JUDGMENT : Lord Justice Mance: CA. 25th March 2002.

Introduction

1. This is the judgment of the Court in a matter which has taken a course which may fairly be described as unusual. It started before us as an appeal by the appellant against an order of HHJ Wilcox dated 22nd June 2001 striking out its claim in the action as an abuse, on the ground that a previous claim relating to the same complaints had itself been struck out by the same judge on 3rd November 2000. It ended by embracing, also, applications seeking permission to appeal out of time against the judge's order of 3rd November 2000 striking out the first claim, and, if we granted such applications, the disposal of that appeal.

Facts

2. The cause of action which the appellant wishes to assert arises out of professional engineering services undertaken by the respondent as recently as 1999 in relation to a building project in which the appellant was engaged. The appellant at a very early stage took the view that the respondent's design and work between March and December 1999 had been defective. Through a company (James R. Knowles) describing itself as ***"international construction lawyers",*** the appellant sent a letter before action in January 2000 and thereafter commenced proceedings very swiftly - perhaps too swiftly for its own good - in May 2000. The letter was signed and the particulars of claim were settled by a barrister, Mr Keith Pitts. The respondent is insured. Solicitors, Squire & Co. ("Squire"), appointed to act for him, wrote on 7th and 28th June and 25th July 2000 seeking successive extensions of time for service of the defence, which was eventually served on the last extended day, 11th August 2000.

3. Both the defence and a letter of the same date maintained that certain paragraphs (nos. 14, 17, 21 and 25-28) of the particulars of claim were wholly inappropriately pleaded and amounted to an abuse of the process. The letter invited their amendment or deletion, failing which it threatened an application to strike them out. The general nature of the claim was for defective work and delay, and for present purposes the paragraphs dealing with causation and quantum are of particular materiality. They read simply as follows:

   "24. By reason of the matters complained of the Claimant has suffered loss and damage.

   PARTICULARS OF LOSS AND EXPENSE

   25. Liquidated and ascertained damages at the rates of £5000.00 and £3570.00 per diem and the Claimant's prolongation costs at the rate of £965.00 per diem amounting to £1,394,090.00 at today's date and continuing at the rate of £4535.00 per diem.

   26. Damages by way of increased sub-contractor costs of £26,555.10.

   27. Remedial costs in respect of the defective design of the brick wall support amounting to £10,000.00.

   28. The cost of employing an alternative structural engineering consultant consequent upon termination of the Defendant's contract at £25,000.00 together with ongoing costs."

   No further explanation of these items of alleged loss was given and no basis for claiming ***"liquidated and ascertained damages"*** was shown.

4. By now the appellant had engaged solicitors, Vizard Oldham ("Vizards"), although primary responsibility for the pleading was still apparently retained by Mr Pitts. Mr Pitts acknowledged the need for particularisation and Squire were told accordingly on 1st September 2000. A draft amendment of the particulars of claim was prepared by Mr Pitts with a Scott schedule and was sent to Squire on 27th September 2000. This would have deleted paragraph 14, supplemented paragraph 17 extensively with reference to a Scott schedule itemising particular problems, deleted the last sentence of paragraph 21 and replaced and amended paragraphs 25-28.

5. Once again, however, the proposed pleading of causation and quantum lacked any substantial particularisation, and at a first case management conference on 4th October 2000 Mr Pitts acknowledged that the amendment was not adequate, at least in this respect, and withdrew it. The following order thus came to be made:

   "1. that the trial of this action be fixed to take place beginning on Monday 5 March 2001 with a time estimate of 10 days.

2. that the particulars of claim be amended to show the relationship between each and every act and omission relied on as to causing delay [sic], and relating every such period of delay to loss or damage claimed (so that the causative link is shown). The claimant may plead by way of narrative pleading and Scott Schedule. Service of the amended defence to be effected by 4 pm on Wednesday 1 November 2000."

6. There followed a tight timetable providing for service of an amended defence by 15th November, an amended reply by 20th November, standard disclosure by 5th December, exchange of factual witness statements by 15th December, a meeting of experts by 20th December 2000, exchange of experts reports and a statement regarding the issues on which experts agreed or disagreed by 5th January and a pre-trial review by 15th January 2001, as well as (if the parties so agreed following the meeting of experts) a 21 day stay for mediation. We were told that the recent introduction of statutory adjudication procedures has greatly reduced the workload in the Technology and Construction Court, and that short trial dates and accelerated programmes of this sort are therefore possible, although this particular timetable left relatively little room for end of year relaxation or other slippage.

