightly held that if BlackBerry had asked for a stay after the FPS reopened, the Court “would, or should” have refused a stay: [79].

18. The Judge therefore rightly concluded that BlackBerry abused the Court’s process for almost four years: [80].
19. The Judge then went on to consider whether the appropriate response was to strike out the Claim. He held at [82] that if BlackBerry was required to show “*compelling reasons*” why the Claim should not be struck out, these were not present and he would strike out the Claim. However, the Judge rejected that test and said he would “*consider the circumstances more broadly*”.
20. The Judge then set out various factors that he considered relevant or not relevant. As to Optiemus’s failure to file an AoS in time, the Judge rightly concluded that this, “*did not matter much for BlackBerry*”: [83]. The Judge likewise correctly concluded that the question of what happened in respect of service of the Claim Form in December 2019 was also not relevant: [84]. However, the Judge did take into account (at [85]) the fact that “*Optiemus, no less than BlackBerry, had the means and the responsibility to progress the case*”.

21. The Judge dealt at [86]-[104] with potential prejudice to Optiemus and concluded that there was no relevant prejudice (save for in relation to interest, as to which the Judge held that *“This is quantifiable financial prejudice which the court has adequate powers to address without striking out the claim”*: [102]). At the consequential hearing, the Judge held that Blackberry should undertake not to seek interest for the period from 1 September 2020 to 18 July 2024 (this was recorded in the final recital of the Order [C/6/75]), but only in respect of the sums claimed in the unamended claim. He imposed no such restriction for the New Fees, and Blackberry now claims some USD 5,634,583.27 interest up to 19 December 2025.
22. At [108], the Judge stated that, if the Claim were struck out, there would be prejudice to Blackberry and *“This is prejudice that I should not disregard”*. At [109], the Judge took into account that *“The delay will mean that the court has to determine what is now a far staler claim than it would have been if vigorously pursued”* but held that *“there is no reason to think that a fair decision is not possible”*. The Judge held that, because Blackberry wished to pursue the New Fees, *“striking out the existing claim form would not (or would not necessarily) significantly reduce the burden on the court”*: [110].
23. At [111], the Judge stated that, although Blackberry had abused the Court’s process by *“a narrow margin”*, strike out was not the *“appropriate or just response”*. He listed *“The key factors in this decision”* as being that: (1) his (plainly wrong) finding that the delay had not caused *“specific identifiable prejudice”* to Optiemus, other than in respect of interest, which could be *“financially estimated and adequately corrected for”*. Additionally, the Judge said that he was, *“alive to the risk delay often does its damage drop by drop. But the damage done by the time that has passed is limited in a case which is likely to depend mostly on documents passing between the parties”*. (2) Strike out would cause specific and substantial prejudice to Blackberry as it could not pursue its claim for sums exceeding USD 6m. (3) The Judge said he had *“firmly in mind the stress the cases consistently lay on diligent pursuit of litigation; the significance of sanctions in deterring abuse; and the fact that the overriding objective is concerned not just with fair trial but with the enforcement of the rules”* but said that the abuse was *“not of the most serious kind”* and did not involve the bulk commencement of a large number of claims followed by a strategic selection of which to pursue. The Judge also stated that Blackberry *“did not abandon the Claim”*. (4) The Judge took into account the fact that the delay was prolonged. (5) The Judge said that Blackberry could have discontinued in mid-2020 and brought another claim in July 2024. (6) The Judge said that the obligation *“to advance proceedings lies on both parties, and that Optiemus itself did nothing at all in the period from March 2020”*. (7) The Judge said a *“subsidiary factor”* was that Blackberry had

other claims “*which are not time barred*”. (8) The Judge said he could take other steps including as to interest and which “*may include the order for costs made on these applications*”. As explained at ¶3 above, Blackberry was, in the end, given a very minor costs penalty that is of little, if any, relevance in the context of the litigation.

24. As to the Stay Application, the Judge held that Blackberry’s breach was serious, with no good reason after August 2020. But as to all the circumstances, the Judge said he reached “*the same conclusions as I reach in relation to abuse of process, and for the same reasons*”: [117] [116].

II. Grounds 1 and 2: the Judge applied the wrong test in relation to *Grovit* abuse and/or failed properly to take into account the seriousness of the abuse

25. In refusing to strike out the Claim, the Judge applied the wrong legal test and/or failed to take relevant matters into account as to the seriousness of *Grovit* abuse.
26. As explained in *Alibrahim v Asturion Fondation* [2020] 1 WLR 1627 at [64] [Au/38/464], a two-stage test applies when considering *Grovit* abuse, namely: (1) was there an abuse of process? (2) Should the Court, in its discretion, strike out the Claim in all the circumstances? However, it is submitted that the finding of abuse at the first stage is not divorced from the decision on the second stage. On the contrary, a finding of *Grovit* abuse will be a serious matter. In order to reach that finding, the Court has to have concluded that: (1) the claimant held the necessary, abusive intention (not to pursue the Claim); and (2) it did not have a good reason for so doing. The second stage is considered in the light of, and is necessarily coloured by, the abuse.
27. The Judge said that if the question at stage two was whether there were compelling reasons not to strike out, he would have struck out the Claim: [82]. But he rejected that test. In fact, he did not in any material way take into account whether Blackberry had raised compelling reasons against strike out. The Judge’s approach to the second stage was in error. The Judge ought to have considered whether there were “*compelling reasons*” why he should not strike out the Claim. Further or alternatively, the Judge on any view failed to take into account that the natural or expected response to *Grovit* abuse is that the Claim should be struck out. Moreover, instead of giving proper weight to the finding of *Grovit* abuse and taking into account that seriousness, the Judge treated the abuse as, in effect, a subsidiary factor, and dismissed its relevance because the abuse “*was not of the most serious kind*” as it did not involve “*the bulk commencement of large numbers of claims, followed by strategic selection*

of those that turned out to be most valuable”: [111(c)]. The Judge failed to recognise, as a matter of law, the seriousness of the abuse, and/or failed to give proper weight to it.

