**IN THE COURT OF APPEAL** **Appeal Ref: CA-2026-000319**

**ON APPEAL FROM:** **Claim No. CL-2019-000521**

**THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**COMMERCIAL COURT (KBD)**

**Paul Stanley KC (sitting as a Deputy High Court Judge)**

**BETWEEN:**

**BLACKBERRY LIMITED**

**Respondent/Claimant**

**- and –**

**OPTIEMUS INFRACOM LIMITED**

**Appellant/Defendant**

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# RESPONDENT/CLAIMANT'S APPEAL SKELETON ARGUMENT

**30 MARCH 2026**

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- References to the Appeal Core Bundle are in the form **{ACB/Tab/Page}**.
- References to the Appeal Supplemental Bundle are in the form **{ASB/Tab/Page}**.

## A. INTRODUCTION

1. This is the skeleton argument of the Respondent/Claimant, BlackBerry Limited ("**BlackBerry"**), in response to the appeal of the Appellant/Defendant, Optiemus Infracom Limited (**"Optiemus"**). The appeal is against a judgment and order of Paul Stanley KC (sitting as a Deputy High Court Judge) ("**the Judge**") both dated 19 December 2025 ("**the Judgment**" and "**the Order**" respectively).

2. In his Judgment, the Judge:

   2.1 Granted BlackBerry's application to lift the automatic stay of the proceedings imposed by CPR 15.11 ("**the Stay Application**"), following Optiemus's failure to file an acknowledgment of service or a Defence in 2020;

   2.2 Dismissed Optiemus's application to strike out the claim ("**the Strike Out Application**"), which alleged that BlackBerry had impermissibly failed to progress the claim, giving rise to a *Grovit v Doctor* [1997] 1 WLR 640 abuse of process; and Au/24/192

   2.3 Granted BlackBerry's application to amend its Particulars of Claim ("**the Amendment Application**") to add claims for further fees owed to it by Optiemus that have fallen due since the original claim was issued.

3. The underlying proceedings involve a claim by BlackBerry against Optiemus (a company listed on India's major stock exchanges) for non-payment of fees due under a Master Services and License Agreement dated 1 February 2017 (**"the MSLA"**). The MSLA was agreed as part of a joint venture between the parties, pursuant to which BlackBerry licensed its software to Optiemus and Optiemus was to produce mobile phone handsets for sale in the Indian market. The MSLA provided for Optiemus to pay BlackBerry various fees, including "Minimum License Fees" that fell due in five annual tranches from 2018 to 2022.

4. Optiemus only paid a small proportion of the fees that were due. Following pre-action correspondence in early 2019, BlackBerry issued proceedings in August 2019, a few weeks after the 2019 tranche of the Minimum License Fees fell due.

5. BlackBerry served the proceedings on Optiemus in India promptly, via the Hague Convention. Optiemus now accepts that it was validly served in late 2019. However, Optiemus did not file an acknowledgment of service or defence, as it was required to do under the CPR. Rather, it ignored the claim and BlackBerry's subsequent correspondence.

6. In March 2020 the Foreign Process Section of the RCJ (**"the FPS"**) confirmed to BlackBerry that Optiemus had been served with the Claim Form. BlackBerry then intended to apply for

summary judgment. However, in order to obtain an enforceable judgment BlackBerry was required to serve the application on Optiemus in India under the Hague Convention. It was prevented from taking this step, because the FPS closed in March 2020 at the outset of the COVID-19 pandemic. Pursuant to CPR 15.11, the proceedings were automatically stayed in July 2020, at a time at which the FPS was still closed.

7. BlackBerry's evidence before the Judge was that, by the time the FPS had reopened, Optiemus's financial position had deteriorated such that BlackBerry considered it would have been disproportionate for BlackBerry to pursue the application in the near term. Doing so would require BlackBerry to incur significant costs and it was unlikely Optiemus could satisfy any judgment. BlackBerry therefore did not apply for summary judgment at that time, though it kept the situation under review.

8. After BlackBerry identified further information which suggested Optiemus's financial position had improved, BlackBerry issued the Stay Application, and also applied for summary judgment ("**the Summary Judgment Application**"), in July 2024. BlackBerry served that application on Optiemus under the Hague Convention, and this process was completed by October 2024.

9. Optiemus then engaged with the proceedings, for the first time. It instructed English solicitors and (after some delay) provided a draft Defence in May 2025. BlackBerry accepted that it thereby raised arguable defences and withdrew the Summary Judgment Application (in respect of which the parties agreed to costs in the case).

10. Separately, Optiemus issued the Strike Out Application in August 2025. This was the first substantive step that Optiemus had taken in the proceedings. BlackBerry issued the Amendment Application in September 2025.

11. This appeal raises only one properly arguable issue, viz. whether on the strength of Aldous LJ's judgment in *Board of Governors of the National Heart and Chest Hospital v Chettle* (1998) 30 Au/25/201 HLR 618, the Judge was required to strike out BlackBerry's claim as a *'Grovit'* abuse of process absent "*compelling reasons to the contrary*". This is Ground 1 of the appeal, and the basis on which the Judge granted permission to appeal.

12. The Judge was correct to conclude in the Judgment that (i) Aldous LJ did not lay down any such rule in *Chest Hospital*, and (ii) even if he did, such a hard-edged rule would be at odds with the ethos of the CPR (in particular, the overriding objective) and could not have survived the CPR coming into force.

13. The Judge's decision accords with the near universal practice of cases that have considered this area of law since the CPR came into force. None of these decisions applied any gloss or fetter on the test for whether a claim should be struck out.

14. The sole exception is *Watford Control Instruments Ltd v Brown* [2024] EWHC 1125 (Ch), which Au/43/579 was the first *'Grovit'* abuse case to cite *Chest Hospital* in the nearly 25 years since the CPR came in force. In that decision Richards J treated *Chest Hospital* as a refinement of the legal test established in *Grovit*. But, with respect, both the detail of the analysis in *Watford Control* and the conclusion are flawed, and the Judge was right not to follow it. *Watford Control* has also been rejected as wrong in principle by the other first instance decision that has considered it in detail.[1] Ground 1 of the appeal should accordingly be dismissed.

15. The remaining grounds of appeal (Grounds 2 to 7) either recycle the same submissions made in relation to Ground 1, or are an attempt to challenge the Judge's exercise of discretion and his evaluation of the facts.

16. In considering Optiemus's application for permission to appeal, the Judge did not consider that any of these points (independently) had any real prospects of success. While he did not impose any "*specific limitation*" on the grounds of appeal pursued by Optiemus, he did state that Optiemus would "*have to exercise judgment in deciding what grounds it ultimately advances*" **{ACB/10/115}**. Optiemus failed to heed that advice. It has pursued a general challenge to the Judge's discretionary analysis, which seeks to relitigate the first instance hearing. Its arguments cannot come close to justifying the reversal of the Judge's decision as a matter of discretion, assuming the Judge applied the correct legal test. Grounds 2 to 7 should never have been pursued.

## B. THE JUDGMENT

17. The Judgment was given following a two-day hearing on 18-19 November 2025. Spanning 122 paragraphs, it is the product of careful consideration of the evidence and authorities.

### B1. The legal principles

18. The Judge closely analysed the authorities relevant to *'Grovit'* abuse and the application of an automatic stay under CPR 15.11: Judgment [6]-[32] **{ACB/7/79-88}**.

