Queen's Bench Division: Liverpool

*Davies *v* Carillion Energy Services Ltd and another

[2017] EWHC 3206 (QB)

2017 Oct 26, Nov 6; Dec 8

Morris J

Practice — Claim — Striking out — Claimant's claim struck out for failure to comply with unless order — Claimant bringing second claim against same defendant concerning same subject matter — Whether abuse of process

The claimant brought a claim against two defendants seeking damages for breach of contract. The second defendant applied to have the claim against it struck out as an abuse of process on the basis that the claimant had already brought a claim against it, alleging the same breach of contract, which had been struck out for the claimant's failure to comply with an unless order requiring him to serve fully pleaded particulars of claim by a specified date. The district judge refused the application, finding that the claimant's second claim was not an abuse of process.

On the second defendant's appeal—

Held, dismissing the appeal, that where a first action had been struck out as an abuse of process or on the ground of otherwise inexcusable conduct on the part of the claimant, a second action covering the same subject matter would be struck out as an abuse of process save in very unusual circumstances; that, for those purposes, an abuse of process in the first action would include intentional and contumelious conduct, or want of prosecution or wholesale disregard of rules of court, and whether the claimant's conduct had been inexcusable would fall to be assessed more rigorously and in the defendant's favour; that a single failure to comply with an unless order in the first action was not, of itself, a sufficient basis on which to conclude that the second action was an abuse of process; that in dismissing the second defendant's strike-out application, the district judge had fallen into error by applying the approach applicable to cases where the first action had been resolved by way of adjudication or settlement; that, however, applying the correct test and making allowance for the likelihood that, as a litigant in person, the claimant had not been fully conversant with the details of the provisions of the Civil Procedure Rules that dealt with pleadings, the procedural failings of the claimant which led to the first action being struck out were neither an abuse of process nor could they properly be described as inexcusable; and that, accordingly, the second action would not be struck out as an abuse of process (post, paras 52–55, 56, 63, 64–66, 69, 74).

Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd [1998] 1 WLR 1426, CA, *Securum Finance Ltd v Ashton* [2001] Ch 291, CA, *C (A Child) v CPS Fuels Ltd* [2002] CP Rep 6, CA and *Aktas v Adepta* [2011] QB 894, CA applied.

Aldi Stores Ltd v WSP Group plc [2008] 1 WLR 748, CA distinguished.

The following cases are referred to in the judgment:

Aktas v Adepta [2010] EWCA Civ 1170; [2011] QB 894; [2011] 2 WLR 945; [2011] 2 All ER 536, CA

Aldi Stores Ltd v WSP Group plc [2007] EWCA Civ 1260; [2008] 1 WLR 748, CA

Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd [1998] 1 WLR 1426; [1998] 2 All ER 181, CA

C (A Child) v CPS Fuels Ltd [2001] EWCA Civ 1597; [2002] CP Rep 6, CA

Cranway Ltd v Playtech Ltd [2008] EWHC 550 (Pat)

Denton v TH White Ltd (De Laval Ltd, Part 20 defendant) (Practice Note) [2014] EWCA Civ 906; [2014] 1 WLR 3926; [2015] 1 All ER 880, CA

A *Elliott v Stobart Group Ltd* [2015] EWCA Civ 449; [2015] CP Rep 36, CA
Henderson v Henderson (1843) 3 Hare 100
Johnson v Gore Wood & Co [2002] 2 AC 1; [2001] 2 WLR 72; [2001] 1 All ER 481; [2001] 1 BCLC 313, HL(E)
Maritime Transport Ltd v Mills (unreported) 22 June 2017, Crown Court at Liverpool (Judge Gregory)
Mitchell v News Group Newspapers Ltd (Practice Note) [2013] EWCA Civ 1537;
B [2014] 1 WLR 795; [2014] 2 All ER 430, CA
R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1633; [2015] 1 WLR 2472, CA
Securum Finance Ltd v Ashton [2001] Ch 291; [2000] 3 WLR 1400, CA
Stuart v Goldberg Linde [2008] EWCA Civ 2; [2008] 1 WLR 823, CA

No additional cases were cited in argument.

