

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
Claim No.: 2026/CLE/gen/01292

BETWEEN:

HAMBY LIMITED

Claimant

AND

(1) HERMITAGE ESTATES LIMITED
(2) BARRY SILVERTON (deceased)
(3) DEIDRE CORALIE BOWE
(4) NEWELL KENNETH BOWE
(5) KENDALL PH, LLC

Defendants

Before: Mr. Renaldo Toote, Registrar

Appearances: Gail Lockhart-Charles, KC of Counsel for the Claimant
Kahlil Parker, KC of Counsel for the Defendants

Hearing dates: 8th and 15th May 2026

Civil Procedure Rules rule 26.3 — Strike out — Abuse of process — Warehousing — Claim deliberately held dormant while claimant pursued external commercial and title-resolution strategy — Inordinate and inexcusable delay — Alternative finding: unfair-trial risk — Death of principal historic witness — Surviving witness unable to replace unavailable first-hand evidence — Claim and unauthorized amendment struck out — Counterclaim reserved.

RULING

Toote, Registrar

Introduction

- [1]. This is the First Defendant's application, filed on 15 October 2025, seeking orders pursuant to rules 26.1(2)(i) and (v) and 26.3(1)(a) -(d) of the Civil Procedure Rules 2022 ("CPR"), to strike out the Claimant's Amended Originating Summons filed on 13 November 2007 and the Amended Statement of Claim filed on 19 March 2025, and to dismiss the action in its entirety.

- [2]. The application rests principally on the Claimant's failure to prosecute the action after pleadings closed in April 2012; the alleged absence of a credible justification; the death of the Second Defendant, Mr. Barry Silverton, on 18 October 2021; and the Claimant's purported non-compliance with the CPR in filing its 2025 amendment and taking steps against a deceased defendant without first regularising representation of his estate.

- [3]. The Claimant submits that it neither abandoned the action nor that its inactivity was an abuse of process. It says that it was engaged in title investigation, regulatory and commercial work concerning the property; proceedings involving PMR Little Exuma, LLC ("PMR"), the entity which asserts that it acquired the Bowes' interest in the separate Bowe Mortgage and commenced foreclosure proceedings against Hermitage in 2023; settlement discussions and mediation; and the related California proceedings. For ease of reference, PMR is referred to in this ruling only as context for later developments affecting the property and the parties' subsequent conduct. Its asserted acquisition and separate proceedings neither alter the original character of this action nor, without more, excuse the Claimant's earlier failure to prosecute it.

- [4]. The Claimant contends that Hermitage's own conduct, including its post-2021 California litigation and participation in mediation, defeats any assertion that a fair trial is now impossible or that strike-out is proportionate.

The Application

- [5]. The Court has considered the Notice of Application; the affidavits of Rushea Stuart and Alexandria Fernander for the First Defendant; the Affirmation of Paul Weinberger, the Affirmation of D. Asher Bistricher, and the affidavits of Kara Neely and Letitia Riley for the Claimant; the parties' written submissions and skeleton arguments; the 2008 ruling of *Mohammed J.* and the Court of Appeal judgment in *Hamby Limited v Hermitage Estates Limited et al.*, SCCiv App No. 21 of 2008.

- [6]. I have not determined the merits of the mortgage, the Settlement Agreement, the alleged continuing obligations, the Bowe Mortgage, or any defence and counterclaim. Those questions remain for trial if the action proceeds. The Court of Appeal has already held that the material issues are complex and were not suitable for resolution merely on the documentary evidence and affidavits which were before that Court.
- [7]. At the hearing on 15 May 2026, the parties completed their oral submissions and declined the opportunity to file supplementary written submissions. The Court identified the issues as: whether Hamby intentionally warehoused the action; whether serious prejudice has been proved; whether a fair trial remains possible; and the effect, if any, of Hermitage's own conduct on the discretionary remedy. Both parties agreed that the Court must assess the weight of the affidavit evidence. Those are the issues addressed in this ruling.