19. The Judge held that the authorities required him to consider five questions:

[1] *Lloyd v Hayward* [2024] EWHC 2033 (Ch). Au/44/600

19.1 First, did BlackBerry deliberately decide not to pursue the claim? Without such a decision there could be no abuse of process; if there was such a decision then there *may* be an abuse of process.[2]

19.2 Second, if there was such a decision, what delay did it cause?[3]

19.3 Third, if there was such a decision, what were the reasons for it?[4]

19.4 Fourth, did those reasons objectively justify the delay? There would be an abuse of process only if BlackBerry took a deliberate decision not to progress the claim for reasons which were not objectively sufficient judged against the length of the delay.[5]

19.5 Fifth, if there was an abuse of process, would the appropriate response to that abuse be to strike out the claim, having regard to the overriding objective and the effect of the abuse?[6]

20. In relation to the application of an automatic stay under CPR 15.11, the Judge held that:

20.1 On a proper analysis of CPR 15.11, the six-month period for the application of a stay began from 14 January 2020, which was the date on which Optiemus's period for filing a defence expired. Accordingly, an automatic stay was imposed with effect from 14 July 2020, which could be lifted by an application under CPR 15.11(2).[7]

20.2 He would follow the criteria in *Denton v White* [2014] EWCA Civ 906 in determining whether the automatic stay imposed by CPR 15.11(2) should be lifted.[8] Au/33/329

## B2. The facts

21. The Judge divided the relevant facts into five periods.

22. The first period was the pre-action stage, starting from the execution of the MSLA to the issuance of the claim in August 2019.[9] During that period, BlackBerry sent Optiemus a letter before action. Optiemus responded denying the factual allegations made by BlackBerry and claimed that BlackBerry's alleged breaches of its own obligations gave rise to a counterclaim.

23. The second period was from the issue of the claim in August 2019 until the onset of the COVID-19 pandemic in March 2020.[10] BlackBerry promptly obtained permission to serve the claim form

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[2] Judgment [15(a)] **{ACB/7/84}**.
[3] Judgment [15(b)] **{ACB/7/84}**.
[4] Judgment [15(c)] **{ACB/7/84}**.
[5] Judgment [15(d)] **{ACB/7/84}**.
[6] Judgment [15(e)] **{ACB/7/84}**.
[7] Judgment [25] **{ACB/7/87}**.
[8] Judgment [26]-[32] **{ACB/7/87-88}**.
[9] Judgment [34]-[40] **{ACB/7/88-89}**.
[10] Judgment [41]-[51] **{ACB/7/89-91}**.

in India via the Hague Convention. The claim form was served on 10 December 2019. Although Optiemus asserted at the time that it had not received all of the documents, by the time of the hearing before the Judge it was common ground that service had been effective at that date.

24. However, Optiemus did not file an acknowledgement of service or defence, as it was required to do by CPR 16 and 58. Indeed, it ignored all subsequent correspondence sent by BlackBerry until late 2024.

25. The FPS provided BlackBerry with a certificate of service on 2 March 2020, confirming valid service on 10 December 2019. BlackBerry then wrote to Optiemus indicating its intention to seek summary judgment (as a default judgment would be unenforceable in India). An application for summary judgment would also have needed to be served via the Hague Convention.

26. The third period was from March 2020 to August 2020.[11] The FPS was closed through most of this period, due to the onset of the COVID-19 pandemic. As a result, Hague Convention service was not possible. The Judge found that there was more limited evidence available as to what the position was in India, but concluded that BlackBerry could attempt service from around August 2020, although the process might have been slower than usual.

27. The fourth period was from September 2020 to July 2024.[12] During that period, Optiemus did not engage with the proceedings in any way and BlackBerry did not issue its intended application for summary judgment. BlackBerry adduced evidence that it considered that it would not be proportionate to incur the costs of pursuing a summary judgment application, given concerns about Optiemus's financial health and its willingness and ability to satisfy a judgment. The Judge found that on a "*rationally balanced view*", throughout that period "*an enforceable judgment for USD 6 million would have had real economic value, though not necessarily face value*".[13]

28. The fifth period was from July 2024 to November 2025.[14] As noted above, BlackBerry sought to progress the proceedings during this period, giving evidence that its investigations had identified that Optiemus's financial position had improved and that it had again become proportionate to advance the claim. BlackBerry issued the Summary Judgment Application and the Stay Application in July 2024 and issued the Amendment Application in September 2025.

29. Optiemus instructed English solicitors in September 2024. It produced a draft Defence following a long delay and ultimately filed an acknowledgement of service about 5 ½ years late, in August 2025. The Strike Out Application was filed on the same day as the acknowledgement of service.

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[11] Judgment [52]-[53] **{ACB/7/91-92}**.

[12] Judgment [54]-[66] **{ACB/7/92}**.

[13] Judgment [66] **{ACB/7/94}**.

[14] Judgment [67]-[71] **{ACB/7/94-95}**.

**B3. The Strike Out Application**

30. The Judge applied the legal principles in relation to the Strike Out Application at [72] to [112] **{ACB/7/95-104}**. He answered each of the five questions set out at paragraph 19 above in the following way.

31. As to the first question (whether there was a deliberate decision not to pursue the proceedings), the Judge concluded that at "*some point in 2020*" BlackBerry made a deliberate decision not to progress the claim.[15]

32. As to the second question (the period of delay), the Judge found that the period of delay was "*just over four years*", running from March 2020 to July 2024.[16]

33. The Judge dealt with the third and fourth questions (the reasons for the delay and whether they were objectively justifiable) together. He concluded that there was an "*objectively strong reason*" for the delay in progressing the proceedings from March to August 2020, in view of the "*truly unprecedented circumstances*" caused by the COVID-19 pandemic.[17] However, the Judge found that the delay from September 2020 to July 2024 was not objectively justifiable.

34. The Judge then spent 29 paragraphs ([83] to [112] **{ACB/7/97-104}**) addressing the fifth question, viz. whether the appropriate response to BlackBerry's abuse of process was to strike out the claim. The Judge took account of four categories of factors: (i) general factors (including the parties' conduct),[18] (ii) the potential prejudice to Optiemus of the delay,[19] (iii) the prejudice to BlackBerry if the claim was struck out,[20] and (iv) the effect on the Court and the just determination of the dispute.[21]

35. Based on that multi-factorial assessment, the Judge concluded that striking out the claim "*would be disproportionate*" and "*would not best advance the overriding objective*".[22] He considered that, in all the circumstances of the case, "*striking out the claim is not the appropriate or just response*".[23] The Judge identified eight key factors underpinning that decision:

    35.1 The delay did not cause any "*specific identifiable prejudice*" to Optiemus other than in respect of interest, which was capable of being financially estimated and corrected. He did

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[15] Judgment [72] **{ACB/7/95}**.
[16] Judgment [73] **{ACB/7/95}**.
[17] Judgment [74] **{ACB/7/95}**.
[18] Judgment [83]-[85] **{ACB/7/97-98}**.
[19] Judgment [86]-[104] **{ACB/7/98-101}**.
[20] Judgment [105]-[108] **{ACB/7/101-102}**.
[21] Judgment [109]-[110] **{ACB/7/102}**.
[22] Judgment [111] **{ACB/7/102}**.
[23] Judgment [111] **{ACB/7/102}**.

take account of the "*general non-specific prejudice*" caused to Optiemus, but found that a fair trial remained possible.[24]

35.2 Striking out the claim "*would cause specific, and substantial, prejudice to BlackBerry, which would be deprived of the ability to pursue admittedly arguable claims for sums exceeding USD 6 million*".[25]

35.3 Although the Judge had "*firmly in mind the stress the cases consistently lay on diligent pursuit of litigation*", the abuse identified "*was not of the most serious kind*". BlackBerry's decision was deliberate, but it was not in bad faith. BlackBerry brought one claim, which it had intended to progress expeditiously. It did not 'warehouse' a large number of claims.[26]

