

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2020/0172

IN THE MATTER OF THE BVI BUSINESS COMPANIES ACT, 2004

AND

IN THE MATTER OF PLATINUM INVESTORS LIMITED (THE “COMPANY”)

BETWEEN:

DAVID A. PENN

Claimant/Respondent

and

REGISTRAR OF CORPORATE AFFAIRS

Defendant/Applicant

Appearances: Mr. Michael Maduro, Counsel for the Claimant
Ms. Dian D. Fahie, Counsel for the Defendant

2021: January 28th
March 4th

JUDGMENT

[1] **ELLIS J:** By Notice of Application filed on 21st October, 2020, the Registrar seeks an order pursuant to CPR Part 26.3 and/or under the Court’s inherent jurisdiction striking out the Claimant/Respondent’s statement of case on the ground that the said claim is an abuse of the court’s process.

[2] The chronological background to this Application is critical to its disposal and so the same is summarized below:

- i) Platinum Investors (“the Company”) was incorporated under the provisions of the Companies Act, on 5th January 2004; the Company was struck off the register of companies on 1st January, 2008 for failing to pay its annual fee. The Company was later dissolved on 1st January, 2018 under the provisions of Schedule 2, paragraph 56 (1) of the Virgin Islands Business Companies Act (“BCA”).
- ii) A Claim was initiated on 2nd October, 2018 in which the Respondent applied for the restoration of the Company (“The Original Claim”).
- iii) The first hearing of the Original Claim was held on 13th November, 2018 during which Counsel for the Respondent applied for, and was granted an adjournment to 15th January, 2019.
- iv) On 15th January 2019, counsel appeared to represent the Registrar, but there was no appearance on behalf of the Respondent or his Counsel. Notwithstanding that there was no application filed seeking an adjournment of the matter, the Court adjourned the matter to 24th January, 2019.
- v) On 24th January 2019, Counsel appeared to represent the Registrar, and again there was no appearance on behalf of the Claimant. On that same day, the matter was further adjourned to 5th February, 2019 in light of the Claimant’s failure to appear.
- vi) On 5th February 2019, at the hearing of the matter again Counsel for the Registrar appeared. There was again no appearance of the Respondent. On that occasion, the Court was satisfied that the Respondent had been properly served with the notice of adjourned date and yet he and his Counsel failed to appear with no excuse being advanced. Moreover no application was filed seeking an adjournment of the matter. The Court provided brief reasons for this decision which included a chronology of the multiple adjournments and non-appearances by the Claimant in the matter. The Court concluded with the following statements:

“It has not escaped **this court’s** notice that this matter would have appeared on multiple cause lists commencing 13th of January through to the 24th of January. Mr. Penn and Ms. Rosan would have been provided with a copy of the cause list on any given week. That aside, they may not have had personal notice of the adjourned date. That was cured on the last occasion on the 28th of January. There is still no appearance. Bearing in mind they were served since the 28th of January, the Court can see no justification for the non-attendance here this morning without appropriate excuse.

The Claimant clearly is not interested in prosecuting this matter. The claim is dismissed for want of prosecution.

I will make an order for liberty to apply, Ms. Fahie, in the event that Counsel has a legitimate excuse for his non-attendance here. He will have to persuade the Court. That brings an end to these proceedings.

- [3] On 15th October 2020, the Respondent initiated the 2020 Claim, raising the same issues as the dismissed in the Original Claim.
- [4] On 21st October 2020 the Registrar filed an application to strike out the present claim as an abuse of the Court's process.
- [5] The Court has considered both the oral and written submissions of both Parties as well as the evidence filed albeit very late in the day by the Claimant. The Respondent initially filed a sparse affidavit in response to the Application in which he disputed that the Original Claim was dismissed on its merits and instead asserted that the Original Claim was dismissed for want of prosecution. He further asserted (quite incorrectly) that the Court granted him leave to reapply at a later date. However, the Respondent filed an eleventh hour affidavit on 26th January 2021 days prior to this hearing in which he asserts as follows:

“On 5th February, 2018, when this matter came up for hearing before this Honourable Court, the Court Office was informed that I would not have been able to attend Court on that date, as I had to take my mother, who was seriously ill, to the Doctor urgently. A copy of the letter of certification from the attending Doctor, which was obtained expressly for purposes of Court, is now shown to me and is attached hereto and marked as **Exhibit “DAP – 6.**

My absence from the Court was not intentional and was regrettably unavoidable.

