Case No: CH/2015/0330

Neutral Citation Number: [2015] EWHC 3295 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: Wednesday 18th November 2015

Before :

THE HON MR JUSTICE ARNOLD

Between :

(1) SOLLAND INTERNATIONAL LIMITED **(2) SOLLAND INTERIORS LIMITED** **(3) ABNER SOLLAND** **(4) GRAZYNA URSZULA SOLLAND**	**Claimants/ Appellants**
and	
CLIFFORD HARRIS & CO	**Defendant/ Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Richard Millett QC and **Daniel Lightman** (instructed by **Bird & Bird LLP**) for the **Appellants**
Jamie Smith QC (instructed by **Clyde & Co LLP**) for the **Respondent**

Hearing date: 4 November 2015

Judgment
As Approved by the Court

MR JUSTICE ARNOLD :

Introduction

1. This is an appeal from an order of Master Bowles dated 14 July 2015 striking out the Appellants' claim for professional negligence against the Respondent and declining to grant the Appellants a retrospective extension of time for filing an allocation questionnaire for the reasons given in his judgment of the same date [2015] EWHC 1018 (Ch). Permission to appeal was granted by Warren J.

Background

The parties

2. The First Appellant ("Solland International") and the Second Appellant ("Solland Interiors") are design and building contractors which are owned and controlled by the Third Appellant ("Mr Solland") and his wife the Fourth Appellant ("Mrs Solland"). The Respondent is a firm of solicitors.

The Daraydan Action

3. From late July 2002 the Respondent represented the Appellants in an action brought against them by Daraydan Holdings Ltd ("Daraydan") and other claimants ("the Daraydan Claimants") in the High Court ("the Daraydan Action") and in respect of a counterclaim by the Appellants. The Respondent's team for the Daraydan Action consisted of Sunil Varma (partner), Nick Rattray (associate) and James Crighton (a junior associate who took over from Mr Rattray when Mr Rattray left the Respondent). The Respondent instructed Sharif Shivji as junior counsel throughout, and first John Brisby QC and then Edward Bannister QC as leading counsel.

4. The Daraydan Action concerned contracts between the Daraydan Claimants and Solland International and Solland Interiors between 1997 and 2000 for the refurbishment and/or redecoration of various properties in London and Qatar. On 14 June 2002 Solland International referred a claim for over £8 million to an adjudicator under the main contract. On 25 June 2002 Daraydan purported to avoid or rescind the main contract, alleging that it had been procured as a result of bribes paid to a Mr Khalid. On 12 July 2002 the Daraydan Claimants commenced the Daraydan Action against the Appellants, Mr Khalid and certain other defendants seeking *inter alia* an account of the secret commissions alleged to have been paid to Mr Khalid. Subsequently Solland International and Solland Interiors counterclaimed for damages for breach of the main contract and another contract or for a quantum meruit.

5. A direction was made for a split trial of liability and quantum. The trial of the liability issues took place before Lawrence Collins J from 20 January to 13 February 2004. Mr and Mrs Solland both gave evidence at the trial. The trial went badly for the Appellants. Accordingly, on 17 February 2004 the Appellants entered into a settlement agreement with the Daraydan Claimants on terms which were unfavourable to the Appellants.

6. On 26 March 2004 Lawrence Collins J delivered judgment on the Daraydan Claimants' claim against Mr Khalid [2004] EWHC 622 (Ch), [2005] Ch 119. In his

judgment he found that Mr and Mrs Solland had procured the payment by Solland International and Solland Interiors of commissions to Mr Khalid which were a "direct kickback" of 10% of all payments under the contracts.

The pre-action correspondence from 13 December 2004 to 22 August 2005

7. On 13 December 2004 Bird & Bird ("B&B"), who had by then been instructed by the Appellants, sent the Respondent a Letter of Claim under the Professional Negligence Pre-Action Protocol. Barlow Lyde & Gilbert (which subsequently merged with Clyde & Co, "Clyde") was instructed on behalf of the Respondent. Clyde sought and was granted a number of extensions of time for responding to the Letter of Claim, in particular so that they could speak to Mr Rattray, Mr Shivji and Michael Coleman (an advisor to the Appellants, who was involved in settlement negotiations with the Daraydan Claimants). During this period the Appellants served draft Particulars of Claim on 26 January 2005. On 16 June 2005 Clyde and B&B jointly interviewed Mr Coleman. Clyde was unable to speak to Mr Shivji, because he did not wish to be interviewed unless all potential claims against him were waived and the Appellants declined to waive any such claims. On 22 August 2005 Clyde sent a Letter of Response on behalf of the Respondent. This Letter stated that Mr Rattray could not be interviewed since he was in hospital and that no approach had been made to Mr Brisby QC or Mr Bannister QC.

8. Thereafter the Appellants took no further step in the proceedings until the issue of the Claim Form. During this period, in about June 2007, the Appellants instructed Lewis Silkin in place of B&B.

From issue of the Claim Form on 28 November 2008 to service of the Defence on 15 March 2012

9. On 28 November 2008 the Appellants issued a Claim Form, claiming damages from the Respondent for negligence and breach of retainer in relation to its conduct of the Daraydan Action. Plainly the Claim Form was issued at this time in order to protect the Claimants' position on limitation, since more than six years had elapsed since the commencement of the Daraydan Action. The Claim Form was served on 23 March 2009.

10. In the meantime, on 9 March 2009, Lewis Silkin wrote a second Letter of Claim running to 57 pages which was accompanied by a 560 page file of the key documents on which the Appellants relied and which were referred to in that Letter. The Letter explained that Lewis Silkin had only now been asked to pursue the action due to the fact that the Appellants had been heavily engaged in litigation with third parties to which they had devoted all their time and financial resources.

11. By consent the proceedings were stayed on 20 March 2009 until either party terminated the stay giving 28 days' notice, with a long stop date of nine months, to enable the parties to comply with the Pre-Action Protocol. Clyde subsequently sought and was granted a number of extensions of time to respond to the second Letter of Claim. During this period, Lewis Silkin stated in a letter dated 19 August 2009 that the Appellants would waive any claims against Mr Shivji, Mr Brisby QC and Mr Bannister QC on condition that interviews with counsel were conducted jointly by

Lewis Silkin and Clyde. The Appellants reinstructed B&B on 24 August 2009. On 25 November 2009 Clyde interviewed Mr Rattray and prepared a note.

12. On 9 March 2010 the parties agreed to a further stay of the proceedings until 31 July 2010, to be terminable upon giving 28 days' notice, to allow Clyde to conduct further interviews with witnesses. Throughout this period Clyde stated a number of times that they were attempting to arrange interviews with Mr Coleman and Mr Shivji, but without success. On 15 October 2010 Clyde sent a second Letter of Response on behalf of the Respondent. It was 15 pages long. No documents were appended to it.