Background Facts

- [8]. The following history is material to the present application.
- [9]. The Hamby Mortgage was executed on 23 December 2004. It provided for an advance of US\$8,000,000 on the security of the Hermitage Estates, with a maturity and redemption date of 31 December 2006.
- [10]. The underlying controversy was not confined to the repayment of the US\$8,000,000 advance. Hermitage's position was that it had forwarded two cheques dated 22 June 2005 in satisfaction of the mortgage debt and was entitled to redeem the Property. Hamby, by contrast, contended that the mortgage formed part of a wider venture: in consideration of the initial funding, Talisker Realty Limited ("Talisker"), a Delaware corporation which originally negotiated the original 2004 investment arrangement with Hermitage and subsequently caused Hamby to be incorporated as the Bahamian vehicle to hold its investment interest was to receive a 25% shareholding in Hermitage and thereby a 25% interest in the proposed Hermitage resort development. Hamby further contended that the mortgage secured obligations extending beyond the original advance, including what it characterized as preferred equity and other non-financial obligations. These competing positions are recorded as the parties' contentions; they are not determined in this ruling.
- [11]. On 15 July 2005, Hermitage commenced redemption proceedings under Order 77 of the Rules of the Supreme Court. *Lyons, J.* presided over the matter and declined to make a summary redemption order, holding that the Court had to determine the parties' true agreement and that oral evidence was the appropriate means of resolving the dispute. The Court of Appeal later noted that this decision was never challenged or set aside.

- [12]. The parties entered into a Settlement Agreement on 23 May 2006, shortly after *Lyons, J's* oral decision. The meaning and effect of that agreement, including any obligations arising, remained disputed. PMR became involved only after its asserted acquisition of the Bowes' interest in the Bowe Mortgage in 2023; it was not a party to the 2004 Hamby/Hermitage venture or mortgage negotiations.
- [13]. On 13 December 2006, Hamby commenced this action by Originating Summons seeking foreclosure. The originating process was later amended on 13 November 2007, and its scope was enlarged beyond the original foreclosure relief.
- [14]. On 27 February 2008, Hermitage applied to strike out the Amended Originating Summons. Hamby's application of 3 March 2008 to convert the matter to an action begun by writ remained pending when the strike-out application was heard.
- [15]. *Mohammed J.* dismissed the action on 31 March 2008. That dismissal was set aside by the Court of Appeal on 25 June 2009. The Court of Appeal remitted the matter back to the Supreme Court, directed that the conversion application be heard in the usual manner, and required that the matter thereafter proceed with a view to a speedy trial. The costs in both courts were ordered to be cost in the cause.
- [16]. The record establishes that, following the remittal, the action was converted to proceed as an action begun by writ. The Claimant filed its Statement of Claim on 2 February 2012; the Defendants filed defences on 12 and 13 April 2012; and Hermitage also filed a counterclaim. The Court accepts that pleadings were therefore substantially complete by April 2012.
- [17]. The parties differ sharply about what followed. There is no evidence of a court-directed step being taken to move this action toward trial between April 2012 and the Claimant's re-amended Statement of Claim in March 2025. This was an extensive period of procedural inactivity. The Claimant's evidence is that it was conducting title and related investigations, encountering difficulties in locating original title records, considering the regulatory and financial implications of a foreclosure, and responding to continuing disputes about the Property. These are explanations, not exculpation. They did not relieve Hamby of its duty to seek directions from the Court.
- [18]. On 18 October 2021, Mr. Barry Silverton, the principal directing mind of Hermitage died. His death is established by the certificate exhibited to Ms Stuart's affidavit.
- [19]. Between 2023 and 2025, there were significant further events. PMR commenced proceedings concerning the Bowe Mortgage. Hamby and Hermitage met in June 2023;

Hermitage commenced proceedings against Hamby in California in 2023 and 2024 concerning the 2006 Settlement Agreement and related matters; the parties engaged in a formal mediation in December 2024; and the California proceedings were dismissed on *forum non conveniens* grounds, with The Bahamas identified as a suitable alternative forum. None of those events erased the Claimant's pre-existing default in this action, but each bear on whether Hamby had no present intention to litigate and whether Hermitage is materially prejudiced by the absence of Mr. Barry Silverton's evidence.