28. The Judge’s approach was in marked contrast to another High Court *Grovit* decision handed down just the day before: *SNV v Al Khayyat* [2025] EWHC 3265 (KB) [Au/46/666-684], where it was stated at [69] [Au/46/682] that, “*Many of the factors relevant to dealing with a case justly and at proportionate cost are equally consistent with the Court taking a robust approach when faced with abuse of process. CPR 1.1(2) includes, so far as practicable, the need to save expense, deal with cases in ways which are proportionate, ensuring cases are dealt with expeditiously, allotting an appropriate share of the court’s resources and enforcing compliance with rules. CPR 1.3 puts an express duty on parties to help the court further the overriding objective. In short, the modern approach to case management under the CPR is the antithesis of endorsing abuse of process*”. It is submitted that the Judge in *SNV* was correct to identify these factors (and their strength), which the Judge here failed to do. It is unsurprising that he therefore fell into error.
29. **The development of the law in relation to *Grovit* abuse** *Grovit* was a House of Lords appeal concerning the strike out of a claim issued (on 25 August 1989) for unlawful interference and defamation. The Claim was struck out on 30 October 1992. The plaintiffs had obtained an *Anton Piller* order but later abandoned the interference claim. They successfully opposed an application to strike out, but from September 1990 took no further steps. While *Grovit* predated the introduction of the new CPR, the Civil Procedure Act 1997 (“CPA 97”) had been passed. The leading (and only substantive) judgment was given by Lord Woolf – the architect of the CPR – and he had those future reforms well in mind, stating that they were “*on the horizon*” (644D). [Au/24/196] Unsurprisingly, *Grovit* has been held to apply in relation to the position under the CPR (in *Asturion* and numerous other cases).
30. At 647G – 648A [Au/24/199-200], Lord Woolf held that (emphasis added): “*The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to 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.”

31. It follows, therefore, that firstly, as was later pointed out in *Asturion* at [50] [Au/38/461] (applying *Grovit*), as to stage one of the process, commencing and continuing litigation which a party has no intention to bring to a conclusion can but will not necessarily be an abuse of process. *Asturion* said at [61] [Au/38/463] that it was relevant to consider the strength of the reason and the length of the delay. Abuse of process will therefore be found only in serious cases. As to the second stage, Lord Woolf said that the response will “frequently” be for the Claim to be struck out, thereby making clear that strike out is not to be reserved only for extreme cases.
32. Second, *Grovit* abuse itself was not established by reference to “warehousing” multiple claims. In this foundational case there was one claim, which was struck out. Moreover, the Court made clear that there was no meaningful distinction between starting a claim without intending to pursue it to trial, and later maintaining a claim without an intention to pursue it to trial (as happened in *Grovit*). The third possibility, later made clear in *Asturion*, is that there can be an abuse where the intention is to pause a claim (see [55]). [Au/38/462]
33. Third, the House of Lords made a deliberate decision to extend the law. Lord Woolf drew a specific distinction between *Grovit* abuse and strike out on the grounds set out in *Birkett* (the latter of which required either intentional and contumelious delay (such as disobedience of a peremptory order); or else that there had been inordinate and inexcusable delay, causing serious prejudice or precluding a fair trial). *Grovit* abuse was specifically intended to, and does, cover situations that do not fall within the *Birkett* criteria. Lord Woolf made this extended ambit clear in the light of specific concerns (at 643B-D) [Au/24/195] as to “*the adverse effect which delay can have on the reputation and efficiency of the civil justice system as a whole*”; that “*Defendants...find it difficult to establish prejudice*”, that otherwise a claimant can act “*with a reasonable degree of confidence that nothing very serious will happen in consequence*”, and that “*Actions therefore take much longer to come to trial than they should and the general impression given to the public is that litigation is a very long drawn-out process with which they should try to avoid becoming involved*”. Specific reference was also made at 643E to the prejudice to a defendant in needing to address the shortcomings of its own witnesses, by way of a strike out application.

34. The Court of Appeal thereafter considered *Grovit* abuse in *Board of Governors of the National Heart & Chest Hospital v Chettle* (1998) 30 H.L.R. 618 (“**Chest Hospital**”) [Au/25/201-211], another case decided after the CPA 97 had been enacted but prior to the CPR. The Court in *Chest Hospital* held at 628 [Au/25/211] that, “*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*” (emphasis added). The Court stated that, “*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*”. The need for compelling reasons was reiterated in *Re Vitara Foods Ltd* [1999] BCC 315 [Au/27/224-233], citing *Chest Hospital* at 321H [Au/27/230] (and more generally quoting approvingly from the judgment).
35. The Court of Appeal subsequently considered *Grovit* abuse in *Arbuthnot v Latham* [1998] 1 W.L.R. 1426 [Au/26/212-223], a further judgment of Lord Woolf. There, Lord Woolf again drew a distinction between *Grovit* cases and *Birkett* cases: see 1432C-H [Au/26/218]. Then, under the heading “*The future*” at 1436B [Au/26/222], Lord Woolf explained that (emphasis added), “*While an abuse of process can be within the first category identified in Birkett v. James [1978] A.C. 297 it is also a separate ground for striking out or staying an action (see Grovit v. Doctor at pp. 642–643) which does not depend on the need to show prejudice to the defendant or that a fair trial is no longer possible. The more ready recognition that wholesale failure, as such, to comply with the rules justifies an action being struck out, as long as it is just to do so, will avoid much time and expense being incurred in investigati[ng] questions of prejudice, and allow the striking out of actions whether or not the limitation period has expired.*”
36. Lord Woolf went on to state at 1437C [Au/26/223] that, “*Whereas hitherto it may have been arguable that for a party on its own initiative to, in effect, “warehouse” proceedings until it is convenient to pursue them does not constitute an abuse of process, when hereafter this happens this will no longer be the practice. It leads to stale proceedings which bring the litigation process into disrespect. As case flow management is introduced, it will involve the courts becoming involved in order to find out why the action is not being progressed. If the claimant has for the time being no intention to pursue the action this will be a wasted effort. Finding out the reasons for the lack of activity in proceedings will unnecessarily take up the time of the court. If, subject to any directions of the court, proceedings are not intended to be pursued in accordance with the rules they should not be brought. If they are brought and they*