C **APPEAL** from District Judge Stuart sitting in Manchester Civil Justice Centre

By a claim form dated 4 December 2015 the claimant, Philip Davies, brought a claim against the defendants, Carillion Energy Services Ltd and Home Insulation Services (North-west) Ltd, for breach of contract in relation to the supply and installation of an oil fired central heating system at
D his property. By an application notice dated 1 August 2016 the second defendant applied for the claim against it to be struck out, inter alia, on the ground that it was an abuse of the process of the court since on 13 July 2011 District Judge Shaw, sitting in Bolton County Court, had struck out a similar claim by the defendant against the second defendant for failure to comply with an unless order. On 29 November 2016 District Judge Stuart refused the application.

E By an appellant's notice, the second defendant appealed on the principal ground that the district judge had erred in his approach to abuse of process where the first action had been concluded for a procedural failure to comply with an unless order.

The facts are stated in the judgment, post, paras 4–21.

F *Elisabeth Tythcott* (instructed by *Dwyers, Ashton-under-Lyne)* for the claimant.

William Poole (instructed by *Plexus Law Ltd*) for the second defendant.

The first defendant did not appear and was not represented.

The court took time for consideration.

G 8 December 2017. **MORRIS J** handed down the following judgment.

Introduction

1 In this action commenced on 4 December 2015 ("the Second Action"), Philip Davies ("the Claimant") claims damages against the first defendant, Carillion Energy Services Ltd ("Carillion") and the second defendant, Home Installation Services (North-west) Ltd, (referred to as "the
H Defendant") for breach of contract in relation to the supply and installation, in 2009, of a new oil fired central heating system at his property at Wickenlow Barn, Quarlton Manor Farm, Turton in Bolton ("the Property").

2 This is an appeal by the Defendant against paragraph 2 of the order of District Judge Stuart dated 3 April 2017 dismissing the Defendant's

application to strike out the claim against it in the Second Action. The eventual basis of the Defendant's application was that earlier proceedings brought by the Claimant against the Defendant in the Blackburn County Court ("the First Action") had previously been struck out for failure to comply with an unless order made on 20 June 2011 and thus that the Second Action was an abuse of process. In his judgment dated 1 August 2016 ("the Judgment") District Judge Stuart concluded that the Second Action was not an abuse of process. District Judge Stuart also dismissed an application by Carillion pursuant to CPR r 3.4(2)(a) and/or CPR r 24.2(a) to strike out and/or dismiss the proceedings brought against it on the basis that the Claimant's case disclosed no reasonable grounds for bringing the claim.

3 On this appeal, brought with permission, the Defendant contends that the judge's decision on its application was wrong in law and that the claim against the Defendant should be struck out.

The facts

The First Action

4 On 9 July 2010 the claim form in the First Action was issued. It was completed in manuscript by the Claimant. Under "Brief details of claim", the Claimant stated that the Defendant installed a central heating boiler and other equipment at the Property and that on 14 December 2009 the system had ceased to function, having frozen. He had invoiced the Defendant on 14 June 2010, in the sum of £19,482. Under "Particulars of Claim", he provided a breakdown of this sum into six different items.

5 On 2 August 2010 the Defendant filed a 16-paragraph defence to that "specially endorsed" claim form. In the defence, it put forward a substantive defence relating to the cause of the breakdown of the system. No objection was taken to the form or content of the claim form, and its particulars and no application to strike out, or for further information, was made. However, in the defence, the Defendant contended that the Claimant had failed to set out any allegations in support of his claim and further, at para 16, had failed to provide any breakdown of the sums claimed and should provide evidence as to how the figure had been calculated.

6 On 30 September 2010 Deputy District Judge Pollard, of his own motion, made an unless order in the following terms:

> "Upon the court's own motion. The court has made this order of its own initiative without hearing.
>
> "IT IS ORDERED THAT
>
> "1. Unless the claimant by 4 p m on 21 October 2010 file and serve a fully pleaded particulars of claim including specifying how the sum of £19,482 is made up, the claim is struck out.
>
> "2. Upon the claimant having complied with 1 above the defendant has permission to file and serve an amended defence by 4 November 2010 . . ."

7 Within the time limit specified in, and in purported compliance with paragraph 1 of, that order, on 18 October 2010, the Claimant filed and served particulars of claim. The document was handwritten by the Claimant and stated at the top "As per Deputy District Judge Pollard's order of 30/9/10". It ran to 12 paragraphs over four pages and described events relating to the fitting of a central heating boiler, listing in detail

correspondence with the Defendant. At para 12 it set out, in similar but no greater detail, how the sum of £19,482 was made up.