[20]. Hamby filed the challenged re-amended Statement of Claim in March 2025 without first obtaining leave. It also filed evidence in support of that pleading. In the course of this application, it has sought permission to amend and give directions for a case management conference, including steps concerning the estate of Mr. Barry Silverton.

The Law

[21]. Rule 26.3 confers a discretionary power to strike out where, among other matters, there has been non-compliance with a rule, practice direction, order or direction; where a pleading discloses no reasonable ground; where it is frivolous, vexatious, scandalous, abusive, or likely to obstruct the just disposal of proceedings; or where it is prolix or non-compliant in form.

[22]. The Court's discretion is governed by the overriding objective: to deal with cases justly and at proportionate cost. Strike-out is a powerful case-management sanction. It must not be imposed merely to mark disapproval of past default. It is imposed only where the applicable threshold is established and where the sanction is proportionate.

[23]. The controlling Bahamian authority on dismissal for want of prosecution remains *Icebird Ltd. v Winegardner* [2009] UKPC 24. The Privy Council reaffirmed the test in *Birkett v James* [1978] AC 297: absent intentional and contumelious default or an independently established abuse, the defendant must demonstrate both inordinate and inexcusable delay and a substantial risk that a fair trial cannot be held or serious prejudice caused by that delay.

[24]. Delay and abuse are distinct, although they may sometimes overlap. *Grovit v Doctor* [1997] 1 WLR 640, which was approved in *Icebird*, establishes that the Court's process is abused where a claimant commences or continues litigation without a genuine present intention to bring it to a conclusion. Once that abuse is proved, the Court need not establish the separate *Birkett* requirements of a substantial risk that a fair trial cannot be had or distinct serious prejudice. *Icebird Ltd. v Winegardner* [2009] UKPC 24 makes clear, however, that delay and abuse are distinct. Inordinate delay is not converted into abuse

merely by applying that label: the Court must identify the additional facts and evidential basis which demonstrate the claimant's want of a genuine present intention to prosecute.

[25]. In *Grovit (ibid)*, the House of Lords determined that:

"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...."

[26]. Modern authorities concerning "warehousing" confirm that a claimant may abuse the process by deciding not to pursue a claim for a substantial period while retaining it as a tactical vehicle for later use. See *Alfozan v Quastel Midgen LLP* [2022] EWHC 66 (Comm).

[27]. That same principle was discussed in *Arbuthnot Latham Bank Ltd. v Trafalgar Holdings Ltd.* [1998] 1 WLR 1426. In that case, Lord Woolf, MR held that:

"a claimant may not keep a live claim in reserve and pursue it later when commercially convenient. If there is a valid reason to pause the action, the claimant must discontinue it or obtain the Court's approval for a stay or adjournment." (underline for emphasis).

[28]. In applying these principles, the Court must objectively assess the Claimant's reasons for the delay and, if abuse is established, decide whether strike-out is a proportionate remedy.

The parties' competing positions
Hermitages' submission

[29]. Hermitage submits that the Claimant did nothing to prosecute this matter between April 2012 and March 2025; that the delay is extreme, intentional or at least wholly inexcusable; and that the purported explanations amount to an attempt to convert collateral commercial activity into litigation progress. It relies on the Court of Appeal's conclusion that the central issues require oral evidence and says that Mr. Barry Silverton was a critical witness. It contends that his death makes a fair determination of the issues in dispute significantly more difficult, if not impossible.

[30]. Hermitage also submits that the 2025 amendment, filed without leave, is a nullity; is prolix and abusive; introduces fresh relief against the deceased Second Defendant; and was filed contrary to the procedural requirements which took effect in 2023. It submits that the

Claimant cannot now be trusted to comply with further directions and that a final remedy is required.