7. The judge said on 4th October 2000 that he would normally only allow 7 days for service of amended pleadings, but that he was on this occasion prepared to allow the 28 days which he granted as a matter of "indulgence". Nevertheless, the appellant did not comply. James R. Knowles and Mr Pitts had never taken any expert advice before or when starting the proceedings. Vizards, by now fully in the saddle, advised in conference on 9th October 2000 that it was essential to instruct an independent consulting engineer. Vizards had by 11th October identified, spoken with and sent papers to Andrew Dutton of Hurst Peirce & Malcolm. On the same day, they wrote saying that, as the judge had been informed on 4th October, their partner (Mr Colin Harvey) handling the matter had a holiday booked from 16th October to 1st November, and saying that it would assist if the respondent could agree an extension of time for the amended particulars until 10th November. Squire rejected this request on 12th October. Mr Dutton attended a conference and accepted instructions on 13th October, and by 25th October he had gone through the files and advised that his draft report might only be ready on 30th October. A formal application for a 7 day extension of time until 8th November for service of the amended particulars was lodged on 27th October. It recited the course of events since 4th October, as I have summarised them, and added that Mr Dutton had spent 75% of his time on the matter, but was still unable to provide the information required in time to comply with the order of 4th October, because of the time-consuming nature of the exercise of examining all the files generated by the project and the need for meetings with other parties affected. It produced a fax, evidently to that effect, from Mr Dutton.

8. Mr Dutton's draft report was ready, as he had said, on 30th October. A conference had been arranged to discuss it with him on that date, but a train strike on 30th October meant that this had to be postponed to 1st November. The matter came back before the judge on 3rd November, when Mr Pitts elaborated on the steps taken and progress made since 4th October. He indicated that Mr Dutton's final report would be ready on 6th November, and told the judge that he had cleared his own diary to be able to ensure that the amended particulars could be served by 4 pm on 10th November 2000.

Order striking out the first claim

9. The judge refused the extension and struck out the whole claim, ordering the appellant to pay the costs. His reasons have not been transcribed as such, but an agreed note was later compiled. This was before the judge, and was referred to by him without disapproval, on 22nd June 2001, so that we may take it as generally accurate. The note reads as follows: *"There are two matters before me of concern.*
One is a Case Management consideration and the other is the attitude of the parties to a Court Order.
I turn first to the Case Management issue. This is a delay case. From the outset the Particulars of Claim were defective. It did not show and plead causation necessary for cases of this type and nature.
It is clear that when the Court reviewed this matter in the exercise of its Case Management powers it took the view that the claim had to be properly pleaded. This is not a matter of nicety and good manners.
Insofar as action against a profession man in negligence is concerned, he is entitled to know properly the case against him. This was not done in this case. The Court therefore made an Order that the matter be properly pleaded. Ordinarily, I would have made a seven day order, as I made clear. Indulgently, I gave the Claimant almost a month, to expire on the 1 November. It transpires that nothing has been done. So far as the Court Order is

concerned, it is a matter of some seriousness when, having been shown indulgence, the Order is not complied with, but when it means that a professional man does not know the case against him, it seems to me wholly unfair to allow yet further indulgence.

The reason given – that the expert now instructed has not been able to devote enough time – is a thin and miserable reason. The expert should have been appointed at the outset. When the Court grants indulgence, as it did in this case, it is incumbent upon the Claimant to obtain an expert to report in a timely way, to enable the Order to be complied with.

This is glaring neglect – a case where no further indulgence is justified. I have to have regard to fairness to both parties; I have to have regard to fairness to the Defendant and the resources of the Court. Enough is enough; I am not going to permit further adjournment. There has been non-compliance and, in accordance with Part 3 of the Civil Procedure Rules 1998, the claim is struck out.

The Defendant shall have his costs today and of the action. There shall be a detailed assessment of the costs."