13. On 1 November 2010 the parties agreed a further stay of the proceedings until 28 February 2011. On 16 March 2011 the Appellants instructed Bircham Dyson Bell ("BDB") in place of B&B. It appears that further stays of the proceedings were subsequently agreed. It was also agreed that the parties would attempt to resolve the dispute by mediation, but the parties were unable to agree upon the form of the mediation.

14. On 22 December 2011 the Appellants served their Particulars of Claim, which run to 140 paragraphs and 58 pages. The damages claimed exceed £8 million.

15. The Respondent, after requesting and being granted three extensions of time, served its Defence, which runs to 113 paragraphs and 31 pages, on 15 March 2012. It will be appreciated that, by this time, over 3 years and 3 months had elapsed since the issue of the Claim Form; over 7 years and 3 months had elapsed since the first Letter of Claim; and getting on for 10 years had elapsed since the Respondent was first instructed in the Daraydan Action.

The Appellants' allegations of negligence and the Respondent's defences

16. The Master reviewed the allegations made by the Appellants in the Particulars of Claim and the Respondent's defences in its Defence in some detail in his judgment at [11]-[38], to which reference should be made.

17. In brief summary, the Appellants criticise almost every aspect of the Respondent's conduct of the Daraydan Action, but focus upon five main allegations: (i) a failure to make an application for disclosure of banking records in Jersey; (ii) a failure properly to prepare the quantum meruit counterclaim; (iii) the disclosure of privileged documents; (iv) the calling of two witnesses whose evidence was unhelpful to the Appellants; and (v) advice said to have been given that the Daraydan Claimants would not take their case to trial and that, if the Appellants "hung on", they would secure a full recovery of their claims, which is said to have led the Appellants to reject a favourable settlement offer.

18. Again in brief summary, the Respondent disputes that it acted negligently in any of the respects alleged, and disputes that any negligence caused the Appellants loss. In particular, the Respondent says that the Appellants were fully advised as to the weakness of their case at the outset and thereafter; that the decision not to make an application in Jersey was made on leading counsel's advice and reflected Mr Solland's instructions to concentrate on higher priorities due to a shortage of funds; that the approach taken to the preparation of the counterclaim again reflected the Appellants' lack of funds; that there was no realistic option other than to disclose the

documents in question; that it was at Mr Solland's insistence that the two witnesses were called; and that it was Mr Solland who insisted upon "hanging on" in the hope of a favourable settlement.

19. An important aspect of the Respondent's Defence is that, in a number of important respects, the Respondent disputes the Appellants' allegations as to the instructions they gave. Furthermore, whereas the Appellants rely extensively upon documentary records of such instructions, the Respondent relies upon instructions said to have been given by Mr Solland orally both by telephone and during visits to the Respondent's offices. Moreover, the Respondent contends that Mr Solland was in the habit of giving different instructions in writing and orally. Still further, it is the Respondent's case that, for reasons connected with the manner in which he gave his instructions, Mr Solland's oral instructions were not always recorded in contemporaneous attendance notes.

The Appellants' failure to file an allocation questionnaire

20. On 19 March 2012 the Court issued a notice to the parties requiring them to complete allocation questionnaires and to return them to the Court Office by 3 April 2012.

21. On 2 April 2012 Clyde sent BDB the Respondent's allocation questionnaire and proposed directions with a view to agreeing the latter.

22. On 3 April 2012 the Respondent's allocation questionnaire was filed at Court. No allocation questionnaire was filed or served on behalf of the Appellants.

23. On 26 April 2012 Clyde wrote a letter to BDB in which it pointed out:

> "As you will no doubt be aware, in circumstances where one party files an allocation questionnaire but the other party does not, the Court may order that an allocation hearing be listed. We put you on notice that we would seek the cost from your clients of having to appear before the Court in that regard."

24. On 27 April 2012 BDB notified Clyde that the Appellants had decided to act in person. Thereafter neither party took any step in the proceedings until the Respondent issued its application.

The Appellants' evidence as to the period from 27 April 2012 to 13 March 2013

25. The Appellants' evidence is that, from 27 April 2012 to 13 March 2013, the Appellants' "resources and time were fully engaged with" three pieces of litigation against third parties. Two of these were related to each other and involved claims by Mr and Mrs Solland which were compromised on favourable terms during the course of a trial in early December 2012. In the third claim Mr and Mrs Solland were defendants, and the matter was compromised after close of pleadings on 13 March 2013.

The Appellants' evidence as to the period from 13 March 2013 to 13 August 2014

26. The only evidence which the Appellants have adduced as to what they did during the period from 13 March 2013 to 13 August 2014 is contained in the following paragraph from a witness statement made by their solicitor Jonathan Speed:

> "Mr Solland informs me that thereafter he and Mrs Solland gave thought to their choice of legal representation for these proceedings and that (without waiving privilege) several meetings were held to discuss how to progress the case."

27. The Master was prepared to infer from the reference to not waiving privilege that the meetings were with lawyers, although this is not expressly stated. As counsel for the Appellants accepted, one cannot tell from the wording whether the meetings were all with the same firm or were with more than one firm. Still less does this reveal how many meetings took place, when the meetings took place, who attended them, how long they lasted or the nature of the discussions. In particular, it is not said that the Appellants decided, or even planned, to take any particular step to progress the claim during, or a result of, these discussions.

The applications before the Master

28. On 13 August 2014, without any prior warning, the Respondent issued an application to strike out the claim pursuant to CPR r. 3.4(2)(c), alternatively pursuant to the inherent jurisdiction of the Court, and served it upon the Appellants. There is no evidence as to what, if anything, the Appellants did during the next six weeks or so.

29. The Appellants re-instructed B&B in late September 2014. On 15 October 2014 B&B went on the record. The Appellants' evidence is that B&B spent from late September 2014 to early November 2014 "getting up to speed on the case", including collating and reviewing the documentation, advising the Appellants and instructing counsel.

30. On 7 November 2014 the Appellants filed an allocation questionnaire and draft directions for a 12-15 day trial in a window from February to April 2016.