Hamby's submission

[31]. Hamby accepts that the action did not advance through the Court after the 2012 pleadings. It says, however, that its conduct was not abandonment or warehousing. It relies on the work said to have been undertaken to resolve title questions, the PMR proceedings, the attempted resolution of the Bowe Mortgage, settlement discussions in 2023, formal mediation in 2024, and the California litigation initiated by Hermitage. It says those matters were commercially and practically connected to the resolution of the same underlying dispute.

[32]. On prejudice, Hamby relies on the evidence that Baron Silverton (the son of Barry Silverton) was actively involved in the venture from the outset, has professed personal knowledge of the relevant matters, and stated in a California declaration given in 2024 that he could competently testify. Hamby submits that it is inconsistent for Hermitage to say that Mr. Barry Silverton's death makes the present action untriable when Hermitage itself pursued California proceedings after his death, on the same underlying factual matrix.

Analysis and findings

The delay; whether the Claimant warehoused the claim

[33]. The First Defendant's case is that the inactivity establishes deliberate warehousing. The relevant question is not whether Hamby hoped eventually to obtain a judicial resolution. It is whether, during the prolonged period of procedural dormancy, it had a genuine intention to prosecute this action in accordance with the Court's process.

[34]. The significance of the loss of Mr. Barry Silverton's evidence is heightened by his position. Baron Silverton was not a named party to this action. Barry Silverton, by contrast, was the named Second Defendant from the commencement of the proceedings and was separately represented on the earlier appeal. He was also a party to the 2004 joint venture said to underlie the pleaded claims. His evidence was therefore not that of a peripheral witness who might be replaced by a family member or corporate agent. It was the evidence of a litigant against whom relief was sought and of a direct participant in the commercial arrangements which this action required the Court to examine.

[35]. Hamby has given an account of its commercial reasons for not moving immediately to trial. As mentioned, it says that it investigated title defects, regulatory matters, potential development or sale, and collateral disputes concerning the Property. Those matters may explain why Hamby considered it commercially preferable to defer active litigation. They

do not provide a reasonable procedural justification for leaving this action dormant for approximately thirteen years. Hamby neither sought a stay nor invited the Court to give directions to regulate the action while those matters were pursued. The Court of Appeal had directed a speedy trial after the Order 28 application was dealt with. Hamby's unilateral decision to await the outcome of its external commercial and title-resolution strategy was not compliant with the Court of Appeal's direction or with its duty to prosecute the action.

[36]. The burden to drive the claim lay upon Hamby. By April 2012 pleadings had closed: Hamby's Statement of Claim had been filed on 2 February 2012 and the Defendants' defence followed on 12 and 13 April 2012. Yet Hamby did not take the procedural steps required to advance its own claim, obtain directions, or bring the matter before the Court for case management. As a consequence, no case-management timetable was made, and no witness-statement process was triggered before Barry Silverton's death in October 2021. The Court rejects any suggestion that the First Defendant bore responsibility to preserve the Claimant's action by prosecuting it on Hamby's behalf. The Privy Council in *Icebird* confirms that a claimant must take the steps needed to prosecute its claim and that inordinate and inexcusable inactivity is not excused by the defendant's failure to do so.

[37]. Hamby relies by analogy on *Morgan Sindall Construction and Infrastructure Ltd v Capita Property and Infrastructure (Structures) Ltd*. [2023] EWHC 166 (TCC). That authority is, however, distinguishable. There, the Court found that the claimant's decision to place the action on hold while it pursued and coordinated a related Aviva claim was commercially sensible, had been encouraged by the defendant, and was followed by a tripartite mediation. The defendant's later delay in pursuing strike-out was also material to proportionality. Here, by contrast, no related proceeding existed during the central period of inactivity from 2012 until 2023; PMR did not emerge until 2023; Hermitage did not consent to a stay of this action or jointly endorse Hamby's asserted title-resolution strategy; and Hamby did not seek any order or direction from the Court authorizing the prolonged suspension of the action. Most significantly, this Court was bound by the Court of Appeal's direction that the matter proceeds with a view to a speedy trial.