10. Immediate consideration was given on the claimant's side both to an appeal and to the issue of fresh proceedings. It appears that Vizards asked Squire as they left court whether Squire had authority to accept fresh proceedings. By letter dated 3rd November, Vizards also said that they were considering an appeal, and asked whether the respondent was insured. By further letter dated 6th November, they indicated that still no decision had been made which course to take. However, they added: *"Though the judge was clearly wrong in significant statements which he made in his judgment, we think that it would probably be more cost-effective and procedurally less complicated for our client to pursue the claim by way of fresh action".*

In the same letter, Vizards asked Squire for a breakdown of the respondent's costs, which the appellant had been ordered on 3rd November to pay. On 8th November Vizards wrote to say that the appellant now intended not to appeal, but to continue with the claim against the respondent by issuing fresh proceedings, and again asked for the breakdown of costs. On 14th November, Vizards wrote again, pointing out that they had no reply to their letter of 3rd November or to their requests for the costs breakdown. That letter crossed with a letter from Squire which stated simply that Squire were authorised to accept service of fresh proceedings, and would provide a breakdown of costs shortly. The breakdown provided by letter dated 23rd November led to a total of over £39,000. Correspondence ensued with a view to a compromise on costs, which was eventually reached on 19th/20th February 2001. The appellant offered and the respondent accepted £25,000, payable in two equal instalments by respectively 28th February and 16th April 2001. These payments were made, albeit a little late, and were accepted by the respondent.

11. By now the pre-action protocol for construction disputes had come into force, and Vizards wrote accordingly on 7th March 2001. They referred to the relevant circumstances, accepted once again that the prior proceedings were not properly particularised, but enclosed completely re-drafted particulars of claim, with schedules, which in their submission gave full and proper particularisation. The claim shown thereby reduced the damages claimed from some £1.3 million to a little under £822,000. Squire replied on 16th March that the respondent would apply to strike out any such new claim, as an abuse in view of the striking out of the previous litigation.

12. A fresh claim was issued on 11th April 2001, with particulars following the form sent on 7th March. No complaint has been made about their adequacy or completeness. Mr Pelling said before us that this had not been the focus of attention, but we have no doubt that, if the respondent felt in any way embarrassed by, or unable to deal with the content of, the present proposed particulars of claim, this would have been observed and high-lighted. As regards causation and quantum, the particulars, in our judgment, show a proper basis on which the appellant's complaints may be said to have led to extra cost and delay. The claim has been properly thought through, with the benefit of the expert advice received, and it is pleaded in a quite different manner to the original pleading, which amounted to no more than unexplained (and, as it now appears as regards the way it was put, unsustainable) assertion.

Order striking out the second claim

13. Application was however made to strike out the new claim, and the judge struck it out. He referred to the fact that he would normally only have given 7 days for an amendment, but that he had been persuaded on 4th October to give what he described as "a realistically longer time for the Claimant to

perfect its case as required". He said that it was evident that no expert had been instructed and no expert evidence obtained before embarking on the action against a professional man. After referring to the note of his judgment of 4th October, he said that: *"It relates to the pleading and relates to what can only be characterised, looking at all the matters I there considered and set out, as an abuse. Accordingly, I was not prepared to permit a further adjournment. There was non compliance with my order, both as to particularisation and as to when it should be provided and making reference to the delay and the burden upon the resources of the court and the parties … [i]n accordance with Part 3 of the Civil Procedure Rules the claim was struck out".*

He went on to refer to the decision not to appeal his order of 3rd November, he repeated that the prior claim had been struck out as an abuse and he rejected the submission that the new claim was not also an abuse. He said that the case was: *"within the parameters and principles considered in* ***Securum Finance Ltd. v. Ashton*** *[2001] 1 Ch 29, particularly para. 34. In that paragraph Chadwick LJ said that, once a first action has been struck for inordinate and inexcusable delay, the court must address an application to strike out a second action with the overriding objective in mind – and must consider whether the claimant's wish to have "a second bite of the cherry" outweighs the need to allot its own limited resources to other cases", and also referred to guidance given by this court in* ***Arbuthnot Latham Bank Ltd. v. Trafalgar Holdings Ltd****. [1998] 1 WLR 1426, 1436-7, where it was said that:*

"In exercising its discretion 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."

14. HHJ Wilcox said that he had done what had been characterised in the appellant's submissions before him as ***"the weighing exercise"*** but could find no special reason to justify the second claim proceeding. The fact that all now appeared to be in order was not a special reason, for by implication it ignored the fact that this was the second time that a professional man was being vexed by an action with its attendant costs, anxiety and the use of public resources.

15. The judge refused permission to appeal his decision of 22nd June 2001, for the reasons, as we read them, that the matter was "Governed by clear authority". Potter LJ granted permission on 27th July 2001, having regard to a pre-Civil Procedure Rules decision, to which the appellant drew his attention, in **Abbahall Ltd. v. Smee** (24/1/00). That decision has not however featured largely before us.

