Neutral Citation Number: [2023] EWCA Civ 821

Case No: CA-2023-000225

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT GUILDFORD
HER HONOUR JUDGE GEORGE
Case No: A52YJ740

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2023

Before :

LORD JUSTICE LEWISON
LORD JUSTICE BAKER
and
LADY JUSTICE NICOLA DAVIES

- -

Between :

LOUISE KEITH	**Appellant**
- and -	
(1) MICHAH LUCIAN ALEXANDER BENKA	
(2) FAIRWARP MANAGEMENT LIMITED	**Respondents**

- -
- -

Nick Grundy KC (instructed by **Direct Access**) by the **Appellant**
Daniel Gatty (instructed by **Gardner Leader LLP**) for the **Respondents**

Hearing date : 04/06/2023

- -

Approved Judgment

This judgment was handed down remotely at 11.00am on 13.07.2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

The claim

1. In February 2014 Mr Benka issued proceedings in the county court against Ms Keith. He was at the time the registered proprietor of a property known as Fairwarp. The building consists of a large country house converted into six separate and self-contained apartments or flats ("the flats"). The flats are all let on long leases. Mr Benka was the lessee of three of them. Ms Keith was the lessee of flat 6 under a 99 year lease granted in 1959.

2. By his Particulars of Claim Mr Benka alleged that Ms Keith was in breach of various covenants in the lease; that there were arrears of rent amounting to £600; and arrears of service charge amounting to £23,258.34. Paragraph 21 of the Particulars of Claim alleged that Mr Benka had served a section 146 notice outlining the breaches and paragraph 29 claimed forfeiture. Some of the alleged breaches took place in 2007, and many of them concerned behaviour by Ms Keith's sub-tenants, also stretching back to 2007. The section 146 notice on which he relied had been served in April 2013. Ms Keith's Defence denied the breaches, denied having received a valid section 146 notice and in the alternative claimed relief against forfeiture.

3. At the time the proceedings were issued section 168 of the Commonhold and Leasehold Reform Act 2002 restricted a landlord's ability to serve a section 146 notice. Before such a notice could be served, the tenant either had to admit the breach, or there had to be a finding of breach, either by the court or the FTT. Section 168 (4) provided:

> "A landlord under a long lease of a dwelling may make an application to the appropriate tribunal for a determination that a breach of covenant or condition in the lease has occurred."

4. The appropriate tribunal in England is the FTT. Section 81 of the Housing Act 1996 imposed similar restrictions on the exercise of a right of forfeiture; and service of a section 146 notice relating to service charges. Section 176A (1) of the 2002 Act provides:

> "Where, in any proceedings before a court, there falls for determination a question which the First-tier Tribunal or the Upper Tribunal would have jurisdiction to determine under an enactment specified in subsection (2) on an appeal or application to the tribunal, the court—
>
> (a) may by order transfer to the First-tier Tribunal so much of the proceedings as relate to the determination of that question;
>
> (b) may then dispose of all or any remaining proceedings pending the determination of that question by the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal, as it thinks fit."

5. The specified Acts include the 2002 Act itself. Section 176A (4) provided:

> "(4) Rules of court may prescribe the procedure to be followed in a court in connection with or in consequence of a transfer under this section."

6. Schedule 12 paragraph 3 of the 2002 Act provided:

> "(1) Where in any proceedings before a court there falls for determination a question falling within the jurisdiction of a leasehold valuation tribunal, the court—
>
> (a) may by order transfer to a leasehold valuation tribunal so much of the proceedings as relate to the determination of that question, and
>
> (b) may then dispose of all or any remaining proceedings, or adjourn the disposal of all or any remaining proceedings pending the determination of that question by the leasehold valuation tribunal, as it thinks fit.
>
> (2) When the leasehold valuation tribunal has determined the question, the court may give effect to the determination in an order of the court.
>
> (3) Rules of court may prescribe the procedure to be followed in a court in connection with or in consequence of a transfer under this paragraph."

7. CPR rule 56.4 provided that a practice direction might set out special provisions with regard to claims under various Acts, including the 2002 Act.