8 On 28 October 2010, and in compliance with paragraph 2 of Deputy District Judge Pollard's order, the Defendant filed and served its amended defence. The original para 16 objecting to the lack of particulars relating to the sums claimed was now deleted. Instead, at paras 16–20 the Defendant pleaded to the individual items of loss claimed, albeit asking for clarification of the basis of the main claim for "depreciations" and also requiring evidence to be provided to support the claims in relation to the washing machine and dishwasher. It appears that the defendant accepted that the Claimant had in fact complied with the unless order: first because the obligation upon the Defendant to plead an amended defence was conditional upon such compliance; and secondly because, despite the existence of an unless order, the Defendant made no application to strike out the claim on grounds of non-compliance.

9 In the meantime, on 8 October 2010, the proceedings had been transferred to Bolton County Court. On 10 January 2011 District Judge Swindley, a senior district judge at Bolton County Court, "considered the papers" and made an order allocating the case to the fast track, making standard fast track directions. The trial was listed for a trial window commencing 20 June 2011. Paragraph 9 of the order required *the Defendant* to lodge the trial bundle. At paragraph 12, it was pointed out that the provisions of the CPR applied and "the Claimant must appreciate that the informality that applies to small claims track cases does not apply"; at paragraph 16 the parties were referred to specified provisions of the CPR, including Parts 1 and 3. Nothing was said about the pleadings not being adequate. Indeed in the separate formal N154 Notice of Allocation to the Fast Track, it was expressly stated that, in making his allocation decision, "District Judge has considered the statements of case". It is a fair inference to draw that, at this time, neither the defendant nor District Judge Swindley considered that the Claimant had failed to comply with Deputy District Judge Pollard's unless order nor that the Claimant's particulars of claim were inadequate.

10 On 8 April 2011 the Defendant applied for a variation in the timetable. On 18 April 2011 an unless order was made requiring the Claimant to file and serve the listing questionnaire and pay relevant fees. The Claimant duly complied. On 11 May 2011 the claim was listed for trial for 20 June 2011 with a time estimate of one day. On 13 June 2011 the Claimant applied for the trial date to be vacated. This was refused without a hearing by District Judge Shaw on 14 June 2011.

The unless order of 20 June 2011

11 The matter duly came on for trial before Deputy District Judge Jones on 20 June 2011. The Claimant appeared in person. The Defendant was represented, including by Mr Poole who appears on the present application. It is not entirely clear what happened at the hearing. The Claimant has asserted that the matter did not come on for hearing until 2 p m, and at that point, the deputy district judge made an order of his own motion. The Defendant is not able to say that it took any objection to the Claimant's pleading. It is certainly the case that there was no written application, in

advance of the hearing, made by the Defendant. In any event, Deputy District Judge Jones made the following order:

> "Upon the claimant's case not having been clarified as ordered by the order of 10 January 2011.
>
> "Upon the claimant not having been [sic] served his witness statement.
>
> "IT IS ORDERED THAT
>
> "1. Unless the claimant do by 4 p m on 4 July 2011 file and serve a fully pleaded particulars of claim specifying on what legal basis the claim is made and upon what basis the sum of £19,482 is made up the claim is struck out and claimant is ordered to pay the defendant's costs of the action subject to detailed assessment if not agreed.
>
> "2. Unless the claimant do file and serve his witness evidence by 4 p m on 4 July 2011 the claimant be debarred from giving evidence at the trial of this case."
>
> "4. Claimant do pay the defendant's costs of today thrown away subject to detailed assessment to be made at the conclusion of the case."

The underlined words in paragraph 1 above are the only substantive addition to the terms of the earlier order of Deputy District Judge Pollard. Further directions were made for the relisting of the trial. The Claimant, with some hesitation, suggests that this unless order might be regarded as "capricious".

The Claimant's 4 July document

12 On 4 July 2011 the Claimant filed and served a 39-page manuscript document, in purported compliance with Deputy District Judge Jones's order of 20 June 2011. In that document, the Claimant states that, as at that time, he had not received from the court, a copy of the formal order recording the precise terms of the unless order of 20 June 2011. This is supported by the fact that the formal unless order itself bears the date 4 July 2011.