31. On 11 November 2014 the Appellants issued an application for an extension of time and (to the extent necessary) relief from sanctions. In the witness statement made in support of this application and in opposition to the Respondent's application, Mr Speed stated (emphasis added):

> "22. [The Appellants] accept that they have latterly been dilatory in pursuing this claim, for which they wish me to apologise to the Court, but Mr Solland informs me that they are fully committed to pursuing this litigation to trial and invite the Court now to fix a trial date and give directions to trial.
>
> …
>
> 74. … [The Appellants] have already spent more than £500,000 in legal costs in pursuing this litigation, have

> put forward detailed case management directions leading to the trial of these proceedings, and *now* have the resources and every intention to diligently and speedily progress this action going forward.
>
> …
>
> 80. [The Appellants] are serious about proceeding with this litigation and have instructed this firm to progress this case to trial. …"

32. Both applications ultimately came before the Master on 18 and 20 February 2015.

The grounds of the Respondent's application

33. The Respondent applied to strike out the claim on three alternative grounds:

    i) the Appellants had failed to comply with a rule, practice direction or court order, namely that "in default of CPR 26.3(6) they have entirely failed to lodge an allocation questionnaire as required by a Notice issued pursuant to CPR 26.3(1) on 19 March 2012";

    ii) the claim should be struck out as an abuse of the process of the court; and

    iii) "significant delay on the part of the [Appellants] has caused prejudice to the [Respondent] and means that there cannot be a fair trial of this matter".

34. Although the Master referred to CPR rule 3.4(2)(c) in relation to all three grounds, my understanding is that the first ground was advanced pursuant to rule 3.4(2)(c), while the second and third grounds were advanced pursuant to the Court's inherent jurisdiction. The second ground could also, of course, have been advanced pursuant to rule 3.4(2)(b); but it is not suggested that this matters.

The Master's decision

35. In a careful and detailed reserved judgment running to 138 paragraphs, the Master rejected the Respondent's first ground for striking out the claim, but accepted that it should be struck out on the second and third grounds. It is convenient to consider his reasoning in relation to each of these grounds below.

The Appeal

36. The Appellants' Grounds of Appeal run to 19 paragraphs (and many more sub-paragraphs) and 10 pages. The Appellants' Skeleton Argument runs to 61 paragraphs and 14 pages. By their Grounds of Appeal, Skeleton Argument and oral submissions on the appeal the Appellants challenge almost every aspect of the Master's reasoning in relation to the Respondent's second and third grounds.

37. In those circumstances, it is appropriate for me to make the obvious point that the appeal is not a re-hearing, but a review of the Master's judgment. This Court is only entitled to interfere with the Master's judgment if it is wrong, that is to say, if the Master erred in law or in principle (which would include making findings which were

not open to him on the evidence) in finding that the Appellants were guilty of abuse of process and that a fair trial was no longer possible or if the Master exceeded the bounds of his discretion in concluding that the appropriate sanction was to strike out the claim.

The Respondent's first ground: failure to file an allocation questionnaire

38. Although the Master rejected the Respondent's first ground, and there is no Respondent's Notice challenging that conclusion, the Appellants contend that the reasons which the Master gave for rejecting the first ground are important, because the Master failed properly to take those reasons into account when considering the second and third grounds.

39. Under the Civil Procedure Rules as they were in April 2012, the obligation to file an allocation questionnaire was to be found in rule 26.3(1A) and (6). In the event of a failure to file an allocation questionnaire by the required date, rule 26.5(5) empowered the court to give any direction it considered to be appropriate.

40. Guidance as to the consequences of failure to file an allocation questionnaire was set out at paragraph 2.5 of Practice Direction 26:

> "(1) If no party files an allocation questionnaire within the time specified by Form N152, the court will order that unless an allocation questionnaire is filed within 7 days from service of that order, the claim, defence and any counterclaim will be struck out without further order of the court.
>
> (2) Where a party files an allocation questionnaire, but another party does not, the file will be referred to a judge for his directions and the court may -
>
> (a) allocate the claim to a track if it considers that it has enough information to do so, or
>
> (b) order that an allocation hearing is listed and that all or any parties must attend."

41. In addition, paragraph 6.6 of PD26 provided:

> "(1) This paragraph sets out the sanctions that the court will usually impose for default in connection with the allocation procedure, but the court may make a different order.
>
> (2)(a) Where an allocation hearing takes place because a party has failed to file an allocation questionnaire or to provide further information which the court has ordered, the court will usually order that party to pay on the indemnity basis the costs of any other party who has attended the hearing, summarily assess the amount of those costs, and order them to be paid forthwith or within a stated period.

(b) The court may order that if the party does not pay those costs within the time stated his statement of case will be struck out.

(3) Where a party whose default has led to a fixing of an allocation hearing is still in default and does not attend the hearing the court will usually make an order specifying the steps he is required to take and providing that unless he takes them within a stated time his statement of case will be struck out."

42. As the Master noted at [49], in the Chancery Division, the normal order where one party failed to lodge an allocation questionnaire would be an unless order, but in some cases the court would feel able to make case management directions on the basis of the allocation questionnaire filed by the other party and other papers on file. In the present case, unfortunately, there was an oversight by the court as result of which neither of these things happened.

43. The Master went on to hold at [50]-[56] that the failure to file an allocation questionnaire did not have the effect that the claim or defence could not be advanced so as to give rise to an implicit sanction which required the defaulting party to obtain not merely an extension of time, but also relief from that sanction. Although an allocation questionnaire was an important case management tool, a failure to lodge one was in this respect qualitatively different to a failure to file a defence, a notice of appeal or a respondent's notice.

44. The Master then held at [57]-[68] that, since the Appellants had not committed a breach of a rule which required them to obtain relief from sanction, it would not be appropriate to strike the claim out purely because of that breach, but rather the consequences of the breach should be taken into account when considering the second and third grounds.

45. The Appellants draw attention to two important points about this reasoning. First, the CPR envisage that cases will be closely monitored and actively managed by the court, but that did not happen in the present case. Secondly, the Appellants' failure to file an allocation questionnaire did not mean that the case could not be progressed by the Respondent, if not by the court. I accept both of these points, neither of which is disputed by the Respondent.

<u>The Respondent's second ground: abuse of process</u>

46. The Respondent contended before the Master, and the Master accepted, that the Appellants had been guilty of an abuse of the process of the court in two distinct, although closely related, ways, which were referred to in argument before me as the *Grovit* and *Choraria* limbs respectively:

i) commencing or carrying on a claim with no intention of pursuing the claim to trial or other proper resolution; and

ii) conducting the proceedings with a wholesale disregard of the rules of litigation in full knowledge of the consequences.

47. The Master did not deal with the *Choraria* limb separately from the *Grovit limb*, but considered them together. That is understandable given their close relationship. Given the arguments on the appeal, however, I have found it necessary to consider the two limbs separately.

48. Before doing so, it is important to note two points which are common to both limbs and which the Master expressly recognised in his judgment (at [72] and [74] respectively):

    i) delay alone, however inordinate and inexcusable, will not without more constitute an abuse of process: see *Icebird Ltd v Winegardner* [2009] UKPC 24 at [7] (Lord Scott of Foscote delivering the judgment of the Privy Council); and

    ii) the burden of proof of abuse of process lies on the applicant, here the Respondent.