are not to be advanced, consideration should be given to their discontinuance or authority of the court obtained for their being adjourned generally. The courts exist to assist parties to resolve disputes and they should not be used by litigants for other purposes” (emphasis added).

37. Again, although *Arbuthnot* pre-dated the CPR, as confirmed in *Asturion* at [55] [Au/38/462], Lord Woolf’s judgment “*was plainly intended to lay down the approach that the courts would adopt in future*”, and it has been repeatedly applied as doing so.
38. **Conflict in recent authorities** There is a more recent conflict of first instance authorities as to the second stage of the test. In *Watford Control Instruments Ltd v Brown* [2024] EWHC 1125 (Ch) [Au/43/579-599], Richards J referred to *Grovit* and correctly pointed out at [23] [Au/43/584-585] that delay does not just affect a defendant but also other court users, who have to wait longer for their own actions to be dealt with. He also referred there to delay giving rise to the undesirable general impression that litigation is long and drawn out. Further, “*the increased anxiety inevitably caused by a protracted action*” constitutes prejudice (*ibid*). Richards J also correctly held that *Grovit* “*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*” ([24]) [Au/43/585]. Richards J went on to refer to *Chest Hospital* and stated at [40] [Au/43/588] that the correct proposition was that “*where a claimant is engaged in Grovit abuse the claim will be struck out absent "compelling reasons"*”. At [47] [Au/43/589] Richards J stated that, “*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... 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*”.
39. In *Lloyd v Hayward* [2024] EWHC 2033 (Ch) [Au/44/600-635], HHJ Keyser KC indicated that he disagreed with Richards J’s test (but held that his decision on the facts did not “*rest primarily on that opinion*” ([66])) [Au/44/629]. However, HHJ Keyser KC stated at [68] [Au/44/631] that (emphasis added): “*Having said all this, I respectfully think that Richards J was correct to be concerned at the possibility that the approach to the exercise of discretion*

under the CPR might be misunderstood to have drawn the teeth from the court's response to abuse of process. Grovit abuse is an inherently serious matter, both because it involves a subjective intention that is repugnant to the proper conduct of litigation and because of its effect on the efficient administration of the justice system as a whole and individual cases in particular. The overriding objective itself identifies the need to ensure that cases are dealt with expeditiously and fairly and the importance of having regard to the resources of the court and the calls of other court users. Further, the jurisdiction to strike out for Grovit abuse specifically does not depend on prejudice to the defendant in the particular case." This was consistent with his findings at [57] [Au/44/619] that in a case where there was "no intention of ever bringing the case to a conclusion" an order for strike out was "likely" albeit not automatic; and at [53] [Au/44/617] that "as a matter of fact an order striking out a claim may well be a more usual response to Grovit abuse than to breach of an order".

40. The most recent relevant judgment is in *SNV*, which was not cited to the Judge (as it was handed down only when the draft judgment was in the process of being finalised). The Court in *SNV* concluded that there was a significant delay without good reason for that delay, and that there was an abuse of process. As to the second stage, the Court in *SNV* was addressed on the conflict between *Watford* and *Lloyd*, but held that there was no need to resolve the dispute, stating, "I anticipate the distinction matters not and in the majority of cases the result will be the same" [69] [Au/46/682], before then going on to set out why the modern approach to case management is the antithesis of endorsing abuse of process (as quoted in full at ¶28 above).
41. **The correct position** It is submitted that the correct position on the law as to stage two is as follows. Firstly, the test is not a question of whether there are "*compelling reasons*" to the exclusion of the overriding objective (as the Judge appeared to take *Watford* to mean); that is a false dichotomy. Richards J in *Watford* made clear at [47] [Au/43/589] that he was making his decision in accordance with the requirement for proportionality under the CPR. In other words, the requirement for compelling reasons is one that is pursuant to the overriding objective. The right approach is that - taking into account the nature of a *Grovit* abuse of process - once such abuse is established, it follows as a matter of principle that, in terms of proportionality, compelling reasons are required for a Court to conclude that strike out is not appropriate. In other words, the test remains what is right in the exercise of the overriding objective, but in applying that test, compelling reasons are required.