The transfer order

8. On 23 January 2015 Ms Keith applied to strike out the claim on the ground that Mr Benka had not been entitled to serve a section 146 notice because section 168 was not satisfied. DJ Bell heard that application on 2 February 2015. He refused to strike out the claim on that ground; but he referred issues about whether there had been a breach of covenant to the FTT. He further ordered that the proceedings in the county court should be stayed, pending determination by the FTT. But he also gave liberty to apply.

9. Paragraph 15 of Practice Direction 56 as it stood in 2015, (at least as printed in the White Book) provided:

> "If a question is ordered to be transferred to a leasehold valuation tribunal for determination under paragraph 3 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 the court will—
>
> (1) send notice of the transfer to all parties to the claim; and

> (2) send to the leasehold valuation tribunal—
>
> (a) the order of transfer;
>
> (b) all documents filed in the claim relating to the question; and
>
> (c) copies of all orders and other entries in the records of the court relating to the question."

10. Despite the fact that, in England, functions formerly exercised by the LVT had been transferred to the FTT, the Practice Direction was not amended (and was still in its unamended form in 2019). Nor was it amended to reflect the power of transfer conferred by section 176A (as opposed to Schedule 12 paragraph 3). In its current form PD 56 para 16 provides:

> "If a question is ordered to be transferred to the First-tier Tribunal for determination under section 176A of the Commonhold and Leasehold Reform Act 2002, the court will—
>
> (1) send notice to all parties to the claim; and
>
> (2) send to the First-tier Tribunal—
>
> (a) the order for transfer;
>
> (b) all documents filed in the claim relating to the question; and
>
> (c) copies of all orders and other entries in the records of the court relating to the question.
>
> (Paragraph 16.1 applies to proceedings in England but does not apply to proceedings in Wales.)"

11. Paragraph 15 still appears in the Practice Direction, but it is now limited to proceedings in Wales. Nevertheless, in both forms of the Practice Direction, the initiative of transfer is placed on the court itself. For reasons that are unexplained, in this case after the Order of DJ Bell the county court did not comply with the Practice Direction.

12. Rule 28 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 deals with transferred cases. The relevant parts of that rule provide:

> "(3) Upon receipt of a matter to which this rule relates, the Tribunal must provide to the parties written notice specifying—
>
> (a) the date when the Tribunal received the matter;
>
> (b) the names and any known addresses of the parties to the proceedings; and

> (c) in a case referred by the registrar, which party or parties will be the applicant or applicants for the purposes of the proceedings and which party or parties will be the respondent or respondents.
>
> (4) Each party whom the Tribunal directs in accordance with paragraph (3)(c) to act as an applicant for the purposes of the Tribunal proceedings, must send or deliver to the Tribunal a statement of case—
>
> (a) containing any information referred to in rule 26(2) which the Tribunal requires;
>
> (b) stating the applicant's reasons for supporting or objecting to the original application to the registrar;
>
> (c) accompanied by copies of any documents available to the applicant which—
>
> (i) are important to the applicant's case; or
>
> (ii) the Tribunal or any other party to the proceedings will require in order properly to understand the applicant's case.
>
> (5) Where a matter has been transferred by a court, the Tribunal may require any party to provide it with a copy of the court order by which the matter was transferred."

13. It appears, therefore, that the FTT's case management powers are triggered by the receipt by the FTT of the transferred case. Since the FTT did not receive DJ Bell's order of 2nd February 2015, those powers did not arise.

The strike out application

14. There matters stood until 20 September 2019 when Ms Keith applied to the county court to strike out the claim. The application was made on three grounds, two of which are relevant to this appeal:

    i) Mr Benka was in "flagrant breach" of DJ Bell's order in that he had failed to refer the issues specified by that order to the FTT; and

    ii) Mr Benka was guilty of inordinate and/or inexcusable delay in the prosecution of all or any of his claims either in the county court or in the FTT prejudicing the fair and just disposal of either of those proceedings.