The appeal in respect of the second order

16. The appeal was well-argued before us on both sides. During the course of Mr Howarth's opening submissions for the appellant, he accepted that, so long as the judge's order dated 3rd November 2000 striking out the first claim stood, it was not open to him, either expressly or implicitly, to challenge the correctness of that order (although he submitted that this did not preclude him from challenging the correctness of certain of the reasons given for it). But, even if it is only the order that is not open to challenge, the appellant faces the difficult task of explaining how it can possibly be right for the court to permit a second action, commenced five months later in April 2001, to proceed if it was, indeed, appropriate to make an order on 3rd November 2000 striking the first claim out peremptorily. To put the point another way, if it were right to refuse a mere ten-day extension to enable a properly pleaded amendment to be served in the first action, how can the court, acting consistently, countenance the pursuit of a second action commenced some five months later?

17. The apparent inconsistency in the course which the appellant was inviting this Court to take on its appeal led to further consideration before us of the submissions made to the judge on 3rd November 2000, and his intention in making the order which he did. We were informed that whether or not any order striking out the first claim would preclude the bringing of any second action was not a matter on which anyone focused expressly on that date. The judge was not referred to either ***Arbuthnot*** or **Securum** (the latter case only quite recently decided in June 2000). Mr Pelling submitted to us that the judge must be taken to have thought that he was bringing the claim to an end for ever. That may be so - although the outcome of the application did not strike the appellant's advisers in that way on 3rd November and Squire remained silent until March 2001 in the face of the many references made in November 2000 to the appellant's intention to start fresh proceedings. An alternative view may be that the judge on 3rd November 2000 assumed that there was no serious possibility of properly drafted

particulars or any fresh claim. If that was his state of mind, we do not consider that it was justified by the evidence; and, if that was what he thought, the judge could have put the appellant to the test by granting the ten day extension sought.

Principles applicable to striking out a first claim

18. We start by accepting that there may be situations in which a judge views a claim as so prematurely and/or defectively presented that he may think it better to strike out the whole claim, leaving it to the claimant to bring fresh and properly presented proceedings at some stage in the future, if he, she or it can correct the defects and present the claim appropriately. Mr Pelling submitted that that was not a course which a judge can take; and that, if a judge is prepared to contemplate that a properly thought out and presented claim might be a real possibility in the future, then what he should do is to adjourn or give further time in the proceedings already begun. We do not accept that the court's process need be so inflexible. We can envisage circumstances in which a judge might think it better to clear the slate, putting the onus on the claimant to re-start matters properly, if he ever could at some future stage. But such cases are likely to be rare. Normally, the court's process should only be engaged once in relation to a particular subject-matter.

19. When considering an application to strike out a claim, a judge should consider the purpose and effect of the suggested order. No judge can fetter the discretion of a future court, on a future occasion when quite different circumstances may pertain. But, if a judge intends to bring a claim finally to an end, his intention will, on any view, carry considerable weight, if and when any second claim is mounted. The striking out of a claim with this intention is thus a severe measure. *"Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court"*: cf **Johnson v. Gore Wood** [2001] 2 WLR 72, per Lord Bingham at p.81C. That is now underlined by the incorporation into our domestic law of Article 6 of the European Convention on Human Rights. A judge should therefore consider the probable implications of striking out, and balance them carefully against the alternatives. In the present case, this would have meant addressing specifically the proportionality of striking out a claim, then for over £1 million, finally and for ever, when the alternative was to grant a 10 day adjournment, within which there was good reason to believe that the appellant would have been able to rectify the manifest defects in its case. The timetable to trial laid down on 4th October 2000, tight as it was, would have had sufficient flexibility to cater for a 10 day delay. Even if it had not had, it would have been incumbent on the judge to consider carefully on 3rd November 2000 whether any inconvenience to the court or to the respondent in altering the trial date could possibly justify the final termination of any claim that the appellant had.

20. In the light of these considerations and not without some stimulus from the court, Mr Howarth made, for the first time before us, the applications, to which we have referred, seeking permission to appeal out of time against the judge's order dated 3rd November 2000, with the appeal to follow immediately if permission was granted. Mr Pelling was able to respond, in part immediately and in part after an adjournment giving him the opportunity overnight to consider further the respondent's position. We will return to this application in due course. Before doing so, it is appropriate to consider further the principles applicable on an application to strike out a second claim.