Also, this Honourable Court would recall that the previous Counsel in this matter, Ms. Sheryl Rosan, informed the Court during the hearing of the Judgment Summons that she was experiencing certain personal difficulties, in conducting the matter, including Blanking Out; and that she was having difficulties maintaining focus to be able to address the matter.

At all times, as the Claimant in this matter, I have always maintained my interest in this matter, and have always remained very interested in having the matter properly addressed before the Court. To which end, I have accordingly renewed my application in accordance with the leave granted by this Honourable Court, with the view to enforcing the Judgment herein.”

[6] Exhibited to this affidavit was a document intituled “Medical Certificate” (“DAP – 6”) issued by Penn Medical Center dated 5th February 2019. This document indicated that the Respondent attended to his medically unwell mother and was present at her medical appointment on 5th February, 2019.

[7] In opposition to this Application, Counsel for the Respondent has submitted that:

- (a) The law in this area is far from settled, that the Original Claim was not in itself an abuse of process and that the mere act of bringing a second claim does not per se constitute an abuse of process.
- (b) That the circumstances leading to the strike out of the first claim are relevant to the Court's balancing exercise.
- (c) The Respondent's actions were neither intentional or contumelious or show a wholesale disregard of the court rules. The Respondent had sought the permission of the court via a medical certificate dated 5 February 2019 to be excused from attendance at court to care for his ailing mother.
- (d) The Respondent is mindful of the need to consider the apportionment of the Court's limited resources, but submits if leave is not granted to proceed, the prejudice to the Respondent will be disproportionate.

COURT'S ANALYSIS AND CONCLUSION

General Principles

[8] The starting point for this Court is the relevant procedural framework which empowers a court to prevent the misuse of the right to issue proceedings, on the ground that proceedings are an abuse of process. Part 26.3 (1) (c) of the **Eastern Caribbean Supreme Court Civil Procedural Rules** (“CPR”) provides as follows:

26.3(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –

- (a) -
- (b) -
- (c) the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or
- (d) -.

[9] The learned authors of **Blackstone's Civil Practice** have explained the rationale for this jurisdiction in the following terms:

“This is a power ‘which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people’ (per Lord Diplock in **Hunter v Chief Constable of the West Midland Police** [1982] AC 529 at p. 536).”

[10] It is however now well settled that the jurisdiction to strike out is to be used sparingly. It is accordingly the accepted rule that striking out should be used as a last option, so that if the abuse can be addressed in some less draconian way, it should be.¹

[11] In the case at bar, the Applicant seeks to strike out what amounts to a second claim brought by the Respondent in which he seeks the same relief sought in his Original Claim on the basis of the same factual allegations. That Original Claim was dismissed for want of prosecution in light of the Respondent's contumelious failure to diligently prosecute the same. The Applicant has now applied to strike out the current Claim (the second set of the proceedings) as an abuse of process.

[12] The abuse argument, so far as it arose from the issue of new and substantially similar proceedings following the striking out of the earlier proceedings, was advanced by Counsel having regard to the now seminal English decision in **Securum Finance Ltd v Ashton**.² In that case, the claimant was the successor in title of a bank which had advanced monies to a company. In January 1987 the defendants signed a guarantee of the obligations of the company to the bank, charging their home. The legal charge contained, in clause 1 included both an all monies covenant and the charge to secure performance of that covenant. In 1989 the bank made a demand on the defendants under the guarantee, which was not met. The bank issued proceedings claiming payment under the guarantee. Those proceedings were struck out in December 1997 for want of prosecution on the ground of delay. In January 1998 the claimant made a further demand under the under the guarantee, and a demand under the covenant in the legal charge. The claimant commenced the a new action in September 1998 to enforce its rights under the legal charge, seeking payment under

¹ Reckitt Benckiser (UK) Ltd v Home Pairfum Ltd [2004] EWHC 302 (Pat); Biguzzi v Rank Leisure Plc [1999] 4 ALL ER 934

² [2001] 1 Ch 291

the covenant and, further, to enforce the security by orders for possession and sale of the mortgaged property. The defendants sought, by counterclaim, a declaration that they were entitled to have their property discharged from the legal charge, and an order that the legal charge be delivered up for cancellation. The defendants applied to have the proceedings struck out on the ground that it was an abuse of the process of the court for the claimant to seek to pursue, in the instant proceedings, what was, in essence, the same claim as that which had already been struck out in the earlier proceedings. The judge dismissed the application, and the defendants appealed.