15. CPR rule 3.4 (2) provides:

> "(2) The court may strike out a statement of case if it appears to the court—
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

16. Ms Keith supported her application with a witness statement. She pointed out that some of the pleaded allegations related to matters far in the past, and that it would be difficult, if not impossible, to trace those involved or any witnesses. The claim for arrears of service charge was unparticularised, and it would be necessary to go back over many years to see whether statutory requirements relating to service charges had been complied with. It would not be possible to have a fair trial. She went on to say that the existence and continuation of the proceedings made it impossible for her to sell her flat, which is what she wanted to do. Any purchaser would have to be told that there was an outstanding dispute and would be deterred from buying either at all or otherwise than at a very low premium to reflect the risk involved.

17. In his evidence in response, Mr Benka asserted many times that Ms Keith could have taken the matter forward. He also vehemently denied being in breach of DJ Bell's order. He said that he had "not filed a claim immediately with the FTT as it was not necessary given that the court order did not require him to do so and he was concerned for the welfare of the other long leaseholders." It is, however, plain that he considered that the initiative to effect the transfer to the FTT was his. In an email to Ms Keith's solicitor sent on 17 February 2015, Mr Benka had said:

> "Further to the CMC hearing on the 2 February 2015, *before I file for the first tier tribunal*, in the interest of overall costs and in particular your client's, does your client still insist she is not in breach…"

18. In his witness statement he made the point that although he could have taken steps to progress the claim, so too could Ms Keith. He went on in his witness statement to explain why he had not taken any step:

> "… at the request of the other long leaseholders of Fairwarp, they wanted respite from the Defendant's serious breaches of lease and whilst the Defendant's "new" tenants had and continue to breach the headlease, they were and are less severe in both frequency and severity such that it made sense to delay proceedings until such time that the Defendant's "new" tenants had moved or the Claimant was compelled to do so for some other reason."

19. Tellingly, but not surprisingly, he did not say that he was expecting or relying on either the county court or the FTT to take the initiative. It is clear from his email of 17 February 2015 that he considered that the initiative lay with him.

20. DDJ Anstis heard the application on 3 December 2019. By that time over five years had elapsed since the claim was issued; and over four and a half years had elapsed

since DJ Bell's order. DDJ Anstis struck out the claim. In recounting the procedural history he said:

> "2. About a year later, that came before Judge Bell, who made an order staying that particular claim, and ordering the parties to make an application to the first tier tribunal in respect of the matters that are raised in the claim. It is not completely clear what Judge Bell had in mind there."

21. His reasoning in deciding to strike out the claim is encapsulated in the following two paragraphs:

> "11. There are really two reasons for this. The first is that in respect of matters that should have gone to the first tier tribunal. Mr Benka has had his chance for that, in the order that was made. He says, and it is true, that there was no time limit on that, but certainly leaving it four years, as I say, Mr Benka is running the risk that a judge takes a dim view of the delay, and I certainly do so. I consider there has been a breach of the order of Judge Bell. It was up to Mr Benka to apply, and he has not done so.
>
> 12. There remains the question of whether any admissions can survive, but I have decided that even to the extent that the case is based on admissions, it has to be struck out. This is simply because Mr Benka has delayed too long in proceeding with the case. This ought to have been applied, a matter referred, to the first tier tribunal. There has been a breach of that order. I understand that Mr Benka may very well have had good reasons for doing that, in order to look after his other leaseholders. It may amount to a practically good reason. I am afraid that I do not find that it amounts to a good reason in law. The ultimate outcome of that is that whether the claims are based on admissions or on matters that should have been referred to the first tier tribunal, they are struck out."

22. His order recorded that:

> "The Claimant's claim is struck out (because of delay and failure of the Claimant to apply to the First Tier Tribunal (Property Chamber) for determination as to breach of tenant covenant or conditions)."

The first appeal

23. Mr Benka applied for permission to appeal on 24 December 2019. He had overlooked the fact that, in the meantime, he had executed a transfer of the freehold to Fairwarp Management Ltd ("FML"); and that FML had become the registered proprietor on 20 December 2019. That omission was rectified by joining FML to the proceedings.