Principles applicable to striking out a second claim

21. **Arbuthnot** was a case in which a first action was struck out for inordinate and inexcusable delay notwithstanding that a second action could be brought within the relevant limitation period in pursuit of the same claim. Prior to the CPR, the striking out of a first action in those circumstances would normally serve no purpose, and therefore be wrong, since the claimant (being within the limitation period) could simply issue fresh proceedings, and (on any application to strike those out) the period of any delay before their issue would be disregarded: see **Birkett v. James** [1978] AC 297, especially at p.322D-E per Lord Diplock, p.328E per Lord Salmon and p.334B-E per Lord Edmund-Davies. In contrast, under the CPR, the court has power to strike out a second action in pursuit of the same claim as a misuse of the court's resources: see per Chadwick LJ in **Securum,** para. 52. **Securum** was the sequel to **Arbuthnot;** in that it was the second action brought by the claimants in order to pursue the claim which had been struck out in **Arbuthnot.** It follows that it will not, now, be wrong in principle to strike out the first

action within the limitation period. But the corollary is that a court, when considering whether to strike out the first action within the limitation period, must keep closely in mind that striking out the first action may well have the effect that no second action can be brought in respect of the same claim. If the court does not intend that to be the effect of its decision to strike out the first action, it should say so; and should explain why, if it does not intend that striking out the first action will preclude further proceedings in pursuit of the same claim, it does, nevertheless, think it appropriate to make an order bringing the first action to an end.

22. The circumstances in **Arbuthnot** and **Securum** were, however, very different from those of the present case. That the second action – the ***Securum*** action - was capable of being viewed as an abusive waste of resources is in no way surprising on the facts in that litigation. Litigation pursued so dilatorily and over so long a period as to be struck out for want of prosecution has (for too long) been a blot on the English legal system. The reference by Lord Woolf, Master of the Rolls, in **Arbuthnot** to the need for a ***"special reason"*** before a second claim could in such a case be permitted matches the context. For completeness, we should add that a reason was found, in **Securum,** why the second action should not be struck out.

23. The present situation could be said to be the obverse of that in **Arbuthnot** and **Securum.** Here, the first action was begun too early, without sufficient thought or any expert advice, and the appellant found itself unable to catch up. Any delay was minor. Further, the root cause of the problem was inability, due to lack of sufficient thought, preparation and advice, to particularise a proper case on causation and quantum. It is true that the court's resources are being taxed twice, but they were taxed relatively little by the first action, and the extra burden imposed on them by a second action can hardly be much greater than the burden which could and would anyway have been imposed, if the appellant had managed to get its expert advice and pleading in order by 1st November 2000.

24. HHJ Wilcox on 22nd June 2001 made repeated reference to the first action being struck out as an "abuse"; but that is not a word he is reported as having used on 3rd November 2000. It is common ground that he must have struck out the claim on that date under sub-paragraph (c) of CPR Part 3.4(2), which reads as follows: *"The court may strike out a statement of case if it appears to the court-*

(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;

(b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or

(c) that there has been a failure to comply with a rule, practice direction or court order."

25. While the word ***"abuse"*** may in one sense be wide enough to cover all the heads in Part 3.4(2), and the notes in the White Book use it in that broad sense, there is, as was observed during argument, no magic in labels. The rule is capable of covering a wide variety of circumstances, of differing seriousness. Its application in practice ought to be confined to serious cases. Even then, there is, as we have said, a potential distinction between situations where the intention is to end all proceedings and the situation where the intention is merely to dispose of the present claim.

26. There is, on any view, a very obvious distinction in order of seriousness between the inordinate and inexcusable delay involved in cases such as **Arbuthnot** and the misconduct leading up to the order of 3rd November 2000 in the present case. It is strictly correct to analyse the default in the present case as default in compliance with the order of 4th October 2000. But the substance of the default was the failure to take steps to put into proper shape ***prior to*** any order proceedings which had been commenced by legal advisers without due thought or preparation. By the time the order of 4th October 2000 was made – however realistic the judge may have thought that the time he allowed would be – it was effectively too late to correct matters within the time allowed. We are satisfied by the evidence that (contrary to the judge's evident attitude) it would not be fair to criticise the claimant or their advisers for any conduct after the making of the order of 4th October 2000. In ordinary language, at any rate, the breach of the order could not therefore be described as abusive, whatever label may be attached to the incompetent conduct of the proceedings prior to the order.