- [13] That decision reflected, among other things, the overriding objective, as then laid down, and the need to weigh, against an individual's wish to pursue a second case, the need to allot the court's limited resources to other cases. That latter consideration was felt to have even greater force, in the current litigation climate, given that the overriding objective made specific and explicit reference to the need to allot only an appropriate share of court resources to any particular case.
- [14] Chadwick LJ, giving the only judgment, held that, contrary to earlier pre-Civil Procedure Rules ("CPR") authority, that where a claim had been struck out, but where limitation had not yet expired, a new and substantially similar claim was, potentially abusive because it gave rise to a misuse of the court's limited resources, which properly used, would have resulted in matters being dealt with within the first, or earlier, proceedings.
- [15] Chadwick LJ, reviewed in detail the trial judge's analysis of the pre-CPR judgment of Lord Diplock in **Birkett v James**³. In that case, Lord Diplock considered whether an action ought to be dismissed for want of prosecution before the expiration of the limitation period and he observed that crucial to that question is whether the plaintiff whose action has been so dismissed may issue a fresh writ for the same cause of action. The learned judge concluded that exceptional cases apart, where all that a claimant has done is to let the previous action go to sleep, the Court would have no power to prevent him starting a fresh action within the limitation period and proceeding with it with all proper diligence, notwithstanding that his previous action had been dismissed for want of prosecution. In explaining the rationale for this approach, the trial judge noted that dismissing such an action would be to assume that the court has the power to treat as amounting

³ [1978] AC 297

to inordinate delay in proceeding with the action, a period shorter than that which the legislature has prescribed in the Limitation Act that a claimant should have as a matter of right in order to commence proceedings.

[16] Chadwick LJ noted that the ratio in **Birkett v James** has been heavily criticized as “unsatisfactory and inadequate” in several judicial decisions which followed. See: **Department of Transport v Chris Smaller (Transport) Ltd [1989] AC 1197, at page 1204C-1205B**; **Grovit v Doctor [1997] 1 WLR 640**; **Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd [1998] 1 WLR 1426**. These culminated in the passage on the English Civil Procedure Rules 1998.

[17] Chadwick LJ noted that following the advent of these Rules, it was no longer open to a litigant whose action had been struck out on the ground of inordinate and inexcusable delay to rely on the principle that a second action commenced within the limitation period would not be struck out *save in exceptional cases*. At paragraph 34, the learned judge summarised the position as follows:

“34. For my part, I think that the time has come for this Court to hold that the “change of culture” which has taken place in the last three years - and, in particular, the advent of the Civil Procedure Rules - has led to a position in which it is no longer open to a litigant whose action has been struck out on the grounds of inordinate and inexcusable delay to rely on the principle that a second action commenced within the limitation period will not be struck out *save in exceptional cases*. The position, now, is that the court must address the application to strike out the second action with the overriding objective of the CPR in mind - and must consider whether the claimant’s wish to have “second bite at the cherry” outweighs the need to allot its own limited resources to other cases. The courts should now follow the guidance given by this Court in the **Arbuthnot Latham** case - in a passage at page 1436H – 1437B:

“The question whether a fresh action can be commenced will then be a matter for the discretion of the court when considering any application to strike out that action, and any excuse given for the misconduct of the previous action: see **Janov v Morris [1981] 1 WLR 1389**. The position is the same as it is under the first limb of **Birkett v James**. In exercising its discretion as to whether to strike out the second action, that court should start with the assumption that if a party has had one action struck out for abuse of process some special reason has to be identified to justify a second action being allowed to proceed.”

- [18] The learned appellate judge went on to conclude that the claim for payment made in the instant action was, in substance, indistinguishable from the claim for payment made in the first action. If that claim stood alone, it could be said with force that to seek to pursue it in a second action when it could, and should, have been pursued, properly and in compliance with the rules of court in the first action, was an abuse of process.
- [19] The court found that the claim to payment involved re-litigating an issue already raised in the earlier proceedings and as such was an abuse of process, but the court nevertheless dismissed the appeal on the basis that the claims to enforce the security under the legal charge, which were not (and did not need to be) raised in the earlier proceedings, could not be so categorized. The Court found that if the issue whether there was a debt secured by the legal charge would have to be litigated in any event, the need to consider the allocation of the court's resources had little weight. In the circumstances, to strike out the claim for payment as a mark of the court's disapproval of the delay in the first action would be a wrong exercise of discretion.
- [20] The judgment in **Securum Finance** therefore heralded a new litigation culture in which it was correct to strike out a second action which fundamentally re-litigated a case which had previously been struck out on the grounds of abuse of process or delay. The court's case management role required it to consider whether it was appropriate to expend time on a case. When facing such an application, the court would need to have regard to the earlier action, and the decisions then taken.
- [21] This modern approach has been endorsed and has been further developed in the more recent case of **Davies v Carillion Energy Services Ltd and Another**⁴. In that case, the English High Court considered whether a second damages action should be struck out for abuse of process following the strike out, some years earlier, of the first action for procedural non-compliance. The facts of that case reveal that in 2010 the claimant, as a litigant in person, issued proceedings against the defendant claiming damages for alleged breach of contract in the installation of a central heating system. The defendant filed a defence. The court then, of its own motion, made an order that the claimant particularise his claim, and claim for damages. The claimant complied. When the matter came for trial, the court of its own motion ordered that the claimant