24. HHJ George heard the appeal on 11 January 2023. As HHJ George correctly said at [49] DJ Bell's order does not order "the parties" to make an application to the FTT. It refers the matter to the FTT without directing either party to do anything. That is consistent with the Practice Direction. DDJ Anstis' error in that regard is then carried through into his reasoning on the application itself. In paragraph [11] he regarded Mr Benka as having been obliged by the order to do something; and at [12] he said in terms that there had been a breach of DJ Bell's order.

25. Having referred to authority on the approach the court takes to delay, HHJ George held that DDJ Anstis was wrong to strike out the claim. No discretion had arisen under CPR 3.4 (2) (wrongly transcribed at CPR 3.42) because there had been no breach of DJ Bell's order by either party. She went on to say that even if Mr Benka had sought to take action he would have had to apply to lift the stay. Alternatively, she said, Ms Keith could have contacted the court to find out what was going on. She concluded at [67]:

> "In my judgment, the learned Deputy did not have a discretion to exercise the matter not having fallen within [CPR 3.4 (2)], and there being no inherent jurisdiction within the County Court, it being a creature of statute."

26. Accordingly, she allowed the appeal.

27. The relevant documents were eventually transferred to the FTT in February 2023.

Abuse of process

28. Mr Grundy KC, on behalf of Ms Keith, accepts that Mr Benka was not in breach of DJ Bell's order; and consequently, that DDJ Anstis did not have the power to strike out the claim under CPR 3.4 (2) (c). But, he says, HHJ George was wrong to say that DDJ Anstis had no discretion to exercise. On the contrary, CPR 3.4 (2) (b) gave him the ability to determine that the lengthy delay of itself amounted to an abuse of process; and following that, to strike out the claim.

29. The categories of abuse of process are not closed, and do not necessarily depend on a failure to comply with rules of court or court orders. Lord Diplock began his speech in *Hunter v Chief Constable of the West Midlands* [1982] AC 529 by saying:

> "My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which *any court of justice* must possess to prevent misuse of its procedure in a way which, *although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it*, or would otherwise bring the administration of justice into disrepute among right-thinking people. *The circumstances in which abuse of process can arise are very varied*; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances

> in which the court has a duty (I disavow the word discretion) to exercise this salutary power." (Emphasis added)

30. One such case (as in *Hunter* itself) is a collateral challenge to a previous decision.

31. So the main question in this case is whether the lapse of time in bringing a claim to a conclusion, unaccompanied by any breach of a rule of court or court order can amount to an abuse of process; and, if so, whether on the facts of this case, it does.

32. The recent learning on the subject begins with the decision of the House of Lords in *Grovit v Doctor* [1997] 1 WLR 640. In August 1989 Mr Grovit launched a claim against a number of defendants. The only extant claim was one for libel. A defence to the claim was filed in October 1989. In July 1990 a judge directed the trial of a preliminary issue. Nothing more seems to have happened until the defendant applied to strike out the claim. The reported account of the facts does not reveal any breach of a court order or rule. The deputy judge struck out the claim in October 1992; and his decision was upheld by the Court of Appeal. The deputy judge found that Mr Grovit had no interest in actively pursuing the litigation and that as far as he was concerned it was "dead in the water". He then asked himself whether the courts were powerless unless the defendant could show prejudice, and decided that they were not. This court upheld his decision, although both Evans and Glidewell LJJ found that there was prejudice to the defendants in that they were in a state of anxiety prolonged by the litigation. Lord Woolf, with whose speech their Lordships agreed dismissed Mr Grovit's appeal. He said:

> "I am satisfied that both the deputy judge and the Court of Appeal were entitled to come to the conclusion which they did as to the reason for the appellant's inactivity in the libel action for a period of over two years. This conduct on the part of the appellant constituted an abuse of process. The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in *Birkett v James* [1978] AC 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."