42. This is so because there will necessarily have been a *Grovit* abuse of process at stage one. It reflects the serious nature of the abuse - requiring not merely the abusive intention, but also a lack of an objective good reason. Such cases will be rare and will, almost by definition, be serious. *Grovit* and *Arbuthnot* are both explicitly clear that *Grovit* deliberately extended the categories in which poor conduct would lead to strike out. Both set out the inherently serious nature of the abuse, both on the Court and other Court users. In such circumstances, something compelling would need to be shown to avoid strike out.
43. This approach is also consistent with the line of case law (including *Arbuthnot* at 1437A [Au/26/223]) as to when the Court will strike out a second claim in circumstances where the prior, first claim was struck out as an abuse of process. That line of case law (which refers to the need for a “*special reason*” not to strike out) is likewise not subverting the overriding objective. Rather, it correctly makes clear, in light of the prior finding, what will in principle be required to avoid strike out pursuant to the overriding objective.
44. Second and alternatively, even if “*compelling reasons*” are not, as a matter of principle, a part of the test (contrary to ¶41 above), then “*compelling reasons*” would be a correct description of the (lack of) frequency with which the test will be met and a suitable indicator of what would generally be required. Even if not the test, that does not mean that the phrase is not an accurate descriptor, or that it loses relevance. In that sense, “*compelling reasons*” is similar, for example, to the exhortation that disclosure on a jurisdiction challenge should only be ordered in “*exceptional circumstances*” (*Societe Generale v Goldas* [2017] EWHC 667 Comm at [49] [Au/35/393]). The exercise of discretion needs to be viewed in that context.
45. To put it another way, on any view the Judge’s approach was wrong because the Court needs to recognise both the seriousness of the starting point, and that the natural response to *Grovit* abuse is that the Claim should be struck out. The mere fact that the Court exercises its discretion in the light of the overriding objective does not mean that it starts with a clean slate, or that the Court can or should not have as its primary factor the nature of the abusive conduct that has led the Court to be considering the question of strike out. The two steps in the process are connected, not distinct. The abuse is a key factor that must weigh heavily in favour of strike out. It is an inherently serious matter for there to have been a *Grovit* abuse of process, for all of the reasons set out in the previous cases (see, for example ¶33 above). There will be stale proceedings which therefore bring the litigation process into disrespect and affect the reputation and efficiency of the justice system; there will be wasted effort in finding out the reasons for the lack of activity; claimants could otherwise act with reasonable confidence that

nothing much serious would happen to them notwithstanding their abuse; the public will believe that litigation is a long and drawn-out process; the Court will have been used for an ulterior purpose (of warehousing, rather than of resolving disputes); litigants will inevitably have faced continuing anxiety; and the party facing the warehousing will likely face the invidious position of having to criticise its own remaining witnesses.

46. Thirdly, the reality of the approach adopted by the Judge is that, absent a finding of prejudice, it would be highly unlikely that the Claim would be struck out. That cannot be right. It would mean that the very introduction of *Grovit* abuse as a species of abuse would not make sense. The House of Lords took a deliberate decision to make clear that there was a new species of abuse, going well beyond *Birkett* abuse. It made clear that prejudice was not required specifically because of the difficulties Defendants have in showing prejudice. Yet unless the starting point – or the natural or expected response – is striking out, then, inevitably, the two species of abuse would collapse into one another. If the Judge were right, it would be easier to show abuse (i.e. to satisfy stage one) under *Grovit* than *Birkett*, but if it is just as hard to procure strike out under *Grovit* as under *Birkett* at stage two, then there would be no purpose in *Grovit* abuse having been set out as a distinct species to *Birkett* abuse.
47. Fourth, further or alternatively, as *SNV* explains, the modern approach to case management under the CPR is the “*antithesis of endorsing abuse of process*”. The litigant will not only have formed the abusive intention, but moreover there will have had to be no good reason for that. Lord Woolf deliberately stated that in *Grovit* that it would “*frequently*” be the case that abuse would lead to strike out. Even putting to one side the reference to “*compelling reasons*”, *Chettle* made clear that strike out would “*normally*” take place. This reflects that strike out would not be a rare occurrence or saved only for the most serious of cases (or cases where it would be impossible to proceed to a trial). Even in *Lloyd* itself, as explained above at ¶39, the Court stated that “*Richards J was correct to be concerned at the possibility that the approach to the exercise of the discretion under the CPR might be misunderstood to have drawn the teeth from the court’s response to abuse of process*”. [Au/44/631] The Judge failed to apply this approach either.
48. Fifth, for similar reasons, on any view the correct position should be no less onerous for a *Grovit* abuser than that set out in *SNV*, namely that the distinction between *Watford* and *Lloyd* is unlikely to be significant. As *SNV* stated correctly at [69] [Au/46/682], “*the distinction matters not and in the majority of cases the result will be the same*” for the reasons set out in the judgment (quoted at ¶27 ¶28 above). While the Judge here did consider that the test was

decisive, that was not because this case raised extraordinary facts in Blackberry's favour. Rather, the Judge seemed to conclude that it might only be in the very "worst" case of warehousing that strike out might be appropriate: [111(c)]. It is submitted that this reflects his misunderstanding as to the starting point and/or his failure to take into account the inherent seriousness of *Grovit* abuse. The Judge wrongly focused on whether this was the "*most serious*" kind of abuse (and wrongly considered as a matter of law that abuse was not serious unless it involved bulk warehousing of claims – *Grovit* itself, the foundational case, did not involve any such abuse).

49. It is therefore submitted that the Judge on one or more of the bases above adopted the wrong legal test. In any event, he failed to take into account the inherent seriousness of the abuse; rather, he downplayed it, and treated it as one relatively minor factor in the balance, rather than as a serious and weighty starting point. It is clear from his decision, which set out specifically that the outcome would have been different if he were wrong on the law, and in any event from the "*narrow margin*" of the decision, that he would have struck out the Claim if he had adopted the correct approach.