27. In another recent decision, **Collins v. CPS Fuels Limited** [2001] EWCA Civ 1597 (9/10/01) this court was again concerned with an application under sub-paragraph (b) of Part 3.4(2) to strike out a second claim, after the first claim had been struck out for delays and failures to comply with court directions, of the

"grossest kind" (per Jonathan Parker LJ: para. 41). Although Bodey J in the leading judgment referred to the approach of this court in **Arbuthnot** and to the need for "special reasons" before a second action could be allowed to proceed, it is worth drawing attention to the careful nature of the balancing exercise which the judge below had conducted and which Bodey J took care to summarise and plainly regarded as necessary: see pares. 26-30 and 35-38. Jonathan Parker LJ said that the only practical effect of allowing a fresh action would be *"to set the clock back to the start of the litigation, a result which would … be plainly contrary to the overriding objective."* Judge LJ referred to the judge's *"impressive and detailed analysis of the relevant specific factors"* and added this on the concept of ***"some special reason":***

"49. I should say a word about his reference to "some special reason". The use of these words is an attractive form of forensic shorthand which encapsulates the broad approach to the decision-making process to be adopted when an action has failed as a result of an abuse of process and the court is considering whether a second action relating to the same issues should be allowed to continue. The words come from authority binding on this court: ***Arbuthnot Latham Bank Ltd. v. Trafalgar Holdings Ltd.*** *[1998] 1 WLR 1426; but they are not words which derive from the statute, nor should they be employed as some form of ritual incantation. If the judge in this case had chosen to express the same principles by saying* ***"very good reason",*** *or* ***"powerful"*** *or* ***"sufficient reason",*** *he would not, in my judgment, have misdirected himself.*

50. The answer to the questions which necessarily arise is always fact-specific. In particular, semantic analysis of this or that factor, or any combination of factors, to see whether they should be regarded as "special", or "not quite special enough", or "good enough", or "not quite powerful enough", is unhelpful. Worse still if that method of analysis is thought to be lent what is only spurious weight by the citation of previous decisions reached by other courts in different cases, even if the citation is used merely by way of example or illustration."

28. Thus, even in the context of a second identical claim following the striking out of the first for gross delay and misconduct under sub-paragraph (b) of Part 3.4(2), an overly formulaic approach should be avoided. In some cases, the height of the hurdle which a second claim has to surmount may be more obvious than in others. **Securum** and **Collins** were cases where self-evidently the claimants faced a difficult task. The power to strike out for procedural reasons is, however, ultimately discretionary and its exercise is, as Judge LJ observed, fact-specific.

29. In this connection, it is instructive to note the attitude of the House of Lords in a parallel context, concerning the power to strike out a second action as an abuse of process for breach of the rule in **Henderson v. Henderson** (1843) 3 Hare 100, prohibiting the re-litigation of matters which were or ought to have been previously litigated on their merits. In **Johnson v. Gore Wood** [2001] 2 WLR 72 the claimant's company had pursued and settled professional negligence claims against solicitors. The claimant had mentioned that he had, arising out of the same matters, a personal claim which he intended to pursue separately. When he did so, the defendant solicitors applied to strike it out as an abuse of process. The application failed in the House of Lords, where Lord Bingham at p.90C-F said this: *"I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances.*

Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

30. This approach has much to commend it in the present context; at least in situations where there is no background of flagrant misconduct or where the second action can be viewed as something other than a mere attempt to revive the claim in the first. The requirement for a "special reason" is readily understandable where the second action does no more than seek to pursue a claim already brought in a first action which was itself so abusively conducted that inordinate and inexcusable delay occurred to the potential prejudice of the defendant and of any fair trial. The requirement is more elusive, both inherently and in relation to the "balancing exercise" which the cases contemplate, in cases where those features are not present. In contrast, an approach paralleling that adopted in **Johnson v. Gore Wood** remits the enquiry to the level of consideration of all the circumstances, with due weight being given to each, including of course the court's resources, and with a judgment being formed at the end of that exercise as to what justice requires overall.

Application of above principles

31. In this light, it is appropriate to stand back and look at the position overall. We shall take as the starting point the order dated 3rd November 2000, and then, without pre-judging the applications for permission to appeal out of time, go on to consider whether any basis appears for challenging that order if such permission were given. Starting therefore with the order dated 3rd November 2000, the strength of the respondent's position lies in the appellant's incompetent conduct of the first claim, leading to the striking out of that claim, and in the futility of that striking out if a second action is permitted. The respondent can say that, if the judge intended the appellant to be able to bring a fresh claim, once it had got its tackle in order, he did not say so, and it would be inconsistent with the tenor of his later judgment of 22nd June 2001. If, on the other hand, the judge intended on 3rd November 2000 to end the matter for ever, the very submission that it is unjust not to allow the appellant to pursue its second claim challenges indirectly the correctness of that decision.