33. What amounted to the abuse was Mr Grovit's lack of intention to bring the matter to a conclusion.

34. *Grovit v Doctor* was considered by the Privy Council in *Icebird Ltd v Winegardner* [2009] UKPC 24. That case concerned a right of way over Ms Winegardner's land to which Icebird was entitled. It claimed that Ms Winegardner was obstructing that right. It began proceedings in September 2000; and a defence was filed in December. The statement of claim was amended in November 2001. Nothing was done for the following two years. In February 2004 Ms Winegardner applied to strike out the claim. One of her grounds was that Icebird had failed to issue a summons for directions, within the time laid down by the rules. Lyons J heard the application. He found that the delay was inordinate (with which the Board agreed). He also took the view that the opinion that Ms Winegardner was "severely prejudiced" by the delay because the existence of the litigation constituted a blight on her title. Lord Scott said:

> "In the absence of any evidence from the respondent that the litigation had in any way obstructed or hindered any dealings with Lot 3 that she had had in mind or had caused her any other species of prejudice, their Lordships are unable to concur in this opinion. The natural worry and anxiety that may be expected to attend litigation does not, absent some very special features of which some evidence would be necessary, constitute "severe prejudice" so as to justify without more a strike-out for delay in prosecuting an action."

35. Having considered *Grovit v Doctor*, Lord Scott went on to say:

> "Where, however, there is nothing to justify a strike-out order other than a long delay for which the plaintiff can be held responsible, the requisite extent or quality of the delay necessary to justify the order ought not, in their Lordships' respectful opinion, to be reduced by categorising the delay as an abuse of process without clarity as to what it is that has transformed the delay into an abuse and, where necessary, evidential support."

36. He went on to say:

> "The present case is not one where there has been any contumelious default. It is a case where there has certainly been inordinate and inexcusable delay on the part of the appellant or its lawyers. But what else? There is no evidence of any serious prejudice to the respondent caused by the delay. Is this a case where the delay has given rise to a substantial risk that a fair trial will not be possible? This was a ground relied on in the respondent's summons and, although not the basis of the respondent's success before Lyons J or before the Court of Appeal, their Lordships think it right to consider whether this might be so."

37. Having considered the issues in the litigation, the Privy Council concluded that the delay did not prevent a trial of any of the issues. Icebird was thus allowed to proceed with the action on terms.

38. In *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426 Lord Woolf MR confirmed, by reference to an earlier decision of this court decided the day before judgment in *Grovit v Doctor* that delay alone, even of 11 years, does not amount to an abuse of process. The particular case to which he referred (*Barclays Bank plc v Maling*) was one in which the court itself had made an order that the action was to be adjourned generally with liberty to restore. But it is clear that, as a matter of case management, Lord Woolf did not approve that course. He said at 1437:

> "It has been the unofficial practice of banks and others who are faced with a multitude of debtors from whom they are seeking to recover moneys to initiate a great many actions and then select which of those proceedings to pursue at any particular time. This practice should cease in so far as it is taking place without the consent of the court or other parties. If there is good reason for doing so the court can make the appropriate directions. Whereas hitherto it may have been arguable that for a party on its own initiative to, in effect, "warehouse" proceedings until it is convenient to pursue them does not constitute an abuse of process, when hereafter this happens this will no longer be the practice. It leads to stale proceedings which bring the litigation process into disrespect. As case flow management is introduced, it will involve the courts becoming involved in order to find out why the action is not being progressed. If the claimant has for the time being no intention to pursue the action this will be a wasted effort. Finding out the reasons for the lack of activity in proceedings will unnecessarily take up the time of the court. If, subject to any directions of the court, proceedings are not intended to be pursued in accordance with the rules they should not be brought. If they are brought and they are not to be advanced, consideration should be given to their discontinuance or authority of the court obtained for their being adjourned generally. The courts exist to assist parties to resolve disputes and they should not be used by litigants for other purposes."

39. We were referred to the decision of Barling J in *Wearn v HNH International Holdings Ltd* [2014] EWHC 3542 (Ch). That was a case which turned on its own facts and did not, in my view, lay down any point of principle.

40. This court considered the "warehousing" of claims in *Asturion Foundation v Alibrahim* [2020] EWCA Civ 32, [2020] 1 WLR 1627. Arnold LJ set out the history of the litigation. At [11] he recorded:

> "In late January and early February 2016 the parties' solicitors discussed directions. An agreed set of directions was lodged at court on 2 February 2016. Through an oversight on the part of the court, however, the court did not either make an order embodying those directions or list a case management conference ("CMC"). This oversight was fatal to the court's ability to exercise active case management in respect of this claim, as is required by the Civil Procedure Rules ("CPR").