The Grovit *limb of abuse of process*

49. *The law.* This limb is particularly based on decisions of the House of Lords in *Grovit v Doctor* [1997] 1 WLR 640 and of the Court of Appeal in *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426.

50. In *Grovit v Doctor* the claimant had commenced wide-ranging proceedings against the defendants in August 1989, but by March 1990 all that remained was an allegation of libel. The last activity of the claimant prior to the application to strike out had been on 20 September 1990. On 21 March 1991 and 23 September 1991 the defendants' solicitors wrote to the claimant's solicitors inviting the claimant to proceed with or abandon the claim. By the time of the application, the claimant had done nothing for over two years. In those circumstances the judge found that the claimant had no interest in actively pursuing the litigation. The Court of Appeal endorsed that finding. The House of Lords held that this constituted an abuse of process for reasons which Lord Woolf expressed at 647G-H as follows:

> "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 a 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."

51. It is important to note that Lord Woolf rejected the submission that it was not open to the judge and the Court of Appeal to conclude that the claimant had no interest in pursuing the litigation given the determination with which the claimant had resisted the strike-out application, including two appeals. As Lord Woolf observed at 647D:

> "The vigour with which he has approached the appeal may indicate no more than that he regarded his prospects in the

> appellate litigation over procedure as a result of the striking out as being more favourable than in the libel action itself."

52. In *Arbuthnot v Trafalgar* the Court of Appeal considered two appeals concerned with striking out on this ground. The facts of the cases and the individual decisions do not matter for present purposes. What do matter are the statements of Lord Woolf MR delivering the judgment of the Court of Appeal in two passages. The first passage is as 1436F-H:

> "It is already recognised by *Grovit v Doctor* [1997] 1 W.L.R. 640 that to continue litigation with no intention to bring it to a conclusion can amount to an abuse of process. We think that the change in culture which is already taking place will enable courts to recognise for the future, more readily than heretofore, that a wholesale disregard of the rules is an abuse of the process as suggested by Parker L.J. in *Culbert v Stephen G Westwell & Co Ltd* [1993] P.I.Q.R. P54.
>
> 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 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 [of] questions of prejudice, and allow the striking out of action whether or not the limitation period has expired."

53. The second passage is at 1437B-E (emphases added):

> "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. *This new approach* will not be applied retrospectively to delays which have already occurred but it *will apply to future delay*."

54. As can be seen from these authorities, it is not a requirement of the *Grovit* limb of abuse of process that the claimant's lack of intention to pursue the claim to trial should persist as at the date of the application to strike out, still less as at a later date (such as the date of the hearing or an appeal). Thus it may be an abuse of process for the claimant unilaterally to "warehouse" the claim for a substantial period of time, even if the claimant subsequently decides to pursue it.

55. *The Master's judgment*. The Master started his analysis at [77] by noting that the Respondent accepted that the mere failure by the Appellants to lodge the allocation questionnaire by the due date and to remedy that breach for 31 months thereafter was not enough to establish abuse of process. He then proceeded at [78]-[89] to consider the evidence with respect to the two periods from 27 April 2012 to 13 March 2013 and from 13 March 2013 to 13 August 2014.

56. So far as the first period was concerned, he stated at [85]:

> "It is, conspicuously, not said that the Claimants were unaware of their obligations [to file an allocation questionnaire and to pursue the claim] and the suggestion, that the litigation that I have outlined, so fully engaged the Claimants that they could not take any steps at all to pursue this Claim is not one which, given that they were, in large part, represented by solicitors and counsel in the other matters, seems to me to hold water. The best that could be said, in respect of this material and in respect of this first stage of the Claimants' delay, is that they were content to leave this litigation in the sidelines while dealing with the other matters."

57. As to the second period, he stated as follows:

> "88. As already stated, it is conspicuously not stated that the Claimants were in ignorance of their obligations. It is, further, inconceivable and unrealistic to think that Bircham Dyson Bell, the experienced solicitors instructed at the date when the allocation questionnaire should have been served, did not inform their clients of the need for and the importance of that questionnaire, in moving on the prosecution of the Claim, or, given that the Claim had been issued with limitation in mind and close to the expiry of the limitation period, that the Claimants were not informed that, once the various stays which had been agreed, in order, ex post facto, to allow compliance

> with the professional negligence protocol, had come to an end, it was incumbent upon them to prosecute the case diligently. It is, similarly, unrealistic to think that any solicitors consulted by the Claimants, with a view to their instruction in the Claim and being apprised of the position which had been reached in the Claim, would not have informed and advised the Claimants of the importance of remedying their default and of taking immediate steps to move the litigation forward, or of the fact, obvious in any event, that their default was causing on-going delay and that the consequence, particularly in the context of the more rigorous approach to compliance, existing from April 2013, would, or might be, that their case would be struck out.
>
> 89. Despite the foregoing, no steps were taken to remedy the position and the overwhelming likelihood must be that, in the absence of the application to strike out, matters would have been left in a state of indefinite abeyance.
>
> 90. In all these circumstances, the only sensible inference, or conclusion, available to the court is that, until prompted by the service of the application to strike out, the Claimants were without any present, or settled, intention to carry on this Claim and that, at best, they were giving some consideration, albeit upon a desultory basis, as to whether, or when, they might elect to continue with the progress of the Claim. As above stated, this course of inaction was perpetuated by the Claimants in a complete and knowing disregard of the rules and of their obligation to pursue their Claim diligently."

58. Accordingly, he concluded at [91] that the Appellants had been guilty of abusing the process of the court in the manner identified in *Grovit v Doctor*.

59. *Grounds of appeal*. The Appellants contend that the Master was wrong to conclude that they had been guilty of abuse of process on grounds which may be summarised as follows:

    i) the Master applied the wrong test, the correct test being whether the claimant had displayed a manifest intention not to bring the litigation to trial;

    ii) the Master failed to give any, or any sufficient, weight to the fact that the burden lay on the Respondent to demonstrate that the Appellants had lost interest in the proceedings and had no intention to prosecute them to judgment;

    iii) the Master should have concluded that the Respondent had failed to discharge that burden, since mere inactivity was not enough, the Appellants had given a credible and reasonable explanation for their inactivity and there were other countervailing factors;

    iv) the Master impermissibly rejected the Appellants' sworn evidence and in doing so failed to consider the credible possibility that the Appellants had

"simply put the litigation on hold for the time being", but had now decided to pursue it in earnest;

v) the Master wrongly conflated two separate questions, namely whether the Respondent had established that the Appellants were guilty of an abuse of process and, if so, what the appropriate sanction should be; and

vi) the Master wrongly drew adverse inferences from the Appellants' refusal to waive privilege.