III. Ground 3: the Court made plainly wrong findings concerning prejudice to Optimus and/or plainly wrongly evaluated the facts; further or alternatively the Judge failed to take into account relevant factors in relation thereto

50. As explained above at ¶21, the Court held that Optimus suffered no "*relevant prejudice*", "*other than in respect of interest, which can be financially estimated and adequately corrected for*": [111(a)]. This was the first and seemingly most important factor relied on by the Judge in declining to strike out. Given the knife-edge nature of his decision ("*by a narrow margin*"), any finding of relevant prejudice would and should inevitably have led to strike out. The Judge reached his conclusion as a result of plainly wrong findings and/or evaluations of fact, which the appeal Court is as well placed as the lower Court to decide.
51. **Ground 3A: witnesses** The Judge's finding at [89] that there was no "*concrete prejudice*" in relation to witnesses was plainly wrong. Optimus's case was that it suffered specific prejudice because it had been denied access to one or more of three key witnesses, namely: (A) Mr Vineet Bhatia, the senior manager hired specifically to oversee the Blackberry project, who was primarily responsible for strategic decisions: Rabinowicz 1 ¶54.3 [S/5/50]. Unfortunately, Mr Bhatia died on 4 September 2021. (B) The other, most relevant individuals were the "Product" team, led by Mr Vikash Agarwal ("VA") and Mr Rajat Singh, and the

software team, in particular Mr Arvind Kumar (“AK”) and Mr Ashish Jain: Rabinowicz 1 ¶52 [S/5/49]. While Rajat Singh and Ashish Jain left Optiemus prior to Blackberry’s *Grovit* abuse: (i) VA, the assistant general manager of the product team, left Optiemus on 4 July 2021 (line 10 [S/27/209]). (C) AK, the Manager of Software Testing, left Optiemus on 31 May 2021 (line 50, *ibid*). The evidence that these three missing individuals were the ones who would have been expected to give the main instructions, and to have been central to Optiemus’s Defence of the Claim, was uncontradicted, as was the evidence that the only people who remain at Optiemus “*do not have the detailed day-to-day knowledge in respect of the software development that is key to this dispute*” (Rabinowicz 1 ¶54-¶55 [S/5/49-51]).

52. The Jmt rejected Optiemus’s position at [89], stating, “*As BlackBerry says, the departure of many staff (and the death of one specifically) would have happened (or had already happened) whatever BlackBerry had done*”.
53. The Judge failed to engage at all with the position of VA and AK. In fact, it is apparent that the Judge had misunderstood it, or failed to appreciate its significance. At [87], the Judge referred in general terms to the software and product teams and said that they had left “*some years ago*”, without mentioning VA or AK at all, let alone that they had left Optiemus specifically while BlackBerry was perpetrating *Grovit* abuse. At [88], the Judge summarised BlackBerry’s case (which he made clear was the basis for his finding at [89] that there was no “concrete” prejudice) as being that: (1) “*some relevant personnel...are still available*” (he referred to three individuals - Nitesh Gupta, Ashok Gupta and Mahendra Bothra); and (2) “*Most of the employees who left, and notably those who left on bad terms, were made redundant shortly before the pandemic, and therefore some time before any decision for which BlackBerry could be criticised*” ([88], emphasis added). (3) As to Mr Bhatia, the Judge said at [88] that he, “*would have been unlikely to have been thoroughly proofed before his death, even if the proceedings had advanced quickly*”.
54. The Judge’s position was simply unsupportable, and plainly wrong. As to (1), i.e. the existence of other people who could give instructions, as explained at ¶52 above, the unchallenged evidence was that the individuals in question do not have “*the detailed day-to-day knowledge in respect of the software development that is key to this dispute*”.
55. As to (2), i.e. the death of Mr Bhatia, the Judge’s conclusion was plainly wrong as a matter of fact: if the proceedings had proceeded after the FPS reopened on 28 July 2020, the SJ application would (or at least might well) have been served before Mr Bhatia’s death almost

14 months later, and he would have been expected to have been proofed in response to it. On any view, Mr Bhatia would have been expected to give material instructions which would still have been of significant use even if he had not been “*thoroughly proofed*” (the Judge not explaining why only a “*thorough proof*”, as opposed to some other form of information gathering, mattered), and, moreover, Mr Bhatia’s documents could have been obtained. On any view, Optiemus lost the opportunity to do this. Clearly, this was highly material prejudice.

56. As to (3), the Judge was also plainly wrong in respect of VA and AK. It appears that the Judge may simply have overlooked them as he made no specific mention of them. To the extent he did not, he indicated that they left before the pandemic, which was straightforwardly wrong: far from leaving before the pandemic, they left in May and July 2021. In fact, it appears that the Judge failed to appreciate that he had been taken to a document showing when these (and other) employees had left Optiemus. Jmt [48] states that “*At around [13 January 2020] — precisely when, the evidence does not say—Optiemus made many employees who had worked on the project redundant*” (emphasis added). In fact, the evidence to which the Judge was taken stated explicitly the precise date on which each member of Optiemus’s Blackberry department left Optiemus [S/27/209]. Clearly, the Judge failed to appreciate that the relevant dates were available to him, and therefore appears to have believed that the relevant events took place prior to the *Grovit* abuse, not after it had started.
57. Absent the *Grovit* abuse, on service of the SJ application, one or both of VA and AK would have been proofed before their departure - or Optiemus could have ensured that their departure was on terms that allowed them to assist in the litigation. Their documents could have been retained. Alternatively, even if Optiemus had taken action only later, as recent leavers it would have been much more likely that VA and AK could have been contacted and proofed. That is so as a matter of inherent probability, but also because the uncontradicted evidence (which the Judge failed to mention) was that Optiemus disposed of HR records after three years: Rabinowicz 1 ¶53.2 [S/5/49]. The result was that the records for VA and AK would have been disposed of in May and July 2024, shortly prior to service of the Stay Application (i.e. prior to the end of Blackberry’s period of abuse). The Judge wrongly failed to take this matter into account at all. If he had done, it would have been decisive.
58. **Grounds 3B-3E:** There were four other respects in which the Court erred in respect of prejudice. Firstly, Ground 3B: the Judge’s finding concerning the passage of time. The Judge mentioned “*general*” prejudice from the passage of time, but wrongly failed to give any weight to this. The Judge justified this refusal by stating that, “*This was never going to be a*