13 The document is headed "Witness Statement of Philip Davies" and goes on to set out in detail the history of the matter, referring to the documents in the trial bundle and responds, paragraph by paragraph, to the amended defence. At p 39, and following 72 numbered paragraphs, the document states:

> "Bearing in mind the foregoing 72 paragraphs I consider it unnecessary to repeat what is adequately set out in the particulars of claim of 18/10/10 including my exhibits 1/ to 13/ referred to many times and on the court file. Coupled with the IF (Plumbers) statement docs 82, 83 and 84 and Eaga plc/Warm Front failed inspection report by Bill Rotherham at Doc 80 dated 18/06/10.
>
> "It will be obvious that I am not in funds to obtain legal representation. In fact I borrowed money to replace the radiators affected and the plumbers work remains unpaid.
>
> "I therefore expected that acting as a litigant in person would not be and should not be perceived as a weakness by anyone [?] involved, quite the opposite I have found, with all concerned. At the end of the frustrating six months of spurned opportunities offered by myself, I had no option but issue the interim claim."

In the bottom left hand corner of that page, the claimant continued:

> "The claim against HIS is for
> "(1) Lack of a duty of care
> "(2) Denial of the claimant's human rights
> "(3) Failure to inspect and rectify problems with HIS installed system under the Eaga plc/Warm Front/DEFRA scheme's two-year warranty
> "(4) Interim claims amount + interest and subsequent costs"

The Claimant then made a statement of truth and signed and dated the document.

The order of 13 July 2011

14 On 13 July 2011 District Judge Shaw made the following order:

> "IT IS RECORDED THAT
> "The documents filed by the claimant on 4 July 2011 do not comply with para 1 of the order of Deputy District Judge Jones dated 20 June 2011 and the claim has already been struck out."

Whilst referring to documents in the plural, District Judge Shaw concluded that there had been non-compliance with paragraph 1 only—relating to the particulars of claim—of the order of Deputy District Judge Jones; and not with paragraph 2 relating to service of a witness statement. Thus it appears that the reasons for confirming the strike out was that, despite the terms of p 39 of the 4 July document filed, its concluding enumeration, and its reference back to the previous 38 pages of that document, this did not constitute "fully pleaded particulars of claim" in the manner specified in paragraph 1 of Deputy District Judge Jones's order.

15 In his second witness statement on this application, the Claimant explained that:

> "as a litigant in person I was confused and ultimately exhausted by the entire process when my case was struck out . . . It is not my intention to seek the sympathy of the court as to these events, merely an understanding that I am not the rule flouting trouble causer the second defendant seeks to portray me to be."

16 On 4 August 2011 Glaisyers Solicitors then acting on behalf of the Claimant wrote to the Defendant's solicitors, stating that they had been instructed to make an application for relief from sanction in respect of District Judge Shaw's order of 13 July 2011 "in order to have our client's claim reinstated". However, before doing so, they asked for sight of a loss adjuster's report carried out on the instructions of the Defendant, over which the Defendant was seeking to claim privilege. Glaisyers added that, given that an application for relief from sanctions had to be made promptly, the report was required within four days, failing which they would advise the Claimant to apply for its disclosure.

17 Nothing further happened. The Defendant's solicitors did not reply to this letter. The Claimant made no application for relief from sanctions and there was no appeal from the order of Deputy District Judge Jones.

18 In August and September 2012 the Claimant, by then acting in person again, reached agreement with the Defendant in relation to the order

for costs made in paragraph 1 of Deputy District Judge Jones's order; and the Claimant subsequently paid those costs.

19 The claimant asserts that he had not proceeded to contest the order of District Judge Shaw because at that time he could not afford to pay for such an application. In his second witness statement in the present application, he said he had not had funds to retain solicitors throughout the First Action. He was devastated when his claim was struck out and did not understand why it had been. He had used what little funds he had at the time to seek advice, but could not afford to maintain his instructions to Glaisyers and did not have the funds or the emotional fortitude to advance the fight any further at that stage. It was for that reason that he had conducted the subsequent costs negotiations himself.

The Second Action

20 The claim form was issued on 4 December 2015 and subsequently amended on 31 March 2016. The Claimant is now represented by solicitors and counsel. At the hearing before me, his counsel informed me, on instructions, that he could now afford legal representation in the second action, because he has, since 2011, come into some money from the sale of a property in which he had a limited beneficial interest. In the Second Action, the Claimant is suing not only the Defendant (as second defendant), but also Carillion. Detailed particulars of claim, settled by counsel and running to ten pages, were served on 31 March 2016. The Defendant served its defence on 28 April 2016.