[38]. Hamby says it wanted to understand and resolve competing interests in the Property before taking possession, developing it or obtaining proper value on a sale. It investigated title with a view to an inquiry or quiet-title action, instructed First American Title after encountering difficulty locating original deeds, and considered permitting, tax and financial consequences of foreclosure. Those were relevant matters for Hamby to investigate. Indeed, its evidence says the existing claim sought an inquiry into other estates, interests and encumbrances affecting the Property. (See the Affirmation of Paul Weinberger).

[39]. However, that does not answer the procedural question. Understanding how to develop or sell the Property after foreclosure is different from showing why the existing mortgage and settlement dispute could not be advanced before all that work was complete. Hamby's account does not identify a particular missing deed or unresolved regulatory question that prevented a particular step in this action. Nor does it explain why Hamby could not ask the Court to manage the title inquiry, give directions, or authorize a defined pause while the investigations continued. Significantly, Hamby's own evidence says that by 2023, it [Hamby] had concluded the action would have to proceed without a complete picture of the title issues.

[40]. If the Claimant believed that the title, regulatory, PMR, or settlement issues required the case to be paused, it had several options. It could have asked the Defendants to agree to a stay or applied to the Court for a stay or adjournment on set terms, sought directions to preserve evidence and manage the case while the related matters continued. It did none of these things. If Hamby had moved the case forward after the pleadings closed, Barry Silverton's evidence might have been recorded through the Court process while he was alive and able to respond to the allegations against him. Hamby's unexplained failure to advance the case denied the Court that assurance and the parties that protection.

[41]. That failure was substantive. *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426 makes clear that proceedings which are not to be advanced should be discontinued or placed on hold only with the authority of the Court. *Aljawharah Bint Ibrahim Abdulaziz Alibrahim v Asturion Foundation* [2020] EWCA Civ 32 confirms that a claimant who wishes to pause an action must seek the defendant's consent or, failing that, apply to the Court; it may not simply treat proceedings as stayed while it pursues extraneous possibilities. The proper course was to apply to the Court; Hamby did not do so.

[42]. The governing authorities are clear. Under *Grovit*, the Court has an independent jurisdiction to prevent a claimant from commencing or continuing litigation which it has no present intention to bring to a conclusion; proof that a fair trial is impossible or that separate prejudice has been established is not a precondition to that finding. The Privy Council in *Icebird*, requires the Court to identify the evidential basis which transforms delay into abuse. That basis is present here. *Arbuthnot Latham* identifies the mischief precisely: a party may not keep a claim in reserve until it becomes convenient to pursue it. *Asturion* confirms that a unilateral decision not to prosecute for a substantial period, pending contingencies extraneous to the claim, may constitute abuse, assessed by reference to the objective strength of the asserted reason and the duration of the pause.

[43]. The later events cited by Hamby do not alter that finding. The present evidence does not justify the whole interval. It says the work began after the 2012 amended pleading and describes obstacles but does not provide a sufficiently dated account of each investigation, the steps taken to overcome each obstacle, or why the action could not make court supervised progress in the meantime. PMR's appearance in 2023 cannot explain the preceding years. The proposed finding should therefore be *not* that title work was unnecessary or that every day of the investigations was wasted. It is that Hamby has *not* demonstrated why those investigations required, or reasonably justified, leaving this action without court-supervised progress from 2012 to 2025, particularly after the Court of Appeal directed a speedy trial.

[44]. The Court finds that Hamby's conduct meets the distinct *Grovit* threshold. The conclusion does not rest upon delay alone. It rests upon the combination of (i) a thirteen-year failure to prosecute after the close of pleadings; (ii) the absence of any application for directions, a stay, or evidence-preservation measures; (iii) the Court of Appeal's unfulfilled direction for a speedy trial; (iv) the Claimant's preference to pursue external commercial and title objectives before returning to this action; and (v) its attempt to revive the proceeding only after those external developments, by an amendment filed without leave. Those facts establish that Hamby retained the Court's process as a contingent vehicle to be used when its wider strategy became commercially advantageous. This was warehousing, not mere inadvertence or ordinary delay.