60. *Assessment.* Apart from the first, in substance all these grounds amount to an attack upon the Master's findings of fact. I recognise that the evidence before the Master was wholly in writing, and therefore I am in as good a position to assess the evidence as the Master was. Nevertheless, it remains the case that the Appellants must demonstrate that the Master was wrong. It is not enough for this purpose simply to argue that this Court should reach a different conclusion on the evidence. That said, I shall consider each of the grounds in turn.

61. So far as ground (i) is concerned, I do not accept that the Master applied the wrong test. Although he did not use the word "manifest" in his judgment, neither did Lord Woolf in *Grovit v Doctor* or *Arbuthnot v Trafalgar*. In my judgment the Master correctly applied the test laid down in those authorities.

62. As to ground (ii), as noted above, the Master expressly recognised that the Respondent bore the burden of proof. I do not accept that he failed to give effect to that recognition.

63. Turning to ground (iii), the Master did not simply treat mere inactivity on the part of the Appellants as being sufficient to discharge the Respondent's burden of proof. Rather, he took into account the surrounding circumstances, the Appellants' inactivity during the 31 month period from 27 April 2012 to 7 November 2014, and in particular the 28 month period from 27 April 2012 to 13 August 2014, and the Appellants' evidence attempting to explain that inactivity. I will address that evidence when considering ground (iv).

64. As for the "countervailing factors", these fall into three groups. The first group consists of the size of the claim and of the costs incurred by the Appellants. The Master clearly did take these into account, but they cut both ways since they make the delay in pursing the claim all the more remarkable.

65. The second group relates to the Appellants' actions and intentions with respect to progressing the claim after the service of the Respondent's application. The Master was right to disregard these when deciding whether or not the Appellants had been guilty of an abuse of process for the reasons explained above.

66. The third group consists of the Respondent's inaction. As is common ground, the Respondent did nothing in the proceedings from 27 April 2012 to 13 August 2014. Counsel for the Appellants drew a contrast in this respect with the defendants in *Grovit v Doctor* who had twice written to the claimant inviting him to proceed with the action or abandon it. It is true that no such letter was written in the present case, but in my view that fact alone cannot absolve the Appellants of abuse of process. Nor

do I consider that the absence of such a letter undermines the Master's reasoning, as will become clear when I discuss the next ground of appeal.

67. In my view ground (iv) addresses the key point with respect to this part of the case. The Appellants contend first that the Master impermissibly rejected the Appellants' sworn evidence and secondly that the Master ought to have concluded that the Appellants had put the litigation on hold.

68. So far as the first contention is concerned, the Master did no such thing. The Appellants' submission conflates their evidence about their historic conduct (which the Master accepted so far as it went) and their evidence as to their future intentions (which the Master did not reject, but viewed sceptically when considering the appropriate sanction as discussed below). So far as the question of whether there had been an abuse of process was concerned, as distinct from the question of sanction, the Master correctly focussed on the evidence (including the omissions in that evidence) as to the Appellants' historic conduct.

69. Turning to the second contention, the Master accepted that, during the first period, it could be said that the Appellants had left this litigation "in the sidelines". Thus the Master made essentially the very finding that the Appellants say that he should have made. That finding does not assist the Appellants. On the contrary, it amounts to a finding that, unilaterally and without the consent of the Respondent or the court, the Appellants (to use the Appellants' own terminology on this appeal) "put the litigation on hold for the time being". That amounts to an admission that the Appellants did not intend to pursue the litigation to trial, or other proper resolution, for an indeterminate period: in other words, an admission of "warehousing" the litigation. As Lord Woolf made clear in *Arbuthnot*, this is not acceptable and can constitute an abuse of process. Contrary to the Appellants' argument, it was not necessary in order for the Master to find abuse of process established for him to find that the Appellants had decided *permanently to abandon* the litigation (even if they subsequently changed their mind).

70. So far as the second period is concerned, the Master accepted that the Appellants were giving some consideration, albeit upon a desultory basis, as to whether, or when, they might elect to continue the claim. Again, this is essentially the finding that the Appellants say that he should have made: as the Appellants themselves put it on this appeal, "nothing had changed" during this period. In other words, having unilaterally warehoused the litigation (for a period of 9 months), the Appellants had gone no further than thinking about unwarehousing it (for a period of 17 months and without actually doing so).

71. With respect to ground (v), the Master was careful to consider these two questions separately. It is the Appellants' submissions which conflate them.

72. As for ground (vi), the Master did not draw adverse inferences from the Appellants' refusal to waive privilege. As discussed above, so far as the first period is concerned, the Appellants effectively admitted that they had put the proceedings on hold. So far as the second period is concerned, all the Master did was to note the paucity of the evidence tendered by the Appellants as to what they were doing in this period. If the Appellants wanted to make a case that they had changed their approach to the litigation from the approach they had adopted during the first period, they needed to

provide evidence of this. But, as discussed above, in fact it is the Appellants' own case on this appeal that nothing had changed during this period.

73. *Conclusion.* I therefore conclude that the Master was entitled to find that the Appellants were guilty of an abuse of process on the basis that, during the period from 27 April 2012 until at least 13 August 2014, they did not intend to pursue this claim to trial or other proper resolution. That was on any view a substantial period, but all the more so having regard to how stale the claim already was at the beginning of that period.

The Choraria *limb*

74. I shall consider this limb upon the assumption, contrary to the conclusion I have just reached, that the Master was wrong to conclude that the Appellants were guilty of the *Grovit* limb of abuse of process.

75. *The law*. This limb is particularly based on the decisions of the Court of Appeal in *Choraria v Sethia* [1998] CLC 625 and *Habib Bank Ltd v Jaffer* [2000] CPLR 438. In *Choraria v Sethia* the claimant was guilty of a number of breaches of court orders culminating in a failure to comply with an order to set down despite surviving a previous strike-out application. The Court of Appeal restored the Master's order to strike out the action as an abuse of process. Nourse LJ stated the law at 630 as follows:

> "Although inordinate and inexcusable delay alone, however great, does not amount to an abuse of the process, delay which involves complete, total or wholesale disregard, put it how you will, of the rules of the court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so, the action will be struck out or dismissed on that ground."

76. In *Habib v Jaffer* Nourse LJ reiterated this statement of principle at 444-445 and noted it had gained general acceptance in subsequent decisions of the Court of Appeal. In that case the claimant bank was in a state of near paralysis from January 1994 to November 1997. From January 1994 to December 1995 the bank's solicitors repeatedly advised it of the obligation to give full discovery, but it only complied at the end of that period. From April 1995 onwards, and in particular from April 1996 to January 1997, the bank's solicitors repeatedly advised it to make progress with witness statements and to decide what to do about witnesses who were not willing to make statements, but the bank did not do so. The Court of Appeal again restored the Master's order to strike out the claim as an abuse of process.