35.4 The delay after Optiemus failed to file its Defence was prolonged, although it was "*somewhat mitigated by Covid-19*" – with the result that some allowance should be made for the difficulties caused by the pandemic.[27]

35.5 BlackBerry did not need to make the Stay Application. The claims were issued shortly after they had accrued, such that BlackBerry could have discontinued the proceedings in 2020 without the Court's permission and then brought the claims afresh in July 2024 (at which point the claims, or at least most of them, would still not have been time-barred).[28] This was not a case in which the claim was issued close to the end of a limitation period, but rather *"one that was promptly started and whose revival occurred when it remained (albeit, just), a claim for which proceedings could have been commenced"*.[29]

35.6 The "*obligation to advance proceedings lies on both parties*", and "*Optiemus itself did nothing at all in the period from March 2020 onwards to advance them*".[30] Those were "*not the actions of a vulnerable individual defendant, but of a publicly listed company equipped with a legal department and well capable of looking after its interests, which presumably thought that those interests were best served by preserving radio silence*".[31]

35.7 A subsidiary factor was that BlackBerry had other claims which it had not previously brought, based on fees falling due in later years, which were not time barred and which

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[24] Judgment [111(a)] **{ACB/7/102-103}**.
[25] Judgment [111(b)] **{ACB/7/103}**.
[26] Judgment [111(c)] **{ACB/7/103}**.
[27] Judgment [111(d)] **{ACB/7/103}**.
[28] Judgment [111(e)] **{ACB/7/103}**.
[29] Judgment [108] **{ACB/7/102}**.
[30] Judgment [111(f)] **{ACB/7/103}**.
[31] Judgment [111(f)] **{ACB/7/103-104}**.

raised substantially the same issues. It followed that the dispute between the parties could come before the Court in any event.[32]

35.8 There were steps short of strike out that the Court could take. Those steps included imposing a condition in relation to the interest that BlackBerry could claim; the Court's order for costs on the applications before it; the way the Court approached disclosure; and the way the trial judge approached adverse inferences from absent witnesses or missing documents.[33] BlackBerry itself proposed an undertaking not to seek an award of interest for any period of delay that Judge found to be unjustified, which the Court accepted, to deal with potential prejudice from the accrual of interest during this period.[34]

36. The Judge therefore dismissed the Strike Out Application.

**B4. The Stay Application and the Amendment Application**

37. The Judge assessed the Stay Application under the *Denton* framework, finding that:

37.1 The delay was serious and significant, because it risked causing significant prejudice to Optiemus.[35] There were good reasons for the delay until August 2020, "*but no procedurally good reason thereafter, though the reason was not in bad faith even though it was procedurally unacceptable*".[36]

37.2 As to the overall circumstances, he reached the same conclusion (and for the same reasons) as in respect of the Strike Out Application: "*[i]t would be a disproportionate response, inconsistent with the overriding objective, to deprive BlackBerry of the opportunity to advance a properly arguable claim, when the delay has not caused specific prejudice that cannot be corrected, the claim can still be fairly tried, and when the conduct for which sanctions are imposed was not that of BlackBerry alone*".[37]

38. The Judge allowed the Amendment Application, rejecting Optiemus's arguments that the amendments were late and caused prejudice to Optiemus.[38]

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[32] Judgment [111(g)] **{ACB/7/104}**.

[33] Judgment [111(g)] **{ACB/7/104}**. Optiemus is therefore wrong to suggest that BlackBerry has suffered no consequences arising from its abuse of process: see Optiemus's Appeal Skeleton Argument dated 12 February 2026 ("**Optiemus Skeleton**") [4] **{ACB/3/21}**.

[34] Order of Paul Stanley KC dated 19 December 2025 **{ACB/6/75}**.

[35] Judgment [114] **{ACB/7/104}**.

[36] Judgment [115] **{ACB/7/104}**.

[37] Judgment [116] **{ACB/7/104-105}**.

[38] Judgment [118]-[121] **{ACB/7/105}**.

## C. GROUNDS 1 AND 2

39. Ground 1 of the appeal is that the Judge applied the wrong test in relation to striking out on the grounds of '*Grovit'* abuse. Optiemus argues that, on the authorities, the Judge was obliged to strike out BlackBerry's claim unless there were "*compelling reasons*" to do so. That argument relies on a misreading of *Chest Hospital*, and is in any event wrong in principle since (at least) the introduction of the CPR. It should be rejected.

### C1. The pre-CPR authorities

40. *Grovit* remains the leading case. In August 1989, two plaintiffs brought a variety of claims against seven defendants, including claims for unlawful interference with business, conspiracy to injure, passing off, and libel. By March 1990, the second plaintiff discontinued, the claims against four of the defendants were dismissed by consent, and the only claim that survived was the claim for libel. In July 1990, Wright J ordered that the question of whether the words relied on were capable of bearing a defamatory meaning be tried as a preliminary issue. The plaintiff took no further steps for two years. The defendants applied to strike out the claim.

41. The first instance judge struck out the claim based on the principles set out in *Birkett v James* Au/23/152 [1978] AC 297. In that case the House of Lords held that the Court's power to dismiss a claim for want of prosecution could only be exercised where the Court is satisfied either: (i) that the default has been intentional and contumelious, or (ii) that there has been inordinate or inexcusable delay by the plaintiff or his lawyers, *and* (iii) that such delay will give rise to a substantial risk that it is not possible to have a fair trial or is such as is likely to cause or to have caused serious prejudice to the defendants. The Court of Appeal upheld the judge's decision.

42. In the House of Lords, Lord Woolf held that if there was an abuse of process, it was no longer necessary to establish want of prosecution under either of the limbs identified in *Birkett*.[39] Rather, as he explained at 647G: Au/24/199

> *"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."*

43. There are three relevant points that emerge from that passage. First, a finding of abuse of process "*can*" result in a strike out, but would not *automatically* do so.[40] Second, the test for determining whether a claim should be struck out was simply whether the justice of the case required it. Third, Lord Woolf's comment that it would "*frequently be the case*" that a claim would be struck out

[39] *Grovit,* 647H. Au/24/199

[40] A point made by Arnold LJ in *Asturion Fondation v Alibrahim* [2020] 1 W.L.R. 1627 at [50]. Au/38/461

upon a finding of abuse was an observation rather than a statement of any legal test. It *could not* be part of the legal test because a future court would have no basis for knowing whether the specific facts before it would bring it within the "*frequent*" or "*infrequent*" category. The latter two points were highlighted by HHJ Keyser KC in *Lloyd*, who noted that Lord Woolf's observation in parenthesis "*serves to indicate that claimants who abuse the process of the court cannot presume on being indulged by the court with a further bite of the cherry*".[41]

44. *Chest Hospital* was decided about three months after *Grovit*. In that case, the plaintiff (landlord) served notice on the defendant, alleging that the defendant had sublet the plaintiff's premises on various occasions without consent. The plaintiff took no steps to progress the claim for over five years following discovery. The defendant applied to strike out the claim. The first instance judge refused to do so, but the claim was struck out as a '*Grovit'* abuse on appeal.