Fair trial and prejudice

[45]. The Court of Appeal identified oral evidence as important to a fair determination; therefore, prejudice must be considered from the position of Barry Silverton as the named Second Defendant, and not merely as a source of evidence for Hermitage. His death on 18 October 2021 is supported by the death certificate exhibited to Ms. Stuart's affidavit. The Court of Appeal held that complex commercial disputes could not properly be resolved on the documents alone without hearing witnesses and remitted the action with a view to a speedy trial. Its decision did not, however, prescribe testimony from any particular individual as an indispensable condition of trial. The failure to advance the action while Mr. Silverton was alive has permanently removed the opportunity for him to give oral evidence on disputed matters within his knowledge and to be cross-examined in response to the case against him.

[46]. The Court accepts the First Defendant's submission that Mr. Barry Silverton was a central, rather than incidental, witness. The 2007 affidavit cited by counsel identifies him as Hermitage's beneficial owner and describes his role in acquiring and developing the Property. The Court of Appeal had before it, affidavit evidence from him when it concluded that oral evidence was required. His death is therefore an actual and irreversible loss of

first-hand defence evidence for a party personally named in this action, not a matter to be discounted as merely formal. Ms. Stuart also asserts that the March 2025 pleading seeks relief against him, which had not previously been sought; whether that proposed amendment is permissible, and against whom any surviving claim may proceed, requires separate determination rather than an assumption that Hermitage's evidence answers his personal defence.

[47]. The Court of Appeal's reasoning at paragraph 27 is of particular importance to the assessment of prejudice. *Osadebay, JA* held:

"It seems to me that the issues which the appellant seeks to raise for determination are complex and cannot simply be determined on the documents only. These documents are the product of meetings, discussion and negotiations of business people. It may be that much of the parties' intention can be discovered by examining the documents but it must always be borne in mind that these commercial documents are made between business persons. While it may be that the intention of the parties can be discerned from the documents themselves, the court is normally reluctant to draw inferences without seeing and hearing the witnesses."

[48]. That appellate finding confirms that evidence from the relevant commercial participants was not peripheral but materially important to the fair resolution of the historic dispute. Mr. Barry Silverton was the principal historic actor and original affiant for Hermitage. His death therefore creates serious prejudice to Hermitage; it has lost the direct, *viva voce*, and cross-examinable evidence of the person who, on the evidence, was centrally involved in the formation, ownership structure, negotiations, representations, intentions, and commercial understanding of the arrangements. That evidence cannot be recreated merely from the documents or by inference. The evidence supporting that conclusion is specific, the Court of Appeal required the oral evidence of the commercial participants; Mr. Barry Silverton was Hermitage's principal historic affiant and commercial actor; and his direct evidence is no longer capable of being tested at trial.

[49]. Baron Silverton's own 2024 declaration provides direct evidence that, in or about November 2004, he and his father acted on Hermitage's behalf in entering the venture with Talisker and Mr. Bistricher; that Mr. Bistricher negotiated transactions with both of them; and that he attended the 13 December 2004 project meeting with his father and Talisker representatives. The Court therefore accepts that Baron may have first-hand evidence concerning aspects of the original venture and mortgage negotiations.

[50]. There is countervailing material which cannot be ignored. Mr. Weinberger states, from personal involvement since 2004, that Baron Silverton was a primary participant and point of contact. In a 2024 declaration given in the California proceedings, Baron Silverton described himself as Hermitage's authorised agent, asserted personal knowledge of the facts set out there, and said he could competently testify to those matters. I do not treat that

declaration as proof that Baron can duplicate every aspect of his father's evidence, nor as proof of the truth of the substantive matters asserted. It establishes that Baron can provide relevant evidence within the limits of his own first-hand knowledge. It does not establish that he can give, or that Hermitage can obtain from him, the missing first-hand evidence of his father.