32. Turning then to the order dated 3rd November 2000, there is, in our view, clear cause for concern about its basis and justification. First, there is the real likelihood, which we have already identified, that the judge on 3rd November 2000 simply assumed that there was no serious possibility of properly drafted particulars or any fresh claim at any time; if that was his state of mind, then, it was, as we have said, not justified by the evidence.

33. Secondly, there is good reason to doubt the correctness of the judge's appraisal of other facts. We refer in this connection to the statements recorded in the note of his reasons on 3rd November 2000 that "it transpires nothing has been done"; that "the reason given – that the expert has not been able to devote enough time – is a thin and miserable reason"; and that, "When the Court grants indulgence, as it did in this case, it is incumbent upon the Claimant to obtain an expert to report in a timely way, to enable the Order to be complied with". The only evidence before the judge on 3rd November, regarding steps taken to comply with his order of 4th October 2000, disclosed substantial and properly directed activity, with the expert working on the matter for as much as either 75% or 70% of his time. The period of 28 days given on 4th October 2000 may, as at 4th October, have appeared "a realistically longer time" (than 7 days), in the phrase used by the judge on 22nd June 2001. But the judge should have been prepared to think again as to whether the period was realistic, or should be extended, when confronted on 3rd November 2000 with the evidence of what had actually been done and the limited extra time still actually required to complete it. Instead, the passages that we have quoted criticise the steps taken by the appellant and its advisers and expert after 4th October 2000. For that criticism, we see no foundation. The note of the judge's reasons also suggests that he did not properly distinguish in his own mind between the period from 4th October to 3rd November 2000 and the period prior to 4th October, to which justifiable criticism could unquestionably be directed.

34. Thirdly and most fundamentally, the question presents itself how, on any view, it could be proportionate to strike out the action on 3rd November 2000, bearing in mind above all that the adjournment sought was very short, and (as a lesser factor) the fact that there had never been any unless order.

Applications for permission to appeal out of time the first striking out

35. In order to mount any challenge to the order dated 3rd November 2000, the appellant must, however, succeed in its late applications before us for permission to appeal out of time. Mr Pelling resisted these applications on unsurprising grounds, which could in many cases be irresistible. The appellate process is subject to short time-limits which are meant to be adhered to. Instead of filing an appellant's notice within the prescribed 14-day period, the appellant on legal advice took and persisted in its own deliberate decision to pursue a fresh claim. It continued to persist in that decision, even after Squire had made the respondent's attitude clear in March 2001. It further continued to do so despite the judge's striking out of the second claim in June 2001 and thereafter until the appeal against that striking out was being presented before us.

36. Asked, however, whether he could identify any prejudice to the respondent if an extension of time was granted, Mr Pelling submitted that the respondent had been entitled to assume that the only live claim was that in the second action. That is true, but it does demonstrate how different the present case is from the familiar situation where a defendant is led to believe that a claim is not going to be pursued at all. Here, the respondent can never have thought that the matter was dead. The appellant disclosed its intentions openly at all times on and from 3rd November 2000. Neither in November 2000, when an appeal could have been lodged in time, nor until March 2001, did the respondent suggest that it would view this as abusive.

37. Further, although it must now be recognised, in the light of **Securum**, that the court has power to strike out a second action brought within the limitation period – and may well exercise that power in circumstances where the first action has been struck out for failure to comply with the court's order – a defendant in the position of this respondent could not have assumed, with any confidence, that a second action would not be allowed. Prior to the decisions in **Arbuthnot** and **Securum,** the long-standing general understanding (based on **Birkett v. James**) was that a second action was possible within the limitation period. That the full potential impact of those decisions might take time for the profession to digest is unsurprising. Further, there were and are evident substantial differences between their circumstances and those of the present case. When making his submissions, Mr Pelling himself said that the appellant should be held to *"a deliberate decision made on apparently competent legal advice"*. But, if the advice was competent (though, Mr Pelling submits, wrong), the court should be slow to hold that the appellant must be denied an opportunity to pursue a claim which (in reality) the respondent could never have thought was abandoned.

38. Mr Pelling submits that the respondent may have suffered procedural disadvantages through being unable to make a payment in and/or through being exposed to longer potential periods of interest. But the court can, either now or at the close of any proceedings, cater for any extra costs incurred or thrown away in either action by making appropriate orders. If the first action is revived, the respondent will be able to make a part 36 offer, as it would have been able to if the first claim had never been struck out. Likewise, the court can disallow interest for any period it may think fit, either at the conclusion of the first claim, if it proceeds, or, if necessary, as a condition of any extension of time or permission to appeal. We can see no prejudice – at the least, no prejudice which cannot be compensated by the imposition of appropriate terms - in granting an extension of time to seek permission to appeal. Mr Howarth's clients accepted that any extension or permission would have to be on such terms as to payment of such costs incurred or wasted as we might think appropriate.