45. Aldous LJ explained the reasons for his decision at p. 628: Au/25/211

> *"[Following discovery] …the plaintiffs decided that their chances of success were so poor that the action could not succeed unless fresh evidence was obtained. It was in those circumstances that they decided not to prosecute the action unless new facts came to light. That by itself would not amount to an abuse of the process. Delay is to be deprecated, but a delay to enable fresh investigations to be made does not in itself amount to an abuse. However that was not the position in this case. One year passed, then another, another, another and another. The result was that the action passed from being a genuine action to resolve a dispute over possession of a house into one which was moribund and only to be re-activated if something turned up… It was an action kept hanging over the head of Mr Chettle without any intention of bringing it to trial either upon the facts known in or upon the facts known after a reasonable time had elapsed to enable further investigations to be made. I therefore would strike the action out upon the basis that it came to be an abuse of the process of the Court. I realise that the plaintiffs can and may well start a fresh action, but that is to my mind not determinative. Once the action came to amount to an abuse of the process of the Court, it required to be struck out unless compelling reasons to the contrary could be demonstrated. There are no such reasons in this case. I therefore would allow this appeal and order that the action be struck out and that the plaintiffs should pay the costs of this appeal and of the action, to be taxed if not agreed."* (emphasis added)

46. There are two points that arise from that passage. First, when read in context, Aldous LJ did not (and was not purporting to) refine the legal test applicable to '*Grovit'* abuse cases generally, such that compelling reasons would always be required to refuse to strike out a claim once a *'Grovit'* abuse is established. Rather, that remark followed a detailed analysis of the facts of the case before him. As HHJ Keyser KC explained in *Lloyd* at [66(3)]: Au/44/629

> *"There is nothing that I can see in the Chest Hospital case to suggest that Aldous LJ was intending to state a refinement of what Lord Woolf had said in Grovit v Doctor. Indeed, the remark about "compelling reasons" was specifically formulated with reference to the case before the Court ("Once the action …"—my emphasis), not as a general legal*

[41] *Lloyd* [66(1)]. Optiemus is therefore wrong to suggest that the Judge failed to apply the "approach" that strike out would "frequently" be the response to a '*Grovit'* abuse: Optiemus Skeleton [47] **{ACB/3/34}**. Au/44/629

*proposition, and in the light of the nature of the abuse in that case it is no doubt understandable."*

47. Second, even if Aldous LJ did intend to refine the legal test applicable to '*Grovit'* abuse cases, that refinement was inconsistent with the ethos of the CPR (and in particular, the overriding objective requiring the Court to deal with cases justly in accordance with the considerations found in CPR 1.1(2)).[42] The Court was endowed with a wide armoury of powers under the CPR in addition to the power to strike out claims. A hard-edged rule requiring the Court to strike out a claim for '*Grovit'* abuse absent "compelling reasons" unduly limits the discretion of the Court.[43] As May LJ observed in a judgment handed down after the CPR took effect, following the introduction of the CPR "*the court takes into account all relevant circumstances and, in deciding what order to make, makes a broad judgment after considering available possibilities*".[44] Moreover, there are no "*hard and fast theoretical circumstances in which the court will strike out a claim or decline to do so*".[45] HHJ Keyser KC reached the same conclusion in *Lloyd*, finding that Aldous LJ's remarks "*cannot constitute a statement of principle that is legally binding on a court exercising its discretion under the CPR*".[46]

48. About five months after *Chest Hospital*, a Court of Appeal that included Lord Woolf issued its judgment in *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426. The Au/26/212 Court gave a joint judgment on two cases. The first was a claim by a bank against husband and wife, where the bank took no steps for about 5 years after disclosure concluded, and the defendants applied to strike out the claim. The second was a claim for fees brought by a firm of accountants against its client. The client alleged that the claimant had failed to comply with various directions within time, which had caused him serious prejudice.

49. Lord Woolf observed that those two cases presented "*a convenient opportunity for this court to give some guidance… as to the likely consequences in the future of excessive delay in the conduct of legal proceedings*" in view of the imminent changes to how civil litigation would be conducted.[47] At p 1436, he then observed as follows:

*"While an abuse of process can be within the first category identified in Birkett v. James…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*

[42] Unlike Lord Woolf in *Grovit*, in *Chest Hospital* Aldous LJ did not refer to the changes on the horizon with the introduction of the CPR.

[43] As is evident from this case – the Judge held that if a "compelling reasons" test applied he would have considered himself obliged to strike out the claim: Judgment [82].

[44] *Purdy v Cambran* [2000] CP Rep 67 at [51]. Au/29/251

[45] Ibid.

[46] *Lloyd* [66(5)]. Au/44/630

[47] *Arbuthnot* [1429]. Au/26/215

*wholesale failure, as such, to comply with the rules justifies an action being struck out, as long as it is just to do so, will avoid much time and expense being incurred in investigation questions of prejudice, and allow the striking out of actions whether or not the limitation period has expired."* (emphasis added)

50. As HHJ Keyser KC explained in *Lloyd*, the legal test identified by Lord Woolf in *Arbuthnot* is consistent with that identified in *Grovit.* The Court would strike out a claim upon an abuse of process if it was "*just to do so*".[48] Lord Woolf's judgment in *Arbuthnot* is also striking for what it did not say. Lord Woolf made no reference to claims being struck out unless there were "*compelling reasons to do so*". He also made no reference to his own observation in *Grovit* of the Court striking out claims *"frequently"* upon an abuse of process, reaffirming that that was merely an observation and did not form part of the applicable legal test.

**C2. The post-CPR authorities**

51. The CPR took effect from 26 April 1999. BlackBerry has been unable to identify a single case in the 25 years following the introduction of the CPR that cited *Chest Hospital* or applied a *"compelling reasons"* test in '*Grovit'* abuse cases.[49] There was no confusion about the test that would apply: it was simply whether the justice of the case required the claim to be struck out.

52. *Asturion Foundation v Alibrahim* [2020] 1 WLR 1627, which is the leading Court of Appeal case on the proper approach to alleged abuse of process arising from delay, provides a good example of the Court's approach to this question. The dispute concerned a claim for the recovery of property on the basis that it had been transferred without authority. After the parties agreed directions to trial, the claimant went quiet for about 8 months. When asked about its intentions, the claimant said that it had not abandoned the claim, but there was no reason to press ahead immediately because the parties were involved in separate proceedings in Liechtenstein. The defendant applied to strike out the claim. Au/38/451

53. The Deputy Master struck out the claim on the grounds of abuse of process. That decision was reversed by Judge Cook (sitting as a judge of the Chancery Division). On a second appeal, the Court of Appeal upheld the Judge Cook's decision. At [78] Arnold LJ held that Judge Cook was entitled to conclude that the claimant's conduct was not an abuse of process because its reason for not progressing the claim was objectively reasonable. However, he held that even if the judge was wrong to reach that conclusion, "*the question would remain as to whether he was entitled to exercise his discretion not to strike out the claim*". There were "*lesser sanctions available to the court which were more proportionate to the abuse*". In particular, the Court "*could have* Au/38/466

[48] *Lloyd* [50]. Au/44/613

[49] For completeness, in *Re Vitara Foods Ltd* [1999] BCC 315 at 321 (which was a pre-CPR case), Lindsay J observed (relying on *Chest Hospital*) that once *Grovit* abuse was shown "*it appears from this case that it is for the plaintiff to bring forward compelling reasons to the contrary if striking out is to be avoided*". Au/27/230

*imposed tight directions to trial, including unless orders against Asturion, and it could have imposed a costs sanction*". He therefore found that striking out was a "*disproportionate response*". As HHJ Emma Kelly observed in *SNV v Moutaz Al Khayyat* [2025] EWHC 3265 (KB) at [69], Arnold LJ did not refer to the court's discretion "*being fettered by the need for 'compelling reasons' or other factors*". Au/46/682

54. The only contrary authority is the judgment of Richards J in *Watford Control*. In that case the claimant took no steps to progress a claim for close to three years after a CMC was adjourned. The claimant then applied to re-list the CMC, while the defendant applied to strike out the claim. At first instance Master Pester found that the claimant had committed an abuse of process. Considering all the circumstances, he concluded that it was appropriate to impose sanctions falling short of striking out the claim. He did not refer to the *Chest Hospital* case.