> Moreover, it meant that neither party was subject to any deadline embodied in a court order for taking the subsequent steps in the proceedings. It is clear that this was a significant factor in what happened (or did not happen) subsequently."

41. At [47] Arnold LJ reiterated the point that mere delay, however, inordinate and inexcusable, does not without more constitute an abuse of process. Having considered a number of authorities, Arnold LJ said at [61]:

> "In my judgment the decisions in *Grovit*, *Arbuthnot*, *Realkredit* and *Braunstein* show that a unilateral decision by a claimant not to pursue its claim for a substantial period of time, while maintaining an intention to pursue it at a later juncture, may well constitute an abuse of process, but does not necessarily do so. It depends on the reason why the claimant decided to put the proceedings on hold, and on the strength of that reason, objectively considered, having regard to the length of the period in question. A claimant who wishes to obtain a stay of proceedings for a period of time should seek the defendant's consent or, failing that, apply to the court; but it is not the law that a failure to obtain the consent of the other party or the approval of the court to putting the claim on hold automatically renders the claimant's conduct abusive no matter how good its reason may be or the length of the delay."

42. He added at [64] that the approach fell into two stages:

> "… first, the court should determine whether the claimant's conduct was an abuse of process; and if so, secondly, the court should exercise its discretion as to whether to strike out the claim."

43. In considering the facts of the case he attached considerable significance at [71] to the fact of the court's oversight in failing either to make an order for directions or to list the CMC.

Was Judge George entitled to overturn the first decision?

44. Contrary to Mr Grundy's submissions, I do not consider that DDJ Anstis decided the original application on two separate and independent grounds. I consider that a fair reading of his judgment shows that what he took to be a breach of DJ Bell's order by Mr Benka was the foundation of both limbs of his decision. It is, to say the least, unfortunate that he was not referred to the Practice Direction. In so far as it could be said that he did consider the question of delay as a free-standing ground, the judge did not identify what turned mere delay into an abuse of process other than his erroneous belief that Mr Benka was in breach of DJ Bell's order.

45. It follows, in my judgment, that HHJ George was entitled to set aside his decision and make her own.

Was HHJ George wrong?

46. Nevertheless, I consider that HHJ George was wrong to say that CPR 3.4 (2) could not apply unless there had been a breach of a rule or order. The power to strike out under CPR 3.4 (2) (b) is available even if there has been no breach. Mr Gatty submitted that HHJ George was correct to say that no discretion had arisen under CPR 3.4 (2). She must be taken to have referred not merely to 3.4 (2) (c), but also to 3.4 (2) (b). If there was no abuse of process, there was no discretion to exercise under CPR rule 3.4 (2) (b). That is not my reading of her judgment. The three paragraphs of her judgment which contain her analysis are replete with statements that Mr Benka was not in breach of the order. There was no consideration of any other form of abuse of process.

47. In my judgment, she was therefore wrong to say that DDJ Anstis had no discretion to exercise; and because she took too narrow a view of the court's power to strike out, she exercised no discretion of her own.

48. It follows, in my judgment, that it is open to this court to take its own view.

Has there been an abuse of process?

49. Mr Gatty submitted that "delay" does not exist in the abstract. It can only mean delay in doing something that ought to be done. Since DJ Bell's order did not require Mr Benka to do anything; and, in addition, the proceedings were stayed, there was nothing that he could have done. It cannot be an abuse of process not to progress a claim where (a) there has been no breach of an order of the court (b) there has been no breach of the CPR and, moreover (c) the court has itself stayed the action.

50. The question whether there has been an abuse of process requires the court to consider the length of the delay and the reason for it, objectively considered: *Asturion* at [61].