[51]. Hermitage's post-death California proceedings do not amount to a waiver, and they do not establish that this Bahamian action is identical in scope. They are nevertheless relevant to the objective assessment of prejudice. Hermitage chose to pursue claims after Mr. Barry Silverton's death arising from the 2006 Settlement Agreement and the same wider commercial relationship. That later and distinct proceeding does not remove the prejudice in this action. It was prompted by the PMR demand in 2023 and the asserted failure to tender payment after the June 2023 notice. It did not require the Court to determine, after *viva voce* evidence, the historic factual issues remitted by the Court of Appeal in this action.

[52]. I therefore find, in the alternative, that the delay has created a substantial risk that a fair trial of this action is no longer possible. The loss is not a generalized concern about faded memories. It is the loss, through the Claimant's prolonged procedural dormancy, of the direct *viva voce* evidence and cross-examination of the First Defendant's principal historic witness on issues which the Court of Appeal held required oral evidence. Baron Silverton may give evidence of what he personally knew; he cannot retrospectively acquire his father's personal knowledge, and any second-hand account cannot be treated as an equivalent substitute. This is serious prejudice within *Birkett* and *Icebird*.

Hermitage's conduct

[53]. I reject Hamby's submission that Hermitage is barred or estopped from pursuing its application. Hermitage's conduct is relevant, but it does not displace the findings above. A defendant is not obliged to assume the claimant's burden of prosecuting an action and participation in settlement discussions invariably waive a later procedural complaint in the absence of an agreement to do so or to forestall the running of time. Furthermore, the California proceedings and mediation did not concern precisely the same claim and were materially prompted by the post-2023 PMR dispute. They do not amount to a waiver of the historic procedural abuse or of the prejudice caused by the loss of Barry Silverton's evidence. In these circumstances, they do not render strike-out disproportionate.

The 2025 Amended Statement of Claim and the deceased Second Defendant

[54]. The 19 March 2025 re-amended Statement of Claim was filed without leave. At the hearing, Hamby expressly accepted that, if the Court regarded it as not properly before the Court, the Court could disregard it pending a proper application to amend and determine the strike-out application by reference to the 2012 claim. That concession is appropriate and resolves the immediate procedural difficulty.

[55]. The Court does not determine in this application whether every proposed amendment is properly pleaded, arises out of the same or substantially the same facts, is barred, or causes irreparable prejudice. Nor does it decide whether the proposed allegations concerning Mr. Barry Silverton's estate are sustainable. Those matters require a properly supported application and focused evidence and submissions from every affected party.

[56]. The amendment cannot remain valid merely because it has been filed. The Claimant also accepts that the estate of Mr. Barry Silverton requires representation, before substantive steps may be taken against it. Thus, the necessary procedural course must be completed first.

[57]. The Court will therefore strike out the 19 March 2025 Amended Statement of Claim because it was filed without leave. In light of the dismissal of the underlying action for abuse of process and, alternatively, unfair trial prejudice, there is no pending claim capable of amendment. No application for permission to amend that pleading shall be entertained.

Conclusion

[58]. The First Defendant's application succeeds. The Claimant's 2012 Statement of Claim is struck out, and the action is dismissed as against the Defendants. The Court reaches that result primarily because Hamby's warehousing of the action is an abuse of process and alternatively, because the inordinate and inexcusable delay has created a substantial risk that a fair trial is not now possible.

[59]. The 19 March 2025 Amended Statement of Claim is also struck out. It was filed without leave and, in light of the dismissal of the underlying action, there is no pending claim capable of amendment. No application for permission to amend it shall be entertained in this action.

[60]. Nothing in this ruling determines the merits of Hermitage's counterclaim, if it remains extant, or the rights and obligations of any party in the PMR proceedings. Any party

seeking to pursue a surviving counterclaim or related proceeding must take the procedural step required by the CPR.

[61]. The Claimant shall pay the First Defendant's costs of the application, to be assessed if not agreed.

Dated this 1st day of October A.D., 2026.

[Original signed & sealed]

Renaldo Toote
Registrar