55. *Chest Hospital* was brought to the attention of Richards J on appeal, and he considered that Aldous LJ's "*compelling reasons*" remark was a binding statement of principle.[50] It appears that this conclusion reflected a concession from the claimant that, in *Chest Hospital,* Aldous LJ was seeking to lay down a general principle rather than merely discussing the facts before him.[51] That concession should not have been made. As explained above, when read in its proper context Aldous LJ *was* commenting on the facts. The "compelling reasons" remark was made following a long passage in which he deprecated the claimant's conduct *in the case before him*.

56. Richards J also rejected the argument that a *"compelling reasons"* requirement could no longer be good law upon the entry into force of the CPR. In arriving at that decision, however, he appears to have assumed that Lord Woolf's remark that strike-out would "*frequently*" follow in cases of *Grovit* abuse was of a piece with the "*compelling reasons*" principle.[52] For the reasons already set out above, Lord Woolf's remark in *Grovit* was an observation about what would frequently happen. It was not expressed to be (and could not be) part of any legal test. The legal test established by *Grovit* (which was consistent with the CPR) was simply whether justice required the claim to be struck out. It follows that, *if* Aldous LJ was seeking to refine the legal test to be applied to cases of *Grovit* abuse (which he was not), that was a refinement that unduly fettered the discretion of the court and could not survive the entry into force of the CPR.

57. *Lloyd* was decided less than 3 months after Richard J's judgment in *Watford Control*. It was a claim arising from the termination of a joint venture agreement. There were several periods of hiatus during the proceedings. After a long period of inactivity, the Court directed the listing of

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[50] *Watford Control* [34]. Au/43/587

[51] *Watford Control* [35]. Au/43/587

[52] *Watford Control* [36], [46]. Au/43/587, 589

a CMC, and the defendants applied to strike out the claim based on abuse of process. HHJ Keyser KC found that the conduct of the claim had not been an abuse of process, so his comments on the circumstances in which a claim should be struck out upon a finding of *Grovit* abuse are (strictly speaking) *obiter*. However, the issue was fully argued before him,[53] he considered it in great detail, and he advanced compelling reasons for rejecting Richard J's analysis.

58. Many of the points made by HHJ Keyser KC have already been referred to above. In summary, HHJ Keyser KC held that Richard J's analysis in *Watford Control* was "*incorrect in principle as well as out of step with other post-CPR cases*" for several reasons:

58.1 The legal test established by *Grovit* was simply whether the justice of the case required the claim to be struck out. Lord Woolf's remark that justice would *"frequently"* require claims to be struck out was "*an observation, not a legal test*".[54]

58.2 The statement in *Chest Hospital* that a claim will be struck out for '*Grovit'* abuse absent "*compelling reasons*" to the contrary is not necessarily inconsistent with *Grovit*, but "*introduces a gloss that goes further than anything said in that case*".[55]

58.3 There was nothing in *Chest Hospital* that suggested that Aldous LJ was intending to refine the legal test for *Grovit* abuse. He was "*not greatly surprised to find only one judgment before 2024 that cites the Chest Hospital case – and none, other than Watford Control itself, after the making of the CPR*".[56]

58.4 If the *Chest Hospital* case was to be taken as having set down a legal test, it cannot constitute binding precedent because it pre-dated the CPR.[57] Under the CPR it was no longer appropriate for a defendant "*to let sleeping dogs lie*". That is a factor that may be relevant in deciding how to respond to an abuse.[58]

58.5 '*Grovit*' abuse "*comes in various shapes and sizes*". It was not clear why "*(a) every variant of Grovit abuse should be subject to the same "compelling reasons" test or (b) why this "compelling reasons" test should be applicable to every instance of Grovit abuse* [under CPR 3.4(2)(b)]*, regardless of gravity, but not at all to instances of breach of orders* [under CPR 3.4(2)(c)]".[59]

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[53] *Lloyd* [66]. Au/44/629
[54] *Lloyd* [66(1)]. Au/44/629
[55] *Lloyd* [66(2)]. Au/44/629
[56] *Lloyd* [66(3)]. Au/44/629
[57] *Lloyd* [66(5)]. Au/44/630
[58] Ibid.
[59] *Lloyd* [66(8)]. Au/44/631

58.6 A *"compelling reasons"* test for *'Grovit'* abuse "*appears incongruous when one considers the different test that applies to relief from sanction*".[60]

59. The final case to consider is *SNV*, which was handed down the day before the Judgment under appeal. *SNV* was another claim for '*Grovit'* abuse, where the only step that the claimant had taken to progress the claim in 5 years was to issue the claim form. HHJ Emma Kelly found that the claimant had committed a *'Grovit'* abuse. She identified the conflict in the authorities between *Watford Control* and *Lloyd*, but did not find it necessary to determine the conflict because her conclusion would be the same on either approach.[61]

60. Towards the end of her judgment, HHJ Emma Kelly observed that "*the modern approach to case management under the CPR is the antithesis of endorsing abuse of process*".[62] Optiemus appears to place some weight on that sentence. But it does not advance the debate about whether a "compelling reasons" test applies upon a finding of '*Grovit'* abuse. Under the CPR, the Court has a wide range of tools at its disposal to censure a '*Grovit'* abuse. Striking out is one of them, but there are many others. It could not seriously be suggested that a *refusal* to strike out following a finding of '*Grovit'* abuse can be regarded as an *endorsement* of the abuse, particularly if other sanctions are imposed on the breaching party (as has happened in this case). Rather, as noted above, at [69] HHJ Emma Kelly specifically observed that the leading post-CPR Court of Appeal Au/46/682 authority to consider this area of law (i.e. *Asturion*) did *not* suggest that the Court's discretion was "*fettered by the need for 'compelling reasons' or other factors*".

## C3. The Judge's approach

61. Having carefully considered the authorities above,[63] the Judge determined that the correct approach in deciding whether to strike out a claim upon finding of *'Grovit'* abuse is as follows:

> *"Under the CPR, the proper approach to the exercise of that discretion does not depend on "compelling reasons", but on the application of the principles that govern the court's exercise of such discretion under the CPR, including proportionality and the overriding objective. The result of the exercise will "frequently" be that the claim will be struck out. But that is because that will "frequently" be what the overriding objective requires, not because there is some special test of "compelling reason"."*

62. The Judge set out his reasons for reaching that conclusion in some detail. In summary:

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[60] *Lloyd* [66(9)]. Au/44/631

[61] *SNV* [69]. Au/46/682

[62] *SNV* [70]. Au/44/682-683

[63] With the exception of *SNV*, which was not cited to the Judge because it had not yet been handed down at the time of oral arguments, but which supports the conclusion the Judge reached.

62.1 This was an area where "*the relevant rules and landscape changed*" with the introduction of the CPR. The imposition of a "*hard-edged test*" ("compelling reasons") in the face of the discretionary powers conferred upon the judge by the CPR would be *"incongruous"*.[64]

62.2 Although the parties in *Chest Hospital* accepted that Aldous LJ had intended to state a general principle, like HHJ Keyser KC in *Lloyd*, he did not consider that Aldous LJ's comment was intended to state a rule.[65] It was a statement made by reference to "*the action*" before Aldous LJ, not a statement of the general legal test.