39. Mr Pelling further submits that there should be no extension or permission, because the judge's decision on 3rd November 2000 was reached in the exercise of his discretion. But we have said enough to indicate that questions arise as to whether the judge properly addressed the matter before him on that date.

Conclusions

40. For these reasons, we are unable to accept Mr Pelling's submission that appellant's applications for permission to appeal out of time against the decision of 3rd November 2000 should be refused because of the appellant's deliberate decision not to appeal earlier or because of the delay that has elapsed or because there has been any such prejudice as Mr Pelling suggests or because the decision was one reached in the proper exercise of an unchallengeable discretion.

41. The reason why such applications are now made is concern - heightened (if not brought about) by the reaction of the Court in the course of argument - regarding the prospects of a successful appeal against the decision of 22nd June 2001. If that appeal were to fail, resuscitation of the first claim would offer the only possible prospect of pursuit of any claim against the respondent. If the Court were to take an overall view that it would be disproportionate, in the circumstances of this case, for the failure to comply with the order of 4th October 2000 to lead to the result that the appellant could not pursue its claim in either the first or the second proceedings, that might be argued to constitute a strong reason for allowing an appeal to be pursued out of time against the decision of 3rd November 2000.

42. Despite the incompetent conduct of the first claim, we have no doubt, on any overall view of the present circumstances, that the justice of the case points unequivocally towards the appellant being allowed to pursue its present claim in one or other of the two sets of proceedings that it has begun. Further, we are satisfied that the right course is to address the root cause of the potential injustice which would be involved in any opposite conclusion. That root cause is to be found in the judge's order of 3rd November 2000. To end the litigation then and there, without allowing the short extension of time required for the pleading to be put in order was, whatever view one takes of the judge's intention at the time, wholly disproportionate and wrong. Further, although there may (as we have said) be cases where it is appropriate to strike out a first action without the intention of thereby precluding a second action, this was clearly not such a case. The appellant was on 3rd November 2000 in the middle of steps, which deserved to be described as energetic, to rectify its default, and whether it could do so as a matter of substance would become apparent very shortly. The appellant was asking for an extension of only ten days.

43. To redress the potential injustice in the present situation by permitting the continuation of the second claim would, in our judgment, obscure the underlying problem and could create potential difficulties of principle in future cases. In these circumstances, it is neither necessary nor appropriate to consider whether the principles governing the striking out of a second claim could otherwise have assisted the appellant. The appellant should have appealed in time against the first striking out. The situation should not have been allowed to continue in which a second action was required.

44. For these reasons – and subject to a condition which we identify in the next paragraph - we grant the necessary extension of time to the appellant to apply for permission to appeal against the judge's order dated 3rd November 2000 and grant permission to appeal. Having heard all the submissions that would be advanced on such appeal, we allow the appeal and set aside the judge's order striking out the first action. In those circumstances the second action was unnecessary and is duplicative, and should be struck out in any event.

45. Subject to hearing any further submissions that counsel may have to make, we would order that the particulars of claim served in the second claim should stand, with appropriate amendment of the claim number, as amended particulars of claim in the first claim, replacing those originally served, and that the respondent should serve a defence to those amended particulars of claim within a period on which we should hear counsel. The judge's order on 4th October 2000 for the appellant to pay all the costs of and occasioned by the service of the amended particulars of claim is ineffective, since no amended particulars of claim were served pursuant to it. In lieu of the judge's order on 3rd November 2000 for the appellant to pay all the costs of the first action, we would, as a condition of the grant of permission to appeal out of time in respect of the order of 3rd November 2000, order that the appellant to pay all the costs wasted in the first and second claims by the service of the original defective particulars of claim and by the pursuit of two actions, rather than one, such costs to be assessed if not agreed (with credit being given to the appellant, when it comes to payment, for the £25,000 already paid in early 2000). But we will hear further argument from counsel on the precise terms of the order to be made.

Order: original appeal dismissed, but permission granted to bring second appeal and that appeal allowed; counsel to lodge an agreed minute of order. (Order does not form part of the approved judgment)

Simon Howarth (instructed by Messrs Vizard Oldham) for the Appellant
Mark Pelling (instructed by Messrs Squire & Co.) for the Respondent