case that turned on vivid memories of very recent events, and always one with a strong documentary and expert element” [89]. This was not a matter raised with the parties and there was no (or insufficient) evidence to support this. It was plainly wrong and/or it was not a relevant factor to take into account. Optiemus’s Defence is based on various software items being provided late, having errors, not working as expected and/or Blackberry not providing adequate resources. These are all matters that the team working on the project day-to-day need to address. Whether software works or not is something that is likely to be particularly reliant on witness evidence, given that the physical operation of software cannot easily be “seen” and would be impossible to reconstruct. The Defence also repeatedly makes clear in terms that various parts of Optiemus’s case are dependent on witness evidence due to the unavailability of documents (for example see ¶47, ¶49 [S/9/140-141], ¶50, ¶52 [C/13/144]).

59. Ground 3C: accounting When the Claim was raised, Optiemus made some provision for it in its accounts for 2018/2019 and 2019/2020 [S/11/158-159; S/21/186-188]. Optiemus then realised that Blackberry did not intend to pursue the Claim. Optiemus therefore took the accounting decision to derecognise the Claim in its accounts: Rabinowicz 1 ¶63 [S/5/52-53; S/22/190]. Optiemus’s case is that the *Grovit* abuse caused prejudice to its shareholders who had bought shares (and hence organised their personal financial affairs) on the basis of accounts which reflected Blackberry’s decision not to pursue the Claim, and who were misled as to the true position by the *Grovit* abuse. The evidence was also that there would be an adverse impact on Optiemus’s share price. These individuals are (on any view) innocent third parties and it is submitted that this impact on third parties was relevant prejudice. Optiemus itself would also be prejudiced by having to restate its accounts. The Judge dismissed all this on the basis that there was no evidence to support there being a link between the *Grovit* abuse and the removal of the relevant information in the accounts: stating at [101] that, “*What management judgment went into the decision to disclose the dispute with BlackBerry (inaccurately) in 2019/20, but to remove that note the following year is insufficiently clear*”. This was a plain error of fact. It was confirmed in clear and uncontradicted evidence that the reason why provision was removed was specifically because of Blackberry’s *Grovit* abuse in not pursuing the Claim; see Rabinowicz 1 ¶63.2: “*this decision was taken because Optiemus did not hear further from Blackberry in pursuit of the Claim and therefore considered it to be at an end*” [S/5/53]. Therefore, the Judge plainly erred in considering that there was no

explanation of the decision and his consequential rejection of there being prejudice was flawed.³

60. Ground 3D: prejudice from the failure to bring amendments (which amendments would have been raised many years earlier absent *Grovit* abuse). Blackberry proposed amending its PoC to claim the New Fees only on 19 June 2025 [S/26/202]. As explained at ¶9 above, the New Fees (of some USD 16m) are said by Blackberry to have fallen due on 30 June 2020, 30 June 2021 and 30 June 2022 respectively. The fact that Blackberry contended that the parties' agreement remained ongoing came out of the blue to Optiemus on 19 June 2025, almost 5.5 years after the *Grovit* abuse began. Optiemus had believed throughout that the parties' agreement was at an end. Its primary position is that this is right: the parties' relationship had broken down by 2018 or 2019 at the latest and no further work was undertaken on projects. In these circumstances, the agreement between the parties was terminated: Rabinowicz 2 ¶73 [S/7/117-118]. However, if Optiemus had known that the question of whether the contract was at an end was disputed, it would, in response, have sent an unequivocal termination notice without prejudice to its position that the contract was already terminated: Rabinowicz 2 ¶56 [S/7/112].
61. It is accordingly clear that the only reason that Optiemus did not know that the position was disputed – and did not, therefore, send an unequivocal termination notice - was because of the *Grovit* abuse. Absent the *Grovit* abuse, the matter would have proceeded to SJ or trial (in 2021 or 2022). In accordance with the principles concerning *Henderson* abuse [Au/22/143-151], Blackberry would have been required to raise the New Fees at that time. So, for example, on a SJ application or trial in 2021, it would have been required to raise the sums said to have become due in June 2020. That would have led to Optiemus taking unequivocal action so that the New Fees alleged to arise in 2021 or 2022 would, on any view, not have arisen.
62. Jmt [104] states that, “*The question raised... is one of substance (is the contract terminated) not procedure*”; and that, “*Whether BlackBerry’s conduct reasonably led Optiemus to conclude that the contract was over may need to be decided when BlackBerry claims under post-2020 invoices.*” This is flawed, it is respectfully submitted, because it conflated two

³ The Judge also erred in considering that the question fell to be considered in March 2021 and “*Not much, if any, of this period can be attributed to delay which was abusive*” ([101]). In fact, the question was considered later, as the accounts were signed off on 30 June 2021 [S/22/191].

separate points - and simply did not address the prejudice relied on by Optiemus. The true prejudice in this respect was not a question of whether the contract in fact was terminated; rather the prejudice is that Optiemus did not take protective action that it is now too late for it to take (i.e. to send unequivocally a termination notice which would, on any view, have made Optiemus's position stronger), as a result of the *Grovit* abuse.