⁴ [2017] EWHC 3206 (QB)

further particularise his case. The trial was adjourned. The claimant filed a 39 page manuscript in attempted compliance. The court held he had not complied and the action was struck out. The claimant subsequently paid the defendant's costs. A second action was issued in December 2015. This time, the claimant was represented by solicitors and counsel. The claimant sued the original defendant and a further defendant. The defendant applied to strike the action out. The defendant's application was refused and the defendant appealed.

[22] This case is particularly helpful because the court used the opportunity to track the development of the common law on striking out a second action in detail, commencing with the line of cases of **Arbuthnot Latham Bank Ltd v Trafalgar Holdings Limited (1997) CA 16 December 1997, Securum Finance Limited v Ashton [2001] 1 Ch 291 and Collins v CPS Fuels Ltd [2001] EWCA Civ 1597**. The court then summarised the general principles which arise from these cases in the following terms:

- (1) *"Where a first action has been struck out as itself being an abuse of process, a second action covering the same subject matter will be struck out as an abuse of process, unless there is special reason: Securum §34, citing Arbuthnot, Aktas §§ 48, and 52.*
- (2) *In this context abuse of process in the first action comprises: intentional and contumelious conduct; or want of prosecution; or wholesale disregard of rules of court: Aktas §§72 and 90.*
- (3) *Where the first action has been struck out in circumstances which cannot be characterised as an abuse of process, the second action may be struck out as an abuse of process, absent special reason. However in such a case it is necessary to consider the particular circumstances in which the first action was struck out. At the very least, for the second action to constitute an abuse, the conduct in the first action must have been "inexcusable". Collins §§24-25 and Cranway §20."*

[23] The Court of Appeal in **Davies v Carillion Energy Services Ltd and Another** helpfully categorised matters in which second claims may be struck out on the basis of abuse of process. The first category is where a party brings a second action in respect of matters which were raised in a first action but where that action had been struck out on procedural grounds and without any consideration of the merits. Cases which, on the facts, fall within this first category are **Arbuthnot Latham; Securum and Collins**. The second category is where a party seeks to raise in a second action issues or facts which could and should have been, but were not, raised in a first action,

which action had resulted in a substantive adjudication or settlement. This type of abuse was identified in the well-known case of **Henderson v Henderson (1843) 3 Hare 100**.

[24] At this point, it bears noting that the claim before this Court falls squarely within the first category. The current claim is in essence a second claim which is in substance, indistinguishable from the Original Claim. That original claim was clearly dismissed not after consideration of its merits but rather because of the failure of the Respondent to properly prosecute the same.

[25] The Court in **Davies v Carillion Energy Services Ltd and Another** was satisfied that where a first action has been struck out for procedural failure, the Court should apply the **Securum/Collins** approach. At paragraph 55 of the judgment, the court concluded:

“(1) Where a first action has been struck out for procedural failure, the Court should apply the Securum/Collins approach I set out in paragraph 52 above. Even if Aldi and Stuart state general principles which are now applicable to all categories of abuse of process, I am not satisfied that there is any case authority which has specifically disapproved of the detailed analysis in Securum, Collins and Aktas of cases of procedural failure. Indeed Securum and Collins were not considered in either Johnson or Aldi. In Aktas, Rix LJ did not indicate disapproval of Securum.