62.3 *'Grovit'* abuses cover a spectrum of cases. The court cannot "*meet its duty to exercise its powers consistently with the overriding objective—which embraces a number of elements which do not always point the same way—if it must apply a "compelling reasons" test across the board*".[66]

63. For the reasons set out above, the Judge's reasoning and conclusions are unimpeachable. To impose a *"compelling reasons"* requirement, when considering whether to strike out a claim for abuse of process, would fetter the Court's discretion in a way that is unprincipled, which has no justification in the text or scheme of the CPR, and which is contrary to the (long-established) approach in the authorities. Richard J's decision that this test did apply, in *Watford Control*, was based upon a misapplication of *Chest Hospital*. Ground 1 should therefore be dismissed.

**C4. Ground 2**

64. Ground 2 asserts that, even if the Judge was correct in not applying the "compelling reasons" test, he should have taken account of the absence of compelling reasons (or the seriousness of the abuse) in deciding whether to strike out the claim.

65. Before turning to the details, there are two principal responses to that:

65.1 The suggestion that the absence of "compelling reasons" to strike out the claim was so critical that it ought to have been taken into account, and would have turned the Judge's decision,[67] is effectively an attempt to introduce the "compelling reasons" test through the back door. It is obvious that if the compelling reasons test were found not to apply, then there would be cases in which the court decided that a strike out was not an appropriate response to the '*Grovit'* abuse *despite* the absence of 'compelling reasons'. Or to put it differently, the *presence* of compelling reasons not to strike out a claim would almost inevitably result in no strike out; but the *absence* of compelling reasons would not

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[64] Judgment [12] **{ACB/7/83}**.

[65] Ibid.

[66] Judgment [13] **{ACB/7/83}**.

[67] See Optiemus Skeleton [44] **{ACB/3/33}**.

necessarily result in a strike out if strike out was not otherwise in the interests of justice. Read this way, Ground 2 simply recycles the same points made by Optiemus in relation to Ground 1 (and it is perhaps no coincidence that Optiemus addresses Grounds 1 and 2 together in its skeleton argument).

65.2 If Ground 2 is *not* arguing that the Judge should have applied a different legal test, then it is simply a challenge to the Judge's exercise of his discretion based on the facts. Optiemus (in effect) argues that the Judge's reasons for declining to strike out the claim were not good enough, because the Judge should have attached more weight to the significance of the delay. But Optiemus is simply wrong to suggest[68] that the Judge did not *take account of* the seriousness of the abuse. He accepted that he should not approach the issue "*in a spirit of indulgence*", and "*must remember that the overriding objective involves not merely fair trial, but the enforcement of rules and practice directions*".[69] Optiemus simply disagrees with the balance struck by the Judge, not his approach, and the Judge's evaluation is one with which an appeal court should not interfere.

66. As to Optiemus's further points of detail:

66.1 Optiemus claims that the effect 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*", with the result that *Grovit* and *Birkett* abuse would "*collapse into one another*".[70] That is wrong. The Court will consider whether to strike out the claim in view of all the circumstances of the case (of which prejudice to the defendant is *one* factor). The Court may choose to strike out a claim for any number of reasons – for example, if it does not believe that the claimant intends "*to progress the case in an orderly fashion*" going forward,[71] or if there are no effective alternatives to strike out in the circumstances. The opposite was, of course, true in this case – BlackBerry was seeking to progress the claim promptly, and any prejudice caused by accrual of interest was met by BlackBerry's proposed undertaking.

66.2 At [111(c)] of the Judgment, the Judge observed that BlackBerry's abuse was not of the "*most serious kind*", because it did not involve 'warehousing' a large number of claims, followed by a "*strategic selection of those that turned out to be most valuable*" **{ACB/7/103}**. Optiemus relies on that paragraph to suggest that on the Judge's approach, strike out would only be appropriate for the *"worst"* case of warehousing.[72] That is a

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[68] See Optiemus Skeleton [45] **{ACB/3/33}**.

[69] Judgment [15(e)] **{ACB/7/84}**.

[70] Optiemus Skeleton [46] **{ACB/3/33-34}**.

[71] See *Alfozan v Alrasheed* [2022] EWHC 66 (Comm) at [53]. Au/39/490

[72] Optiemus Skeleton [48] **{ACB/3/34}**.

distortion of the Judge's decision. The Judge's finding at paragraph [111(c)] was one among a series of factors that led him to conclude that striking out the claim was not an appropriate response to the abuse. The Judge did not say (or suggest) that that factor alone was decisive. On the approach adopted by the Judge, it would naturally be possible that, in the absence of other factors, a claim would be struck out despite not being an example of the "*most serious kind*" of warehousing, depending on the balance of other factors.

67. For those reasons, Ground 2 should also be dismissed.

## D. GROUND 3

68. Ground 3 includes various complaints about the Judge's evaluation of the facts. The short answer to these points is that Optiemus identifies no basis for interfering with the Judge's assessment at the appeal stage. But none of its complaints have any merit in any event.

### D1. Witnesses

69. At [87]-[89], the Judge concluded that although Optiemus would suffer some prejudice due to the unavailability of witnesses, the evidence did not "*support the proposition that BlackBerry's delay caused concrete prejudice in this respect*" **{ACB/7/98}**.

70. Optiemus complains about the Judge's evaluation in relation to three witnesses. The first is Vineet Bhatia, who died in September 2021. The Judge found that Mr Bhatia "*would have been unlikely to have been thoroughly proofed before his death, even if proceedings had advanced quickly*".[73] It followed that the relevant delay did not cause the alleged prejudice. That finding was entirely logical and correct. Had BlackBerry issued its intended summary judgment application after the FPS reopened in September 2020, it would likely have taken some time for the application to be served on Optiemus via the Hague Convention (bearing in mind the Judge's finding that the process might have been "*slower than normal*" in India due to the pandemic).[74]

71. Optiemus complains that the Judge did not explain why only a "*thorough proof*" mattered for the purposes of evaluating prejudice.[75] That is a distortion of the Judge's findings. The Judge was not purporting to assess the matter in binary terms, but rather considered the *extent* to which BlackBerry's delay caused prejudice. Given Mr Bhatia's death only a year after the process for service of the summary judgment application could have commenced, the proceedings would not have progressed to the stage where Optiemus would have obtained evidence that would make any material difference to its position.

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[73] Judgment [88] **{ACB/7/98}**.

[74] Judgment [53] **{ACB/7/91-92}**.

[75] Optiemus Skeleton [55] **{ACB/3/36}**.

72. The other two witnesses are Arvind Kumar and Vikash Agarwal, who left Optiemus in May 2021 and July 2021 respectively. The Judge did not address their positions individually, but it is self-evident from their dates of departure that Optiemus is unlikely to have suffered any real prejudice due to BlackBerry's delay in progressing the claim. They would have departed in any event, before the proceedings had reached the stage at which they could have given evidence for trial.

**D2. Passage of time**

73. At the end of the passage of his judgment addressing the position of Optiemus's witnesses, the Judge observed that "*[t]his 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*".[76] While the context makes clear that that observation was made in the context of the availability of witnesses, Optiemus seeks to present it as a general finding concerning the passage of time, complaining that this was not a matter raised with the parties.[77]

74. The potential prejudice arising from the unavailability of witnesses *was* addressed by the parties. BlackBerry also emphasised the significance of the documentary record, and specifically noted that it had preserved the relevant documents in accordance with its document preservation obligations.[78] It is evident that this is not, for example, a case which turns upon an oral agreement, or oral representations, or who said what to whom at particular meetings between the parties.

75. The Judge's conclusion that this case would not turn on "*on vivid memories of very recent events*" was therefore justified. He was similarly justified in referring to the significance of the documents, in circumstances where the contract was entirely in writing and a large number of written communications would have been exchanged between the parties in relation to their performance of the contract (indeed, Optiemus's Defence refers to many such communications).