77. *The Master's judgment*. The Master's reasoning was essentially the same as I have set out above. The only additional point which it is necessary to note is his statement at [87]:

> "What can and must also be said is that, in taking no active steps between April 2012 and, eventually, November 2014 to pursue their Claim, the Claimants acted in knowing and total

> disregard both of the rules and of the requirements of modern litigation."

78. *Grounds of appeal*. The Appellants contend that the Master was wrong to conclude that they had been guilty of abuse of process on grounds which may be summarised as follows:

i) the Master was wrong to conclude that the Appellants' failure to file an allocation questionnaire amounted to a wholesale disregard of the rules;

ii) the Master was wrong to conclude that the Appellants were aware that that failure could lead to their claim being struck out;

iii) the Master made no finding that there was any causal nexus between the Appellants' failure to file an allocation questionnaire and the subsequent delay and he should have found that there was no such causal nexus because any chain of causation was broken by the court's failure to manage the case and the Respondent's failure to take any steps of its own.

79. *Assessment*. In my judgment grounds (i) and (ii) are well-founded. The only breach of the rules that the Appellants are alleged to have committed is a failure to file an allocation questionnaire. Apart from that, the most that can be said is that they failed to comply with the spirit of the CPR, which as the Master rightly said requires claimants to prosecute their claims diligently. In my view that cannot be categorised as amounting to a complete, total or wholesale disregard of the rules. This is particularly so having regard to the consequences of failing to file an allocation questionnaire, which were impeccably analysed by the Master when considering the Respondent's first ground for the striking out application. Still less can I see any basis for concluding that the Appellants knew, or even should have known, that a mere continuing failure to file an allocation questionnaire, even for 31 months, could have the consequence that their claim would be struck out as an abuse of process.

80. As to ground (iii), it should be noted that, in the context of discussing the Respondent's third ground for striking out, the Master expressly accepted (at [65]) that there needed to be "some nexus, or some causative link, between the breach of rule, or order, giving rise to the jurisdiction to strike out, and the delay, which is said to make the striking out of the case the proportionate, or proper response". Moreover, he expressly recorded (at [67]) that it had been held by the Court of Appeal in *Asiansky Television plc v Bayer-Rosin* [2001] EWCA Civ 1792 at [48] that "It is no longer appropriate for defendants to let sleeping dogs lie" (Clarke LJ, with whom Mance and Dyson LJJ agreed). Nevertheless, with respect to abuse of process, he said at [91]:

> "In so far as the point is made by the Claimants … that their conduct, now complained of, could have been brought to an end at an earlier date by the action of Clifford Harris, it is, I think, of note that Lord Woolf, in *Arbuthnot Latham Bank* at 622H, cited in *Chorariа v Sethia* at 629G, makes clear that, in the context of abuse of process, the fact that the other party in the litigation may have been 'remiss' is not a matter upon which the abusive party can rely."

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. I do not agree that it follows that, in considering whether the claimant has been guilty of the *Choraria* limb of abuse, the defendant's inactivity is irrelevant. Nor is the court's inactivity irrelevant.

82. In the circumstances of the present case, I consider that the facts that, exceptionally, the court failed to take any action when the Appellants failed to file an allocation questionnaire and that the Respondent took no action either reinforce the conclusions which I have drawn in paragraph 79 above.

83. *Conclusion*. I conclude that the Master was wrong to find that the Appellants were guilty of the *Choraria* limb of abuse of process.

Sanction

84. For the reasons given above, I shall consider the question of sanction on the footing that the Master was entitled to find that the Appellants had been guilty of the *Grovit* limb of abuse of process, but wrong to find that they had been guilty of the *Choraria* limb.

85. *The Master's judgment.* The Master considered at [92]-[110] whether the proper and proportionate response to the abuse of process he had found established was to strike the claim out or whether some lesser sanction should be imposed, and in particular the sanction suggested by counsel for the Appellants (in response to a suggestion made by the Respondent in its evidence in reply) of requiring a payment into court by the Appellants of £150,000 as security for the Respondent's costs. Although he recognised at [110] that "the sanction of striking out, particularly in the context of a substantial claim is draconian and, therefore, that … other and lesser sanctions must be considered", he concluded that any order other than striking out "would, in all the circumstances, be contrary to the due administration of justice".

86. The Master's reasons for reaching this conclusion may be summarised as follows:

    i) given the start/stop manner in which the litigation had been pursued before it fell into abeyance in 2012, as well as the Appellants' inactivity for the past three years and the conclusion he had drawn that, until prompted into action by the current application, they were content to keep the proceedings in indefinite abeyance, it was "very difficult to believe in Damascene conversion, and that there is now, in the Claimants, a full-hearted intention to pursue this litigation in compliance with the rules" ([102]);

    ii) this difficulty was compounded by the obvious fact that there was an alternative explanation for the Appellants' current activity, namely their desire to avoid the costs consequences of being struck out ([103]);

    iii) the Master was also "troubled by the Claimants' lack of openness": he considered that, if the Claimants really intended now to pursue the matter, they would have been rather more open with their court as to their conduct, in particular since March 2013, and as to why they could now be trusted ([104]);

iv) the Master was not satisfied that the Claimants' assurances together with the proferred payment in of £150,000 provided an adequate and proportionate sanction ([105]);

v) there was a real danger that, if the claim was allowed to continue, it would not proceed expeditiously and smoothly to trial, but rather the Claimants would be reluctant participants in the process, so that significant time and effort would need to be expended by the court and by the Respondent to ensure the case was tried in 2016, some 14 years after the Respondent was first instructed ([106]);

vi) this sanction was fair to the Appellants given their conduct and fair to the Respondent who had been faced with that conduct ([108]);

vii) the court would not be fulfilling its duty having regard to the overriding objective if it imposed a lesser sanction ([109]).

87. *Grounds of appeal*. The Appellants contend that the Master was wrong to conclude that the appropriate sanction was to strike out the claim on grounds which may be summarised as follows:

i) the Master was not entitled to reject the Appellants' assertion that they were now committed to pursuing the litigation to trial;

ii) if the Master was concerned about the Appellants' intentions, he should have tested them by setting a tight timetable going forward with robust sanctions for any failure by the Appellants to comply with that timetable;

iii) the Master misdirected himself as to the nature of his discretion because he failed to recognise that striking out was a remedy of last resort and there were lesser alternatives available which constituted a proportionate means of controlling the court's process;

iv) the Master failed to give weight to the fact that any new claim would be time-barred; and

v) the Master reached a conclusion outside the ambit within which reasonable disagreement is possible.

88. *Assessment.* As the last of these grounds recognises, the Appellant must surmount a high hurdle to establish that the Master exceeded the bounds of his discretion. That said, I shall consider each of the grounds in turn.