(2) However given the introduction, since those cases, of amendments to CPR 1.1 and given developments in Mitchell and Denton, the “special reason” exception identified in Securum and Collins falls to be more narrowly circumscribed. Where the conduct of the first action has been found to have been an abuse of process or otherwise inexcusable, then the second action will be struck out as an abuse of process, save in “very unusual circumstances”. (Other terminology might equally be used to indicate this strict approach). In addition, in a case where the first action was not itself an abuse of process, whether the conduct in that action was “inexcusable” might fall to be assessed more rigorously and in the defendant’s favour. However, even post-Jackson, ultimately, the importance of the efficient use of resources does not, in my judgment, trump the overriding need to do justice: see *Aktas* §92.

(3) A single failure to comply with an unless order is not, of itself, sufficient to conclude that the second action is an abuse of process.”

[26] This Court is similarly persuaded.

[27] It is now settled that a mere negligent failure was not an abuse of process in a first action so as to debar the claimant from pursuing a second action. The authorities have established that for a matter to be an abuse of process something more than a single negligent oversight is needed.

Having reviewed the authorities this Court is however satisfied that where there has been a failure to diligently prosecute the first action or where a claimant has been guilty of inordinate and inexcusable delay that will constitute an “*abuse of process*”. The Court finds support for this view in the case of **Aktas v Adepta**⁵ which was considered by Morris J at paragraph 45 of his judgment in **Davies v Carillion Energy Services Ltd and Anor**:

“...In cases where the first action had been struck out for procedural failure (and had not been lost on the merits), the second action would be an abuse of process only where the conduct *in the first action* itself amounted to an *abuse of process*; and that **such an abuse or process in the first action would arise where there had been (a) intentional and contumelious conduct or (b) want of prosecution (i.e. inordinate and inexcusable delay) or (c) wholesale disregard of rules of court: see [2011] QB 894, paras 48, 52, 72 and 90.**” Emphasis mine.

Was the Original Claim dismissed as an abuse of process?

[28] The Original Claim which sought the restoration of a defunct company to the register of companies was commenced by fixed date claim form. Such claims by their very nature must be actively and aggressively managed and indeed, due to their nature, they are routinely disposed of at the first hearing in accordance with CPR Part 27.2. This provides as follows:

- (1) When a fixed date claim is issued the court must fix a date for the first hearing of the claim.
- (2) On that hearing, in addition to any other powers that the court may have, the court shall have all the powers of a case management conference.
- (3) The court may, however, treat the first hearing as the trial of the claim if it is not defended or it considers that the claim can be dealt with summarily.

[29] Although first hearings are generally used as case management conferences, wherein a court may give any directions that may be required to ensure the expeditious and just trial of the claim, it is equally possible that the Court may exercise its discretion to deal with the claim summarily. The import of a first hearing therefore cannot be overstated.

⁵ [2010] EWCA Civ 1170

[30] In the **Attorney General of Saint Lucia v Darrel Montrope**⁶ at paragraph 21 et seq. Pereira CJ, expounded on the role of the first hearing in fixed date claims:

“In fixed date claims, there is no formal case management conference like in ordinary claims. Rather, there is a ‘first hearing’ which is typically the date on which the parties will appear in the High Court before the judge for the first time. In that regard, it is necessary to consider whether the first hearing is the case management conference for fixed date claims.

On this point, Part 27 of the CPR, which deals with the procedures by which the court will manage cases, is relevant. CPR 27.2 specifically outlines the procedures the court must follow upon the filing of a fixed date claim. CPR 27.2 (1) expressly states that when a fixed date claim is issued, the court must fix a date for the first hearing of the claim. Indeed, it is the practice that the first notice issued by the court office upon the filing of a fixed date claim is the notice of first hearing. CPR 27.2 (2) further provides in clear terms that, at the first hearing, ‘in addition to any other powers that the court may have, the court shall have all the powers of a case management conference’. CPR 27.2 (3) permits the court to treat the first hearing as the trial of the claim if it is not defended or if it considers that the claim can be dealt with summarily. It is apparent that the aim of CPR 27.2 is to provide an occasion on which fixed date claims may be case managed for trial (if the claim is defended or cannot be dealt with summarily) in a manner akin to a case management conference for ordinary claims.....

I agree with the view expressed by the learned judge at paragraph 12 of the judgment that:

“...the effect of those provisions is that a court has two options at a first hearing: either cases manage the matter or try it summarily. It therefore seems that the intention of the rule is that the first hearing serves as the case management conference. The invariable court practice is indeed that the first hearing is the case management conference. This is bolstered by Part 56.”