**D3. Accounting**

76. Optiemus contends that the Judge committed a "*plain error of fact*" by failing to take account of a passage from the evidence of Mr Rabinowicz explaining the prejudice allegedly suffered by Optiemus because it removed a provision concerning the litigation from its accounts.[79]

77. This submission is puzzling, as the Judge did specifically refer to the relevant passage from Mr Rabinowicz's evidence,[80] and then found that Optiemus did not suffer any relevant prejudice because Optiemus' financial statements gave "*rise to various questions*" that were unanswered

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[76] Judgment [89] **{ACB/7/98}**.

[77] Optiemus Skeleton [58] **{ACB/3/37}**.

[78] BlackBerry's Skeleton for the first instance hearing, [100.2] **{ASB/29/230-231}**.

[79] Optiemus Skeleton [59] **{ACB/3/37-38}**.

[80] Compare Judgment [97] with Optiemus Skeleton [59] **{ACB/3/37-38}**. Although [59] of the Judgment does not refer to Mr Rabinowicz by name, it is clear from the passage quoted that it was referencing the relevant section of his evidence.

on the evidence. Those questions were set out at [100] of the Judgment **{ACB/7/100}**. The Judge was correct that Optiemus's evidence had not grappled with them.

**D4. The amendments**

78. Optiemus asserts that it suffered prejudice from BlackBerry's failure to bring amendments (that were ultimately made through the Amendment Application) at an earlier date. In its skeleton argument, Optiemus explains that the "*true prejudice*" was not whether the contract "*in fact was terminated*", but rather that Optiemus did not have the opportunity to send a termination notice to make its "*position stronger*".[81]

79. The Judge found that this point raised an issue about the substantive merits of the case, which was incapable of resolution at the strike out stage.[82] He was right. Whether Optiemus suffered any prejudice by being unable to send a termination notice earlier depends upon whether, as a matter of construction of the MSLA and its schedules, a termination notice would have made any difference to its obligation to pay the Minimum Licence Fees. The Judge was not in a position to determine that issue.

80. In any event, Optiemus was wrong to identify these points as relevant 'prejudice'. The causes of action set out in the amendments had (in their entirety or in large part) not even *accrued* in 2020, when the relevant delay began. These claims could not have been advanced at that stage. Further, if the original claim had simply been discontinued then the claims in the amendments could have been brought later, as of right, and Optiemus would have had no ground to object; the Judge relied on this point as regards the claims pursued in the original claim form, and it applies *a fortiori* as regards the claims advanced by amendment. None of these claims are time-barred, even now (the first of the further claims accrued in the Summer of 2020, at the earliest). There is therefore no relevant prejudice from the amendments being advanced in September 2025.

**D5. Interest**

81. At hand down, the Judge accepted BlackBerry's undertaking that it would not claim interest on the sums originally claimed by it during the period of undue delay, but did not disallow interest on the sums claimed in the claims introduced by amendment .[83] Optiemus states that this caused it "*concrete prejudice*", because (absent the '*Grovit'* abuse) BlackBerry would have had to plead and pursue those claims earlier.[84]

82. The Judge considered and rejected that argument at hand down, concluding that:

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[81] Optiemus Skeleton [62] **{ACB/3/39}**.

[82] Judgment [104] **{ACB/7/101}**.

[83] Hand Down Judgment dated 19 December 2025 [1]-[8] **{ACB/8/107}**.

[84] Optiemus Skeleton [63] **{ACB/3/39}**.

82.1 The interest on the sums claimed by amendment were not caught in principle by the '*Grovit'* abuse, because - even if the Judge refused to lift the stay - BlackBerry would have been free to pursue them in separate proceedings.[85]

82.2 Optiemus would be free to argue at trial that the trial judge should do "*something different…about interest*", because the claims were not brought until 2025.[86]

83. Those conclusions were clearly correct. In any event, if the Judge was wrong on this point then the appropriate course would be to require a broader undertaking, not strike out the claim.

## E. GROUND 4

84. Ground 4 includes various complaints about the Judge having taken account of irrelevant factors or failed to take account of relevant factors.

### E1. Alleged prejudice from investigating questions of prejudice

85. Optiemus contends that the Judge failed to take account of the prejudice involved in investigating questions of prejudice, including (in particular) *"[t]wo and a half days of Court time"*.[87] This appears to be a new point. In its skeleton argument for the hearing before the Judge, Optiemus referred to prejudice arising from: (i) missing documents, (ii) unavailable witnesses, (iii) impact on shareholders and Optiemus (which is the point about the provision removed from Optiemus's accounts), (iv) interest, and (v) BlackBerry's alleged "submarine" pursuit of the claim.[88] The Judge addressed each of those matters comprehensively in his Judgment.[89]

86. In any event, even if the Judge had been invited to consider this matter, it would not have had any effect on his findings. This is because the point is thoroughly bad. The Court spent time considering allegations of prejudice because Optiemus advanced those allegations, before finding that those allegations were insufficient to justify the relief Optiemus sought. Optiemus cannot rely on the fact that it required the Court to incur time dealing with its (unsuccessful) arguments as an independent source of prejudice.

87. In any event, but for the November 2025 hearing itself, the Court specifically found that the proceedings had not "*at any of its earlier stages, consumed much court time and resource*".[90] The (lack of) consumption of court resources was therefore a point *against* striking out the claim.

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[85] Hand Down Judgment dated 19 December 2025 [11] **{ACB/8/107-108}**.

[86] Hand Down Judgment dated 19 December 2025 [12] **{ACB/8/108}**.

[87] Optiemus Skeleton [64] **{ACB/3/40}**.

[88] Optiemus Skeleton for the hearing on 19-20 November 2025 [55]-[73] **{ASB/30/252-256}**.

[89] Judgment [86]-[104] **{ACB/7/98-101}**.

[90] Judgment [109] **{ACB/7/102}**.

## E2. Focus on Optiemus's conduct

88. Optiemus contends that the Judge was wrong in law to rely on Optiemus's conduct in deciding what sanction to impose in response to the abuse.[91] That contention is based the remark of Lord Woolf in *Arbuthnot* at p 1435 that "*The conduct of the defendant may have been remiss. However, this is not a matter upon which the plaintiff can rely when there has been an abuse of process*". Lord Woolf's remark was – and has subsequently been understood as being – relevant only to the first limb of enquiry about whether there has been an abuse of process. It does not apply to the second limb of enquiry about what sanction to impose for the abuse. Au/26/221

89. That is clear from first principles: whether strike out is a proportionate sanction is necessarily a matter that takes into account *both* parties' conduct, particularly where the party seeking strike out has done nothing to progress the proceedings. The position is *a fortiori* where – as here – Optiemus committed its own (serious) breaches of the CPR requirements in failing to participate in the proceedings, which were directly responsible for the initial delay to the action.

90. This has also been confirmed as a matter of authority:

    90.1 In *Solland International v Clifford Harris* [2015] EWHC 3295 (Ch),[92] after referring to the first instance judgment's citation of Lord Woolf's remarks in *Arbuthnot*, Arnold J observed at [81]: "*I agree with the Master that the passage in Lord Woolf's judgment to which he refers establishes that a claimant who has been guilty of abuse of process cannot rely upon the defendant's inactivity as excusing his abuse*" (emphasis added). Au/34/367

    90.2 A similar point was made by HHJ Pearce in *Alfozan* at [39]: *"…the fact that the Second Defendant could have driven matters forward by itself applying for a CMC would go only to the exercise of the discretion and in particular the question as to whether the Second Defendant had acquiesced in the Claimant's inaction so as to make striking out a disproportionate response*". Au/39/486

91. Accordingly, there is no inconsistency between the authorities under CPR 3.4(2)(b) and CPR 3.4(2)(c), and in deciding what sanction to impose the Judge was entitled to rely on Clarke LJ's statement in *Asiansky Television plc v Bayer-Rosin* [2001] EWCA Civ 1792 at [48] that "*[i]t is no longer appropriate for defendants to let sleeping dogs lie*". As HHJ Keyser KC explained in *Lloyd* at [66(7)], "*[i]t may be that strike-out will more commonly be the response to abuse of process than to the breach of an order. But that does not mean that there is or ought to be any basic difference in approach when considering the two situations.*" Au/31/280 Au/44/630

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[91] Optiemus Skeleton [65] **{ACB/3/40}**.