21 On 1 August 2016 the Defendant applied to strike out the Second Action as against it on three grounds: abuse of process, vexation/harassment and estoppel. This appeal concerns only the abuse of process ground. Carillion also applied to strike out the second action as against it. The applications were heard by District Judge Stuart on 20 October 2016. He handed down judgment on 29 November 2016.

District Judge Stuart's judgment

22 The judge addressed the Defendant's application based on abuse of process at paras 10–34 of the Judgment. At paras 11–23 he set out the parties' arguments including citation of relevant passages from *Securum Finance Ltd v Ashton* [2001] Ch 291, *Johnson v Gore Wood & Co* [2002] 2 AC 1, *Aldi Stores Ltd v WSP Group plc* [2008] 1 WLR 748, *Cranway Ltd v Playtech Ltd* [2008] EWHC 550 (Pat), *Stuart v Goldberg Linde* [2008] 1 WLR 823, *Aktas v Adepta* [2011] QB 894 and *Elliott v Stobart Group Ltd* [2015] CP Rep 36. *C (A Child) v CPS Fuels Ltd* [2002] CP Rep 6, to which I refer below, was not cited.

23 In his conclusions, at para 24, he referred to the overriding objective as including consideration both of the use of court resources and doing justice to a case. There was no judgment as to why the First Action had been struck out. It was not for him to decide whether it had been struck out as an abuse of process, but whether the second action is itself an abuse due to the fact that the first action had been struck out. The first action was never litigated to a trial: para 25. Then, at para 26, he stated:

> "One of the difficulties that has arisen is that Mr Davies, for understandable reasons, considered that he had obeyed the initial order of

A the court made by Deputy District Judge Pollard on 27 September 2010, and that he had in fact filed and served a fully pleaded particulars of claim. Indeed the learned judge dealing with the question of allocation etc, on 10 January 2011 gave no hint that the claim was in any way defective, and indeed no application was made by the defendants who filed an amended defence to the fully pleaded particulars of claim. It was only on 4 July 2011 that Deputy District Judge Jones declared that the B claimant's case had not been clarified and ordered clarification. As a result of a failure to comply with that order, and *clearly on the basis that the claimant did not know how to express his claim in any other way*, the matter was struck out. The court accepts that as was held by the Court of Appeal in *Elliott v Stobart Group Ltd* [2015] CP Rep 36, para 39: 'being a litigant in person with no previous experience of legal proceedings is not a C good reason for failing to comply with the Civil Procedure Rules or, I would add, court orders.' " (Emphasis added.)

24 At para 27, referring to the balancing exercise under the *Aldi* case, the judge considered that, nevertheless, being a litigant in person was a matter that could, to a limited extent, be taken into account in that exercise. At para 28, he took account of the fact that the Claimant had failed to D comply with a final court order and did not appeal that strike out, although he had intended to. Court time had been used, but the Claimant had suffered the consequence of having been required to pay the Defendant's costs of the First Action. He commented that in the Second Action the Claimant's case was set out on a clear legal and factual basis. He did not accept that the passage of time had affected the ability to call witnesses.

25 At paras 29–30, the judge then cited the dicta of Rix LJ in *Aktas v* E *Adepta* [2011] QB 894, para 92 (set out below) and of Lord Millett in *Johnson v Gore Wood & Co* [2002] 2 AC 1. At para 31, he considered that the court was well able to manage the case to ensure that there was no further unnecessary use of court resources and that there was a factual issue that needed to be resolved and of which the Claimant had not had a trial. A further important point was that the claim against Carillion would F continue in any event and it was more likely than not that Carillion would bring the Defendant into the action in any event: "It would be a strange decision if the claimant were not able to pursue the second defendant on the same facts that the first defendant was able to pursue a claim against the second defendant": para 32.

26 At para 33 the judge remarked that there were no authorities where the facts were identical to the present case. He recognised that following G *Mitchell v News Group Newspapers Ltd (Practice Note)* [2014] 1 WLR 795 and *Denton v TH White Ltd (De Laval Ltd, Part 20 defendant) (Practice Note)* [2014] 1 WLR 3926 the court took a more robust view of a failure to comply with the rules, but "Mr Davies has already fallen foul of a general approach and paid the cost consequences. To deprive him of the opportunity of litigating this matter seems to me a further unnecessary H imposition upon him for his early failures". Finally the Second Action was well within the limitation period and so the delay in bringing the Second Action was not a relevant consideration.

27 The judge concluded, at para 34: "Balancing all the matters and having discretion I conclude that the second action has not been shown to be an abuse of process and is not an abuse of process in any event." He then

went on to dismiss the Defendant's alternative grounds based on vexation and estoppel.