[31] The first hearing is therefore an important first step by which claimants are expected to advance their matters through the system. No doubt this explains why the attendance of a litigant and/or his legal practitioner is mandated and why a party must apply to the court if he wishes to vary a date which the court has fixed for a case management conference. CPR Part 27.4 provides that:

- (1) If a party is represented by a legal practitioner, that legal practitioner or another legal practitioner who is authorised to negotiate on behalf of the client and competent to deal with the case must attend the case management conference and any pre-trial review.

⁶ SLUHCVP2019/0021

- (2) The general rule is that the party or a person who is in a position to represent the interests of the party (other than the legal practitioner) must attend the case management conference or pre-trial review.
- (3) The court may dispense with the attendance of a party or representative (other than a legal practitioner).
- (4) If the case management conference or pre-trial review is not attended by the legal practitioner and the party or a representative, the court may adjourn the case management conference or pre-trial review to a fixed date and may exercise any of its powers under Part 26 (case management – the court's powers) or Part 64 (costs – general).

[32] The facts of this case reveal that on 13th November 2018, the convened first hearing was adjourned. That adjournment was at the instance of Respondent who, despite being informed of the adjourned date failed to attend the next adjourned date. There was also no appearance by Counsel for the Respondent. This forced a further adjournment of the first hearing. Thereafter, there were at least two further adjournments when the Respondent did not appear. These adjournments were granted because the Court was not satisfied that the Respondent had received the proper notice of the adjourned dates. This, notwithstanding that both the Respondent who is a practicing legal practitioner and his attorney would have been routinely sent an electronic copy of the civil court's cause list which would have reflected the listing of the Original Claim.

[33] At the hearing of 5th February 2019, the last adjourned date of the Original Claim, it became clear to the Court that the Respondent had in fact been properly served by the Court's Office with the notice of the adjourned hearing date and yet neither he nor his legal practitioner appeared. Astonishingly, the Respondent did not file and serve an application for seeking an adjournment of the hearing and it also became clear to the Court that no attempt was made to alert Counsel for the Applicant who continued to appear at each and every adjournment of the matter.

[34] What is apparent is that having filed the Original Claim, the Respondent was content to be dilatory in his approach. As a Claimant in the matter, the Respondent had an obligation to ensure that it progressed to trial in accordance with the overriding objective. In the Court's judgment, this meant that the Respondent was obliged to diligently prosecute his matter by ensuring compliance with the

CPR Procedures. In **Arbuthnot Latham Bank Ltd v Trafalgar Holdings**, Lord Woolf first used the term to “warehouse” in relation to such conduct:

“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, where 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.”

[35] In the Court’s judgment the Respondent’s repeated failure to appear or to ensure that a representative appeared to deal with the first hearing of the Original Claim was completely antithetical to the overriding objective, contumelious and amounted to an abuse of process. The Respondent’s wholesale disregard of his obligations under CPR Part 1.2 and under CPR Parts 27.4 and 27.8 of the CPR also justified the dismissal of the Original Claim. Having regard to the nature of the claim, there can be no doubt that the delays caused by the Respondent in the Original Claim took up an inordinate amount of the court’s time.

[36] In **Securum**, the Court of Appeal prescribed that where a court has characterized a case of inordinate and inexcusable delay in the first action as being one of “abuse of process”, in the second action, the court is entitled to take into account the excuse given for the misconduct. In such a case, the second action could proceed if “some special reason” was shown. It is therefore necessary to examine the events which led to the striking out of the first action.

[37] In that regard, the Court is also guided the judgment in **Collins v CPS Fuels**. In that case, the trial judge had stated that special reasons had to be identified if the claimant’s second action were to be allowed to proceed and the appellate court concluded that that had been entirely the right approach to adopt. Jonathan Parker LJ at paragraph [42] of the judgment observed that:

“... the Claimant must, ... show some good reason why she should be allowed to resurrect the claim in the form of a fresh action and, in effect, start again; otherwise the judge's order in the first action will have been rendered worse than futile in that its only practical effect would have been to set the clock back to the start of the litigation, a result which would, in my judgment, be plainly contrary to the overriding objective.”

[38] The English appellate court noted that the words ‘special reasons’ were not defined in statute or the CPR. However, this Court is satisfied that it is necessary to examine the events which led to the striking out of the first action and to take into account the explanation advanced.

[39] On the basis of the foregoing analysis, the Court is satisfied at the Respondent’s Original Claim was dismissed on the basis that it constituted an abuse of process. It follows that the current claim will constitute an abuse of process and should accordingly be struck out unless there is some special reason.