51. In deference to Mr Gatty's submission, I shall avoid the use of the word "delay." The lapse of time between DJ Bell's order and the hearing before DDJ Anstis was extremely long (five years since the claim was issued; and over four and a half years since DJ Bell's order). It is true that Mr Benka was not obliged by DJ Bell's order to take any positive step. But what were stayed were the court proceedings, not the overall resolution of the dispute. That, in my judgment, is a distinguishing feature of the stay in this case. Mr Benka did not suggest that he was powerless. He could, at the very least, have applied to lift the stay or have made enquiries of the court or the FTT to find out what was going on. Although section 168 (4) of the 2002 Act specifically empowers "the landlord" to apply to the FTT for a determination of breach, Mr Grundy did not suggest that Mr Benka could have made his application to the FTT under that power, given that the matter had been placed in the hands of the court. Nor was it suggested that Mr Benka had been in breach of any of the FTT's own rules of procedure.

52. In fact Mr Benka had done nothing to progress his claim. Even in the two months or more that elapsed between the application to strike out on 20 September 2019 and the hearing on 3 December 2019 Mr Benka did nothing. The FTT finally received the documents in February 2023, after the appeal to HHJ George, and so will be faced

with determining whether there were breaches of covenant committed well over a decade earlier.

53. The lapse of time is, in my judgment, lengthy. Nevertheless, I consider that we are bound by authority to hold that the lapse of time, without more, does not amount to an abuse of process.

54. The ostensible reason for not progressing the claim was out of consideration for other leaseholders. I find it very difficult to understand why other leaseholders would be inconvenienced or affected by proceedings in the FTT between Mr Benka and Ms Keith. I do not consider that Mr Gatty was able to provide a cogent explanation. Mr Benka also said that it made sense to delay proceedings until he was "compelled" to proceed. That, to my mind, is no good reason at all. An intention not to prosecute a claim until compelled to do so can properly be described as "warehousing" the claim. But it is necessary to consider objectively the reason for the delay. Mr Benka's own perception is not determinative. As Mr Gatty said, the courts do not punish thought crimes. In this case it is hard to avoid the conclusion that the objective reason for the lapse of time was a combination of the court's own oversight in not complying with the Practice Direction, coupled with the stay. The court's own part in the lapse of time (either by adjourning the case generally as in *Barclays Bank* or by failing to embody directions in an order and listing a CMC as in *Asturion*) is a highly relevant factor in deciding whether there has been an abuse of process.

55. Unlike the *Icebird* case, in this case there is evidence that the delay has caused prejudice to Ms Keith. It seems to me to be almost self-evident that the existence of a pending forfeiture action makes a long lease unmortgageable and probably unsaleable except to a cash buyer at a reduced price. But if evidence were necessary, Ms Keith says so. Although Ms Keith's flat was sublet during the pendency of the proceedings, I consider that given the long history of acrimonious relations between Mr Benka and Ms Keith, there is no reason to doubt her wish to sell and to extricate herself from Fairwarp.

56. In addition, after this lapse of time there is, in my view, considerable force in Ms Keith's assertion that a fair trial of these historic breaches will be very difficult, if not impossible. Some of them are, by now, statute barred even allowing for the fact that the lease was made under seal.

57. Does this combination of factors amount to an abuse of process? I do not accept that in considering an allegation that a claim has been "warehoused" it is a precondition of abuse of process that there has been either a breach of a court order or a breach of a rule of the CPR; although the existence of either will clearly be a highly relevant factor. But in *Grovit* itself none of the courts who considered the question treated a breach as a necessary condition. What, in my judgment, tips the balance in this case is the existence of the stay coupled with the court's own error in not transmitting the order for transfer to the FTT. As Mr Gatty put it, to strike out the claim would be to punish Mr Benka for the court's mistake.

Result

58. Mr Gatty has persuaded me that we would be extending the law by holding that on the particular facts of this case there has been an abuse of process sufficient to justify the

striking out of Mr Benka's claim. I reach this conclusion with reluctance, because the claim is thoroughly stale, and it may well be that DJ Bell ought to have struck it out back in 2015 on the ground that at that time Mr Benka was not entitled to serve a section 146 notice. But that decision was not appealed, and it is now too late to do so.

59. I would dismiss the appeal.

Lord Justice Baker:

60. I agree.

Lady Justice Nicola Davies:

61. I also agree.