The authorities

28 There are different categories of case where an action may be struck out for abuse of process: see, for example, *Civil Procedure 2017*, vol 1, paras 3.4.3.1–3.4.3.6. The approach to be taken by the court in a second action where a first action has been struck out, specifically, for failure to comply with an unless order is not entirely clear on the authorities. I have been referred to a substantial number of cases. Before addressing the main cases in chronological order, I make some general observations.

29 The cases fall into two of the categories 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 Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426, the *Securum* case [2001] Ch 291, *C (A Child)* [2002] CP Rep 6, the *Cranway* case [2008] EWHC 550 (Pat), *Aktas v Adepta* [2011] QB 894 and the recent decision of Judge Gregory in the County Court at Liverpool in *Maritime Transport Ltd v Mills* (unreported) 22 June 2017. *C (A Child)* appears not to have be cited in any previous case before it was cited in the *Maritime Transport* case.

30 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 category of case concerns the type of abuse identified in the well known case of *Henderson v Henderson* (1843) 3 Hare 100 and is the subject of the leading modern authority of Lord Bingham of Cornhill in *Johnson v Gore Wood & Co* [2002] 2 AC 1. In my judgment, the subsequent decision in the *Aldi* case [2008] 1 WLR 748 falls into this second category; the analysis of Thomas and Longmore LJJ is based squarely on *Henderson v Henderson* and *Johnson v Gore Wood & Co* and none of the pre-2007 first category cases appears to have been cited in the *Aldi* case. *Stuart v Goldberg Linde* [2008] 1 WLR 823 likewise falls into this category.

31 Since the *Aldi* case, in *Aktas v Adepta* [2011] QB 894 the Court of Appeal cited both lines of authority in a case falling into the first category. In the present case, District Judge Stuart did the same. More recently, in the *Maritime Transport* case Judge Gregory identified the possibility of different approaches derived from the two lines of authority. The distinction between these two categories was clearly identified by Chadwick LJ in the *Securum* case [2001] Ch 291, para 15; whilst in *Aktas v Adepta*, para 53, Rix LJ seemed to suggest that first category is a sub-set of the second category.

32 Finally, my attention has been drawn to an unofficial note of *Jane Padley v CDI Anderselite Ltd*. In that case, a second action had been struck out by a deputy judge as an abuse of process where a first action had been struck out for failure to comply with an unless order. On appeal, the designated civil judge overturned that decision and allowed the second action to proceed. In granting permission to the defendant for a second appeal to the Court of Appeal in early 2015, Sharp LJ commented that the appeal raised "an important point that merited consideration by the Court of Appeal as to the correct approach (post-*Mitchell* and *Denton*) to

A permitting a second action to proceed, where no application for relief from sanctions in respect of the first action is made or pursued". Subsequently the case settled and the appeal did not proceed.

Securum Finance Ltd v Ashton

33 This was a case where a first action had been struck out on grounds
B of inordinate and inexcusable delay. The Court of Appeal concluded, that since the advent of the CPR, the former rule that, save in exceptional circumstances, a second action could not be struck out if it had been commenced within the limitation period no longer applied. At [2001] Ch 291, para 34, Chadwick LJ cited with approval guidance given in the *Arbuthnot Latham* case [1998] 1 WLR 1426, 1436–1437, where the Court of Appeal had said that whether the second action could be commenced
C would be a matter for the discretion of the court, taking account of "any excuse given for the misconduct of the previous action", and continued:

> "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."

D

34 Thus in the *Securum* case [2001] Ch 291 the Court of Appeal (a) characterised a case of inordinate and inexcusable delay in the first action as being one of "abuse of process", (b) in the second action the court was entitled to take into account the excuse given for the misconduct and (c) in such a case the second action could proceed if "some special reason" was shown. It was necessary to examine the events which led to the striking out
E of the first action: para 36. On the facts, the abuse in the second action was the misuse of the court's limited resources: para 52.

Johnson v Gore Wood & Co

35 This was a case on abuse of process in circumstances where a claim that could have been, but was not, brought in earlier proceedings which
F earlier proceedings went to trial. None of the "first category" cases were cited. Rather the case is directed to abuse of process where it is ancillary to matters of cause of action estoppel and issue estoppel and expands upon the long standing principle in *Henderson v Henderson*. Lord Bingham, at [2002] 2 AC 1, 32H, identified "An important purpose of this rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter". On the other hand, "Litigants
G are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court": p 22C. Lord Millett commented, at p 59C–D:

> "It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been
H adjudicated upon."