[40] The Court has considered the Respondent’s eleventh hour evidence filed on 26th January 2021. This evidence makes clear that the Respondent has the benefit of a judgment in the amount of \$15,000.00 against the Company which he seeks to restore to the companies register as at 12th January 2017. The Respondent further avers that when the matter came on for hearing on 5th February 2018, he had informed the Court Office that he would not have been able to attend court on that date as he had to take his mother, who was seriously ill, to the doctor. The Respondent then exhibited the copy of what is termed “a *letter of certification from the attending doctor*” (“DAP 6”) written by Dr. Mitchell E. Penn who asserts that the Respondent was present during a medical appointment of his mother.

[41] For the reasons which have already been indicated, the Court is concerned that the course adopted by the Respondent was wholly inconsistent with the procedures mandated by the CPR. The Court has noted the inconsistency in date referenced at paragraph 4 of his affidavit (5th February 2018) and the date referenced in the exhibit (5th February 2019). This is of no moment however; the Court has noted that the Respondent has failed to provide any cogent proof or at all that Exhibit “DAP 6” was actually communicated to the Court’s Office at the material time. In the Court’s judgment, this is an obvious lacuna which is glaring, and indicative of the contrary. Moreover, the Respondent does not acknowledge that this was not the first time that he failed to

appear to deal with his claim when he was well aware of the hearing date. To date, he has advanced no explanation for his non-attendance on 15th January 2019.

- [42] Even if the Court were to accept that this difficulty had been communicated to the Court's Office, the Respondent failed to explain why (when it is clear that he was legally represented by Counsel who could well have been tasked to advance the matter in his absence) his legal practitioner failed to appear at the first hearing. Instead, at paragraph 7 of his affidavit he asserts as follows:

"Also this Honourable Court would recall that the previous Counsel in this matter, Ms Sheryl Rosan, informed the Court during the hearing of the Judgment Summons that she was experiencing certain personal difficulties, in conducting the matter, including Blanking Out; and that she was having difficulties maintaining focus to be able to address the matter."

- [43] Needless to say, this wholly inappropriate averment directed as it were to prodding the Court's supposed recollection of oral representations made in other proceedings on a previous occasion could, in any event, have little bearing on the proceedings of 5th February 2019 and, in the Court's judgment, carries no evidential weight. Equally glaring is the Respondent's failure explain why given his apparent prior knowledge of his attorney's difficulties, no arrangements were made to secure the assistance of alternative counsel to take conduct of the matter and equally why no attempt was made to inform Counsel for the Applicant of these difficulties.

- [44] Moreover, the Respondent failed to address the obvious fact that this was not the first occasion (15/1/2019) when neither he nor his legal practitioner appeared, despite the fact that they would have been well aware of the hearing date. Again, the record shows the Respondent made no attempt to comply with the requirements and obligations under CPR Part 1.1; Part 1.3; Part 27.4 and Part 27.8 (1).

- [45] The Respondent asserts that these failings were unavoidable and not intentional. This Court cannot agree. In the Court's view, the Respondent's failure to actively pursue his matter following the 15th January 2019 adjournment belies his averment that *"I have always maintained my interest in this matter and have always remained very interested in having the matter properly address before the Court."* In the Court's judgment, the Respondent has failed to show any good reason why the Original Claim would not have been dismissed for want of prosecution and consequently

why it was not an abuse of process. The Court has also considered whether there are any *unusual circumstances* which would militate against the strike out of the current proceedings. In that regard, the Court notes that apart from the evidence filed on 26th January 2021, the Respondent did not address this issue.⁷

[46] The Court has however, noted that the Respondent wishes to enforce a judgment debt which accrued since 12th January 2017 against a defunct Company that was struck off the register of companies and dissolved. All assets of a company not disposed of by a Company at the date of dissolution vests in the Crown. However, when a company is restored to the register, such property must be returned to the company upon restoration.⁸ Within 10 years of the date of dissolution, a creditor may apply to the court seeking restoration of company to the register.⁹ There is therefore obvious prejudice to the Respondent in the event that he is not allowed to restore the company because, short of applying to the Crown for a discretionary grant on *bona vacantia*, he will be unable to recover the fruits of his judgment.

[47] However, the Court has also noted that at all material times, the Respondent was an attorney who was represented by a legal practitioner. Both the Respondent and his legal practitioner would have been fully conversant with the procedural rules and the requirements and norms of conduct. There is therefore no question that he may have been unduly disadvantaged or unfamiliar with the rules of court or its procedures.