89. So far as ground (i) is concerned, I do not accept that the Master rejected the Appellants' assertion that they were now committed to pursuing the litigation to trial. Rather, he was sceptical as to extent of that commitment, and in particular as to whether it would be translated into appropriate action in the future. In my judgment he was entitled to be sceptical given the previous history, the time it took the Appellants to file their allocation questionnaire after the service of the Respondent's application (a period of nearly three months) and the state of the Appellants' evidence.

90. As to ground (ii), I accept that the Master could have adopted this approach. It is also fair to say that the Master did not explicitly address this possibility in his judgment. On the other hand, I think it is implicit in what he said at [106] that he considered that such an approach was likely to lead to further satellite litigation. In my view that was a reasonable assessment. In any event, the question for me is whether the Master exceeded the bounds of his discretion by failing to adopt this approach. I do not consider that he did.

91. Turning to ground (iii), I do not accept that the Master misdirected himself. The Master expressly stated at [110] that the sanction of striking out was draconian and that other and lesser sanctions must be considered. Indeed, as he mentioned at [98], during the hearing he indicated that he was prepared to accept supplemental written submissions on this very point, and the parties duly lodged such submissions which he took into account. The Master decided, however, that a lesser sanction was not appropriate in the circumstances of this case.

92. With respect to ground (iv), it is fair to say that the Master did not explicitly mention this. I consider that it is clear from reading the judgment as a whole, however, that he was aware of this and took it into account.

93. As for ground (v), this amounts to a submission that it was simply not open to the Master on the facts of the present case to conclude that striking out was an appropriate sanction. I do not accept this. After all, the starting point for the exercise of the Master, as he correctly recognised, was that he had found that the Appellants had been guilty of an abuse of the process of the court. It is true that both Article 6 of the European Convention on Human Rights and the common law guarantee the right of access to a court, but that right does not extend to abusing the process of the court.

94. In addition to these grounds, I should mention a further point which was raised by counsel for the Appellants during the course of argument, although it was not mentioned in the Grounds of Appeal or skeleton argument. This is that, during the course of his consideration of sanction, the Master referred (at [94] and [109]) to the new version of the overriding objective following the Jackson reforms. This, of course, only came into effect in April 2013. Counsel for the Appellants submitted that the Master should not have relied upon this. I do not accept that the Master exercised his discretion improperly in this regard. First, it is clear from [93]-[94] that the Master only treated this as reinforcing the more disciplined approach laid down in cases such as *Arbuthnot v Trafalgar*. Secondly, given that the Appellants' inactivity persisted for 18 months after the relevant amendments to the CPR and that, on their own evidence, the Appellants were meeting with lawyers during this period, I consider that the Master was entitled to take the new version of the overriding objective into account to the extent that he did.

95. I should also make it clear that, in my judgment, the Master's exercise of his discretion is not undermined by the fact he wrongly concluded that the Appellants were guilty of the *Chororia* limb of abuse of process as well as the *Grovit* limb.

96. *Conclusion*. I conclude that the Master was within his discretion to order that the Appellants' claim be struck out.

The Respondent's third ground

97. It follows from the conclusions reached above that the appeal must be dismissed. Accordingly, I shall consider the Respondent's third ground slightly more briefly than I would if it were potentially decisive.

The law

98. Prior to the CPR, the court could exercise its inherent jurisdiction to strike out a case upon the grounds of inordinate and inexcusable delay by the claimant, but only where that delay gave rise to a substantial risk that it would not be possible to have a fair trial, or where it had caused, or would be likely to cause, serious prejudice to the defendant: see *Birkett v James* [1978] AC 297 at 318F-G. There was a considerable body of case law on the exercise of this jurisdiction. In particular, the law, as developed, required that the risk that it would not be possible to have a fair trial or the prejudice to the defendant be shown to have arisen not from the generality of any delay, but specifically from identifiable periods of "culpable" delay.

99. As is clear from the decisions of the Court of Appeal in *Biguzzi v Rank Leisure Ltd* [1999] 1 WLR 1296, *Purdy v Cambrian* [1999] CPLR 843, *Walsh v Misseldine* [2000] CPLR 201, *Axa Insurance Co Ltd v Swire Fraser Ltd* [2001] CP Rep 17 and *Purefuture Ltd v Simmons & Simmons* [2001] CP Rep 30, that approach did not survive the coming into force of the CPR and the greater flexibility of approach required by the new rules. The correct approach now is first to assess the aggregate impact of all delay on the possibility for there to be a fair trial, and secondly, if there is a substantial risk that a fair trial is no longer possible, to assess whether culpable delay on the part of the claimant has materially contributed to that state of affairs.

100. As is common ground, and as the Master noted at [114], the burden of proof lies on the applicant, here the Respondent. In the circumstances of the present case, this requires the Respondent to establish that, as the Master put it, "the dimming of memory will give rise to specific problems of a nature such as to give rise to a serious and substantial risk that the court will not be able to afford the parties, specifically, here, the Defendant, a fair trial". As the Master noted at [112], a mere general assertion that the claimant's delay has resulted in a dimming of memories is insufficient.

The Master's judgment

101. The Master's analysis proceeded in three stages. In the first stage, at [114]-[124], the Master considered whether there was a substantial risk that a fair trial would no longer be possible. He concluded that there was such a risk for reasons that may be summarised as follows:

    i) he noted the Respondent's case as to the oral instructions alleged to have been given by Mr Solland, and as to the absence of contemporaneous notes thereof, and accordingly the Respondent's reliance upon the evidence of Messrs Rattray, Crighton, Varma and Coleman and, potentially, Mr Shivji ([115]-[119]);

ii) he accepted that the passage of time would be likely adversely to affect the ability of those witnesses to respond to cross-examination by reference to the prevailing circumstances and in detail and thus be likely adversely to affect the credibility of their evidence ([117]-[119]);

iii) he noted that Mr Coleman had been interviewed by both parties in 2005 and Mr Rattray had been interviewed by the Respondent in 2009 and that there was no specific evidence as to recollections of Mr Varma and Mr Crighton ([120] and [122]);

iv) he noted that it was unclear that Mr Shivji would be called as a witness by the Respondent ([122);

v) he noted that Mr Rattray was unable to recall matters in detail even in 2009 and he saw no reason to think that Messrs Varma, Crighton and Shivji would be in any better position, although Mr Coleman might be in somewhat better position because he had had the benefit of being interviewed in 2005 ([122]-[123]);

vi) he concluded that this was "not just a matter of memories generally becoming dimmed", but "a matter of memories, in particular memories of detail, becoming dimmed in respect of crucial factual disputes" ([124]).