63. Ground 3E: inappropriate interest The Judge accepted that “*delay will have increased the period for which interest might be awarded*”: [102]. On hand down, the Judge did disallow interest on the sums originally claimed prior to amendment, for the period from September 2020 to July 2024. However, the Judge refused to disallow interest on the sums claimed by amendment. This ignored the fact that, absent the abuse, the claims in respect of these sums would have been brought as early as 2020 (for the reasons given in ¶62 above). The same logic applies to the sums originally claimed and the sums added by amendment. Yet the result of the Judge's order is that Blackberry has claimed some USD 5,634,583.27 of interest up to 19 December 2025, in circumstances where the claims were only raised for the first time in June 2025, and where – absent the *Grovit* abuse – they would have been pleaded and pursued from 2020, 2021 and 2022 respectively. This is concrete prejudice.

IV. Ground 4: irrelevant factors wrongly taken into account/relevant factors wrongly not taken into account

64. Ground 4A: failure to take into account prejudice from investigations The case law is clear that a form of prejudice caused by *Grovit* abuse comes from “*investigation [of] questions of prejudice*” (*Arbuthnot* at 1436H) **[Au/26/222]**, while *Grovit* makes clear that there is prejudice to a defendant in needing to address the shortcomings of its own remaining witnesses: see ¶33 above. That was plainly the case here. Two and a half days of Court time were spent on dealing with the issue, at great expense and disruption to Optiemus, and constituting to a significant drain on Court resources, to the detriment of other Court users. There had to be a detailed factual examination of all of the steps taken over a five-and-a-half-year period. The Court erred in failing to take this factor into account: no mention is made of this at all in the Court's discussion of the relevant factors at [111]. This was a relevant factor that ought to have been taken into account and, given the knife-edge nature of the decision, it would have led to a different result.
65. Ground 4B: wrongful focus on Optiemus's conduct The Judge relied at [85] and [111(f)] (in refusing strike out) on the fact that Optiemus had not responded to the Claim. This was wrong as a matter of law. As stated by Lord Woolf in *Arbuthnot*, “*The conduct of the*

defendant may also have been remiss. However, this is not a matter upon which the plaintiff can rely when there has been an abuse of process". [Au/26/221] That point was later reiterated in *Solland International Limited v Clifford Harris & Co (A Firm)* [2015] EWHC 2018 (Ch) at [80] (cited in addition as this is a post-CPR case). [Au/34/366] The Judge (as with a handful of other first instance authorities) appears to have gone wrong by placing reliance on what was said in *Asiansky Television Plc v Bayer-Rosin* [2001] EWCA Civ 1792 that parties cannot let "*sleeping dogs lie*". [Au/31/280] That was a case under CPR 3.4(2)(c) (a failure to comply with an order, rule or practice direction), and not under the relevant CPR 3.4(2)(b), whereas *Arbuthnot* was a seminal decision on *Grovit* abuse itself and so sets out the correct position. Moreover, as Richards J pointed out in *Watford* at [57] [Au/43/591], there is a significant difference between *Grovit* abuse and a case where a party does not comply with an order: the former 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.*" In other words, the *Grovit* abusive conduct is internal: it is the decision not to pursue the case without an objectively good reason that constitutes the abuse. A defendant is not under an obligation to persuade a claimant to pursue a claim that the claimant does not wish to pursue.

66. The Judge's reliance was also misplaced because, as *Watford* also points out at [58] [Au/43/592], any "*lack of progress will necessarily be apparent to the defendant*". As such, if "*a defendant's perceived culpability in allowing the delay to mount up*" were relevant to "*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)*".⁴

67. **Ground 4C: wrongfully taking into account that there was no breach of a Court rule** At [111] the Judge set out one of the "*key factors*" in refusing to strike out the Claim as being that Blackberry was not in breach of "*any specific rule*". That was an unsupportable finding. It was rightly submitted to the Judge by Optimus that Blackberry was in breach of CPR 1.3: see *Bank of America* at [22] [Au/40/503].

⁴ Richards J referred in the same paragraph to the "*compelling reasons*" test but his judgment in this respect was not predicated on that being the test.

V. **Ground 5: the Court ought to have taken into account that BlackBerry had (for a time) no intention to pursue the Claim to trial at all**

68. In the event that Optiemus were wrong on Grounds 1 and 2, then Ground 5 would arise. It would, in that case, be relevant that the Court was wrong not to take into account the fact that this was a “never” case: meaning a case of a party having no real intention of bringing the action to trial (as it was put in *Chest Hospital* at 628 [Au/25/211]); as opposed to (as was the case on the facts of *Asturion*) a decision having been reached to pause a claim pending an event occurring in future (described by the Judge as a “maybe” case). The Judge specifically declined to decide this point at [8(k)], describing such an exercise as “*needlessly scholastic*”. The elision of “never” and “maybe” cases was described as “*legally erroneous*” in *Asturion* at [69] [Au/38/465]. It is submitted that the categorisation would be relevant on the Judge’s description and application of the law, given that a “never” case is an even more serious abuse than a “maybe” case, as on any view where there is no real intention to pursue a Claim to trial it should be discontinued.
69. The Court decided as follows: (1) at [56], the Judge quoted from ¶60 of Murtha 1, referring to problems with the closure of the FPS and stating that the COVID-19 pandemic caused serious concerns about Optiemus’s financial health. The Judge then quoted Murtha 1 ¶61, by which Mr Murtha referred only to the reasons for BlackBerry not pursuing a SJ application “*at that time*”. (2) At [57], the Court rightly said that there was no evidence that “*BlackBerry obtained or considered Optiemus's accounts...[or] that there was any plan, or practice, of monitoring Optiemus's financial position going forward, or any definite idea about when the claim might be revived (if ever). There is no evidence that BlackBerry monitored the case systematically.*” (3) At [58]-[65], the Judge referred to submissions about Optiemus’s accounts, which he rightly said were “*not of much significance*” as BlackBerry did not say that “*it considered those accounts as part of its decision-making until 2024*”. The Judge concluded at [66] that “*there is no evidence that [Optiemus] was a business that its stakeholders wished to abandon, or that it was perceived as on the brink of collapse. That conclusion was more likely from 2021 onwards than it had been in 2019 or 2020. A rationally balanced view would have been—throughout the period—that an enforceable judgment for USD 6 million would have had real economic value, though not necessarily face value*”. (4) At [68], referring to BlackBerry bringing the Stay Application, the Judge held that, “*Mr Murtha's witness statement reveals that at some point—obviously some time before July 2024, though Mr Murtha does not say exactly when or why—BlackBerry engaged a corporate investigation firm to investigate Optiemus's assets, and that Optiemus's annual report for*