[48] The Court has also considered that unlike the case of **Securum**, where the second claim for payment did not stand alone but was conjoined with claims to enforce the security under the legal charge, this second action is indistinguishable from the claim in the first action. The Court has therefore considered the following ratio **Securum** which was recounted in **Hefferman and Anor v Grangewood Securities Ltd.** ¹⁰

This court considered in **Securum Finance Ltd v Ashton [2001] Ch 291** the question whether a party whose earlier proceedings had been struck out for want of prosecution or delay could, within the limitation period, raise the same issues in a subsequent action. It

⁷ See paragraph 42 of the Collins v CPS Fuels

⁸ Section 220 of the Virgin Islands Business Companies Act

⁹ Section 218 and Schedule II paragraph 57 of the Virgin Islands Business Companies Act

¹⁰ [2001] EWCA Civ 1082 paragraph 25

reached the conclusion that where the claim in the second action was indistinguishable from the claim in the first action it could be said with force that to seek to pursue that claim in a second action - when it could and should have been pursued properly and in compliance with the rules of court in the first action - was an abuse of process. It was an abuse because it was a misuse of the court's limited resources - resources which could be employed in the resolution of disputes between other parties. To allow a party a "second bite at the cherry" was an unnecessary and wasteful use of the court's limited resources - see particularly at page 315 F. **Securum Finance** was a case where the earlier proceedings had been struck out; but the same principle must apply a fortiori where the earlier proceedings, or issues in those earlier proceedings, have been abandoned; and that abandonment recognised by an order for dismissal by consent.

- [49] The Court has also taken into account the fact that in dismissing the Original Claim for want of prosecution, the Court granted the Respondent liberty to apply in the Original Claim. Nevertheless, the Respondent failed to apply to restore the matter, which he would nevertheless have been able to do under CPR Part 11.18 (1). In the Court's view, that failure is a relevant factor which militates strongly against the court finding "very unusual *circumstances*." In that regard the Court is guided by the judgment in **Davies v Carillion Energy Services Ltd and Anor** where at paragraph 70, the court concluded that failure to apply for relief from sanctions would militate strongly against a court finding "very unusual circumstances."
- [50] The Court has also noted that second claim was filed on 16th September 2020 over one year after the Original Claim was dismissed for want of prosecution which again belies the Respondent's contention that he has "*always remained very interested in having the matter properly address before the Court.*" Indeed, it reinforces the Court's conclusion that the Respondent never intended to diligently prosecute the Original Claim through to trial.
- [51] Finally, this Court is obliged to weigh the Respondent's wish to have a 'second bite of the cherry' against the overriding objective, and in particular to the need to allot the court's limited resources to other cases. In **Arbuthnot Latham Bank Ltd v Trafalgar Holdings** the court considered the speech by Lord Griffiths in the **Chris Smaller** case¹¹, in which he identified the advantages which would accrue from a civil procedural process which was subject to "*court controlled case management techniques*". The Court went on to note that:

¹¹ [1989] AC 1197

“...In **Birkett v James [1978] AC 297** the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration of increasing significance. Litigants and their legal advisers, must therefore recognise that any delay which occurs from now on will be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also in relation to the effect it can have on other litigants who are wishing to have their cases heard and the prejudice which is caused to the due administration of civil justice. The existing rules contain time limits which are designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.”

“It is already recognised in **Grovit v Doctor [1997] 1 WLR 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 the courts to recognise for the future, more readily than heretofore, that a wholesale disregard of the rules is an abuse of process as suggested by Parker L.J. in **Culbert v Stephen G Westwell & Co Ltd [1993] P.I.Q.R. P54.**”

[52] It is clear that this Respondent has already had a share of the court’s resources in the Original Claimant and his claim for a further share must be balanced against the demands of other litigants. The Court is satisfied that to allow the Respondent to “*seek to pursue that claim in a second action - when it could and should have been pursued properly and in compliance with the rules of court in the first action - was an abuse of process.*”¹²

[53] In the Court’s judgment there are no special reasons or unusual circumstances made out in the case at bar which would justify allowing the Respondent to resurrect the claim in the form of a fresh action and in effect start proceedings all over again. The Court therefore finds that the Statement of Case herein should be struck out as an abuse of process.

[54] Costs will follow the event and so the Applicant will have their costs in the sum of \$500.00.

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar

¹² Arbuthnot Latham Bank Ltd v Trafalgar Holdings at paragraph 25