102. In the second stage, at [125]-[133], the Master considered whether the delay occasioned by the Appellants' failure to file an allocation questionnaire had materially contributed to the risk. He concluded that it had for reasons that may be summarised as follows:

i) he accepted that Mr Rattray had already had limited recollection in 2009 ([127]);

ii) he accepted that the absence of attendance notes was a constant ([128]);

iii) he nevertheless considered that the absence of attendance notes made it difficult for the Respondent and its witnesses adequately to meet the Appellants' allegations relying only upon ever-decreasing recollection ([129]);

iv) he accepted that loss of recollection was not linear ([130]);

v) he considered that, in circumstances where oral testimony and recollection of circumstances and detail was going to be so important to the Respondent's case, even a relatively small additional loss of recollection was of potential significance ([132]);

vi) he considered that an additional delay of 31 months was likely to have made a difference: the "clear likelihood is that a delay of twelve and half years (from 2003 …) will have resulted in a greater ultimate impairment of recollection than if the delay had been only one of ten years" and "even a small additional loss of recollection, in a case such as this, could well be significant" ([133]).

103. In the third stage, at [134]-[138], he considered the impact of the Respondent's inactivity on the appropriate order to make. He accepted that the Respondent could

have brought matters to a head considerably earlier, but nevertheless he considered that the Appellants bore the primarily responsibility for the delay. In those circumstances, he considered that it would not be right to refuse to strike out the claim and thus expose the Respondent to the substantial risk of an unfair trial.

Grounds of appeal

104. The Appellants contend that the Master was wrong to strike out the claim on this basis on grounds which may be summarised as follows:

i) the Master misdirected himself in law since he ought to have directed himself that a general assertion that memory fades with time was insufficient and that the Respondent bore the onus of proving that a fair trial was no longer possible due to inordinate and inexcusable delay since the issue of the proceedings;

ii) the Master applied the test in a manner which involved wrongly reversing the burden of proof;

iii) the Master was not entitled on the evidence to conclude that there was a substantial risk that there could not be a fair trial of the claim;

iv) the Master was not entitled on the evidence to conclude that the Appellants' delay in filing an allocation questionnaire had materially contributed to that risk;

v) the Master exceeded the bounds of his discretion in striking out the claim, having regard in particular to the Respondent's inactivity.

Assessment

105. So far as ground (i) is concerned, in my judgment the Master directed himself correctly. As noted above, he expressly recognised that a general assertion that memory fades with time was not enough and that the burden lay on the Respondent to show that the dimming of memory would give rise to specific problems which led to a substantial risk that there could not be a fair trial and that the Appellants' culpable delay had materially contributed to that risk.

106. As to ground (ii), this focuses upon the use by the Master of a double negative at [131]:

> "All that said, I am not persuaded that the additional delay, consequent upon the Claimants' failure to file their allocation questionnaire, has not had any material impact on recollections and, so, upon what I see to be the substantial risk that a fair trial can no longer be conducted in this case."

The Master used similar language at the beginning of [133].

107. The Appellants contend that, in expressing himself in this way, the Master wrongly reversed the burden of proof. I do not accept this. While the Master's choice of language in these paragraphs may have been slightly unfortunate, it must be read in context. The context is that, by this stage in his judgment, the Master had correctly

directed himself as to the burden of proof (at [114]), had then considered whether there was a substantial risk that there could not be a fair trial and concluded that there was (at [115]-[124]) and was considering whether the delay occasioned by the Appellants' failure to lodge their allocation questionnaire had materially contributed to that risk (at [125]-[133]). As the Master made clear, in particular at [132], his approach to that question was that he considered that the starting point was that, in the circumstances of this case, it was likely that 31 months of additional delay would materially contribute to the risk. Accordingly, the exercise he was engaged in was considering whether he was persuaded to the contrary by a number of points relied upon the Appellants. It was in that context that the Master said at [131] and [133], in effect, that he was unimpressed with those points.

108. Turning to ground (iii), the Appellants contend that the Master failed to analyse the matter with sufficient specificity: he ought to have considered what evidence there was that each witness's recollection had dimmed in relation to each issue as a result of the Appellants' culpable delay. In my view it is unrealistic to expect that degree of specificity. The Master carefully considered the nature of the issues in the case, and the likely impact of the passage of time on the Respondent's witnesses' recollections having regard to the available evidence regarding those witnesses, and in particular the dates when Mr Coleman and Mr Rattray were interviewed, the state of the latter's recollections when interviewed and the inherent probabilities as to the effect of the passage of time since then having regard to the nature of the issues.

109. The Appellants also contend that the Master engaged in unjustified speculation unsupported by evidence with respect to Messrs Varma, Crighton and Shivji. I do not accept this either. In my view the Master was entitled to draw the inferences as to those witnesses' recollections that he did.

110. The Appellants also complain that the Respondent declined to disclose the attendance note of the interview with Mr Rattray. In my view this complaint is a bit rich given the Appellants' own stance on privilege. The Appellants' solicitor Fergal Cathie deposed to the state of Mr Rattray's recollections in 2009 and there is no basis for the Appellants' attempt to go behind that evidence.

111. Finally, the Appellants complain that the Master failed to take into account the extensive pre-action correspondence (including the post-Claim Form correspondence) and the opportunity that this had given the Respondent to interview relevant witnesses with respect to the Appellants' allegations. I do not accept this. It is clear from the Master's review of the procedural chronology that he was well aware of this. In my view he was entitled to conclude that it was not an answer to the Respondent's concerns, which were focussed in particular on cross-examination at trial. The same goes for the Appellants' reliance upon the fact that the Respondent was able to serve a Defence verified by a statement of truth signed by Mr Varma.

112. Overall, I consider that the Master was entitled on the evidence to reach the conclusion that he did.

113. The position with respect to ground (iv) is similar. Again, I consider that the Master was entitled on the evidence to reach the conclusion that he did. Contrary to the Appellants' argument, I do not consider that that conclusion was precluded by the

Master's analysis of the procedural consequences of the Appellants' failure to file an allocation questionnaire.

114. As for ground (v), as noted above, the Master expressly cited *Asiansky* for the proposition that it was no longer acceptable practice to let sleeping dogs lie. He accepted that the Respondent could have taken action, but nevertheless he considered that the primary responsibility for the increased risk of an unfair trial lay on the Appellants and therefore the correct course was to strike out the claim. In my judgment he was entitled to exercise his discretion in that way, particularly bearing in mind how stale the claim already was at the beginning of the relevant period of delay. The right of access to a court does not extend to a right to pursue a claim which there is a substantial risk cannot be fairly tried that has been materially contributed to by the claimant's delay.

Conclusion

115. I conclude that the Master was entitled to strike the claim out on this ground as well.

Disposition

116. The appeal is dismissed.