2022/23—dated 12 August 2023—suggested that it was now a worthwhile target. That, coupled with the ability once again to serve in India (a point which must, as a matter of common sense, have been obvious many years before July 2024) led, he says, to the action being reawakened”.

70. Firstly, the starting point is that the Judge held that Blackberry did not have a good reason for its *Grovit* abuse. Blackberry was an international corporation with sophisticated representatives. It would be inherently unlikely and irrational for Blackberry not to have pursued a claim that it genuinely intended to pursue to trial, if (as the Judge found was the case) there was no impediment to it being pursued at the time.
71. Second, as the Judge found, there was no material change of circumstance in 2023 or 2024. It follows that, if Blackberry genuinely did intend to pursue the Claim in future at all times, it would have pursued it far earlier (and not doing so would have been fundamentally perverse and inherently improbable). In other words, Blackberry’s behaviour, based on the Judge’s findings, is fundamentally inconsistent with this being a “maybe” case throughout.
72. Third, Blackberry’s evidence did not proffer any reason at all for the abuse in the period after July 2020. Murtha 1 ¶64 in fact stated only that “*Blackberry had good reasons for not progressing the proceedings prior to the stay being imposed [on 14 July 2020]*” [S/4/29]. No reason was given for the delay from August 2020 to July 2024. That was accepted in reply submissions by Blackberry, whose counsel said in respect of Murtha 1 that “*the evidence was focused on what happened prior to that point [14 July 2020]*” [S/31/268]. He also accepted that Mr Murtha “*doesn’t say anything specific about the position in [20]21 and [20]22*” [ibid]. There was therefore no evidence at all from Blackberry that it had a real intention to pursue the Claim to a conclusion in the period from August 2020 until shortly before July 2024. This was all the more striking given that Optiemus’s evidence put in issue this very point (e.g. Rabinowicz 1 ¶9, ¶45 [S/5/38; 47-48]), yet Blackberry chose to duck this point in its responsive evidence. The inferences are obvious; and the position is similar to *SNV* at [68]: “*The Claimants have failed in a spectacular fashion to provide an explanation, whether through formal evidence or otherwise*”. [Au/46/681] Ultimately, as was submitted to the Judge below, it was for Blackberry to explain itself. It chose not to. Optiemus therefore does not know the real reasons why there was no intention to pursue the Claim to trial – though it might be thought to be related to the collapse in Blackberry’s handset business, which Murtha 1 ¶14 [S/4/17] says was “*fully exited*” in 2022 – but, either way, if there was a genuine reason

other than Blackberry having simply decided it no longer wished to pursue the Claim at all, it would have said so.

73. If the Court had determined the point, the only reasonable conclusion would have been that Blackberry (at least for a time) had no real intention of pursuing the Claim to trial. This ought to have been a yet further factor in favour of strike out.

VI. Ground 6: the Court's decision should have been that the Claim be struck out

74. It is submitted that, if the relevant factors and/or legal position had been taken into account, the Claim would have been struck out. Further and in any event, it is submitted that even on its own findings, the Court's decision was perverse. The decision in this case provides (by some distance) the starkest facts on which the Court has refused to strike out for *Grovit* abuse.
75. Accepting the Judge's findings for this purpose: (1) there was an abuse of process on a prolonged basis over around four years (far in excess of the periods seen in many cases leading to strike out); (2) there was no good reason for the period of abuse; (3) the only prejudice to Blackberry was the loss of its claim (which prejudice would necessarily be a feature of every case of *Grovit* abuse were the claim to be struck out). The countervailing factors were on any view minimal. In these circumstances, the decision that the Court reached was outside the bounds of its discretion. It is submitted, respectfully, that, based even on the Judge's undisturbed findings, if the decision were to be right, the effect would be to significantly reduce the relevance of *Grovit* abuse within English litigation generally.

VII. Ground 7: the Court's decision was wrong in relation to the Stay Application

76. In relation to the Stay Application, the Judge correctly held that Blackberry failed the first two stages of the *Denton* test: [114]-[115]. The Stay was, however, lifted as the Judge held that Blackberry satisfied stage 3 (the overall circumstances). The Judge specifically relied on the same reasons as he had relied on to refuse strike out on the basis of *Grovit* abuse: [116]. All of the grounds above set out in respect of *Grovit* abuse therefore apply *mutatis mutandis*. There is one additional factor, however. The burden for an application for relief lies on the party making it. If and to the extent that the Court considered that there was simply a lack of evidence on any relevant point, then this would count all the more against Blackberry in the context of the Stay Application. The Stay should therefore have remained in place, and the Claim should therefore have been struck out for this reason too.

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Authority Bundle references added 13 July 2026 by current counsel, David E. Grant KC
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