[92] Optiemus refers to the decision of Master Bowles in the same proceedings at [2015] EWHC 2018 (Ch): Optiemus Skeleton [65] **{ACB/3/40}**.

### E3. No breach of Court rule

92. At [111(c)], the Judge held that BlackBerry's decision not to progress the proceedings "*did not involve any breach of any specific rule*" **{ACB/7/103}**. Optiemus contends that that "*was an unsupportable finding*", because BlackBerry was in breach of CPR 1.3, which requires the parties to help the Court to further the overriding objective.

93. That is a non-point. The Judge had CPR 1.3 well in mind and referred to the parties' obligations under CPR 1.3 at [6] and [28]. Indeed, that seems to be why the Judge referred to BlackBerry not having breached any "*specific*" rule, as opposed to its general duty to assist the Court.

## F. GROUND 5

94. Ground 5 turns upon Optiemus's classification of '*Grovit'* abuse cases into "*maybe*" cases (where a party pauses a claim pending an event occurring in the future) and "*never*" cases (where a party has "*no real intention of bringing the action to trial*"). Optiemus's position before the Judge was that for "*never*" cases, the Court did not need to consider whether the reasons for the delay were objectively justified.[93]

95. The Judge rightly rejected this classification as incorrect in principle and unrealistic in practice:

    95.1 As the Judge explained at [8(k)], it is well established that a conclusion that there has been an abuse is never automatic. Lord Woolf made that clear in *Grovit* (as noted at paragraph 43 above). The same point was reiterated by Arnold LJ in *Alibrahim* at [50]. Au/38/461

    95.2 Moreover, as the Judge then went on to explain at [8(k)], the distinction between "maybe" and "never" cases is not realistic in practice, because the line between those two categories "*will rarely be clearcut*".

96. In any case, the point fails on the facts. Optiemus accepts that BlackBerry's evidence advanced reasons for the delay in progressing the proceedings from late 2019 to July 2020, but says that it did not advance reasons for the delay from August 2020 to July 2024.[94] BlackBerry did, then – of its own initiative, and not prompted by any action in the proceedings from Optiemus – seek to progress the proceedings. If it mattered, it is clear that this was not a "*never*" case, because otherwise BlackBerry would not have taken these steps.[95] That only serves to illustrate the

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[93] Judgment [8(k)] **{ACB/7/82}**.

[94] Optiemus Skeleton [72] **{ACB/3/42-43}**.

[95] Cf Optiemus Skeleton [71] **{ACB/3/42}**, where Optiemus says that BlackBerry's conduct is "*inconsistent with this being a maybe case throughout*" (emphasis added). That further muddies the waters, because it suggests that Optiemus might in fact have in mind a third category, viz. a case that starts as a "maybe" case but later becomes a "never" case. The same point emerges from Optiemus Skeleton [73] **{ACB/3/43}**, where Optiemus says that BlackBerry had no real intention of pursuing the claim to trial "*at least for a time*". This is not a recognisable use of the term *"never"*.

strength of the Judge's point that debating which category a case should be placed into would be a "*needlessly scholastic*" exercise.[96]

## G. GROUND 6

97. Optiemus contends that the Judge's decision was perverse on his own (undisturbed) findings, which should have resulted in the claim being struck out.[97]

98. This ground of appeal also lacks any merit. The judge assessed the relevant facts with care and in detail, referring to the following matters: (i) the absence of any specific identifiable prejudice to Optiemus; (ii) the specific and substantial prejudice to BlackBerry that would result if its claim were struck out; (iii) that BlackBerry's abuse was not of the most serious kind and not in bad faith; (iv) that while the delay was prolonged, some margin of appreciation should be afforded to BlackBerry due to the disruption caused by the pandemic; (v) that BlackBerry could have avoided making the Stay Application by pursuing a new claim (but did not do so); (vi) that Optiemus itself did "*nothing at all*" to advance the proceedings from March 2020 onwards; (vii) that BlackBerry has new claims that it had not brought (and which were not time barred); and (viii) that there were steps falling short of strike out that could be taken to address the abuse.[98]

99. Having considered those matters, the Judge concluded that striking out the claim "*would be disproportionate, and would not best advance the overriding objective*".[99] The Judge's decision not to strike out the claim represents a classic multi-factorial assessment which the Court "*must be especially cautious about interfering with*".[100]

100. Optiemus alleges that this case provides "*the starkest facts on which the Court has refused to strike out for Grovit abuse*".[101] That submission is simply an assertion, and it is wrong. Optiemus identifies no case in which a delay to proceedings has arisen in (even arguably) similar circumstances, and where the Court has struck out the claim. It notably also identifies no case in which an applicant has obtained an order for strike out where the applicant itself[102] committed serious breaches of the CPR by failing to participate in the proceedings, thereby derailing the progress of the action, before the respondent did anything that could fairly be criticised (let alone characterised as abusive). But that is this case. In those circumstances it would be far more 'stark'

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[96] Ibid.

[97] Optiemus Skeleton [74]-[75] **{ACB/3/43-44}**.

[98] Judgment [111(a)] – [111(h)] **{ACB/7/102-104}**.

[99] Judgment [111] **{ACB/7/102}**.

[100] *Okotoks Limited (Formerly Spicerhaart Limited) v Fine & Country Limited* [2014] F.S.R. 11 at [50]. Au/32/303

[101] Optiemus Skeleton [74] **{ACB/3/43}**.

[102] Not to mention an Applicant that is a publicly listed company.

(and very surprising) if Optiemus had succeeded in striking out the claim against it. It is not sensible to suggest that the Judge's decision to refuse that relief is 'perverse'.

101. Finally, Optiemus also asks (rhetorically) *"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?"*[103] The short answer, which would be apparent to the party reading the Judgment, is that a decision to self-consciously commit an abuse of process would (obviously) be in bad faith and that would be a strong factor in favour of strike out. The position on the facts of this case is very different, because BlackBerry had genuine reasons for not advancing the claim which were not in bad faith (Judgment, [111(c)], [115]), even if the Judge found that they were procedurally insufficient. A fuller answer would also point out that BlackBerry has suffered a meaningful downside, namely the loss of its interest claim for the period of undue delay.

## H. GROUND 7

102. Optiemus contends that the Judge should not have allowed the Stay Application. It relies on the same points that it makes in respect of the Strike Out Application. Those points are misconceived, for the reasons set out above.

103. Optiemus also submits that since the burden in relation to the Stay Application was on BlackBerry, "*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*".[104] That is an unparticularised submission which does not refer to the *specific* points that the Court should have counted against BlackBerry due to the different burden of proof on the Stay Application. No such points have been identified because no such points exist.

## I. CONCLUSION

104. For the reasons given above, BlackBerry respectfully invites the Court to dismiss the Appeal.

**CRAIG MORRISON KC**

**CHINTAN CHANDRACHUD**

**Brick Court Chambers**

**30 March 2026**

[103] Optiemus Skeleton [4] **{ACB/3/21}**.

[104] Optiemus Skeleton [76] **{ACB/3/43}**.