C (A Child) v CPS Fuels Ltd

36 This case is closest on the facts to the present case, and unlike the *Arbuthnot Latham* and *Securum* cases does not appear to have been cited

previously in other reported cases. In the first action, there was an unless order requiring (a) compliance with an earlier order for disclosure and (b) attendance at an adjourned case management conference. The claimant's solicitors failed to comply with either part of the order. At the adjourned case management conference, the first action was struck out for failure to comply with the unless order. Prior to the making of the unless order, between 1996 and 1999 there had been repeated failures, by the claimant's solicitors, to comply with earlier orders—on at least six occasions. The claimant then applied to set aside the order striking out the claim. The same judge refused that application. The claimant then commenced a second action. The same judge acceded to an application to strike out that action as an abuse of process. The Court of Appeal upheld that decision, endorsing the approach of the judge. Bodey J gave the lead judgment of the Court of Appeal.

37 It is clear that the first action had been struck out, not only for failure to comply with the final unless order, but because there had been a number of failures to comply with earlier orders and a failure to engage with the case management process. Although the judge did not find that the failures were intentional, he found that no good explanation had been given and that the failures were "inexcusable": see [2002] CP Rep 6, para 16, per Bodey J.

38 Bodey J cited relevant passages from the *Securum* and *Arbuthnot Latham* cases and then, at paras 24–25, approved, as being entirely the right approach, the following passage from the judgment below:

> "It is an abuse of the process for the claimant to seek to litigate in the present action the same issues as were raised, but not adjudicated upon, in the first action which was struck out as a result of *inexcusable* failures to comply with the rules and court orders.
>
> "In order to exercise my discretion so as not to strike out the present action, *some special reason* needs to be identified which, having regard to the overriding objective, would mean that it was just to allow the present action to proceed." (Emphasis added.)

Bodey J noted that the judge found that the claimant would have a cast iron case against his solicitors for their conduct of the first action. The discretion was that of the first instance judge and in line with CPR r 52.11(3) as it was then, the appeal court should only interfere where the first instance judge had exceeded the generous ambit within which reasonable disagreement is possible.

39 Judge LJ agreed with Bodey J's judgment and added, at para 49, that the words "some special reason", derived from the *Arbuthnot Latham* case [1998] 1 WLR 1426, were not a fixed formula and that other terms, such as "very good reason" or "powerful" or "sufficient" reason, express the same principle. I note too that in that paragraph Judge LJ characterised the failures in the first action having been "as a result of an abuse of process". *Johnson v Gore Wood & Co* [2002] 2 AC 1 was not referred to in the judgments.

Aldi Stores Ltd v WSP Group plc

40 Here there had been complex multi-party commercial litigation which had concluded, partially in a judgment, and partly in settlement during trial. A second action was commenced against parties who had been

involved, and which raised claims which could have been brought, in the first set of proceedings. The Court of Appeal held that the decision whether or not a second action is an abuse of process is not an exercise of discretion, but rather a "decision involving the assessment of a large number of factors to which there can . . . only be one correct answer to whether there is or is not an abuse of process": [2008] 1 WLR 748, para 16, per Thomas LJ. On appeal, however, the court will be reluctant to interfere with the decision of the judge where it rests upon the balancing of such a number of factors.

41 Even recognising that *Johnson v Gore Wood & Co* and the *Aldi* case are now properly to be taken to represent general statements of the law of abuse of process, applicable to all the different categories of such abuse, nevertheless neither case directly addressed the specific case where a first action has been struck out for procedural grounds and neither case cited the *Arbuthnot Latham* case [2001] Ch 1, the *Securum* case [2001] Ch 291 or *C (A Child)* [2002] CP Rep 6.

Stuart v Goldberg Linde

42 This was a *Johnson v Gore Wood & Co*/*Aldi* type of case. The Court of Appeal endorsed the statements of principle in the *Aldi* case, whilst emphasising, at para 82, that the role of an appeal court in reviewing the decision of the first instance judge as to whether there is an abuse of process is very similar to its role in reviewing the exercise of a discretion. Further, as regards the role of discretion in such cases, Lloyd LJ, giving the lead judgment, at para 24 considered that there remains a residual discretion *not* to strike out a second action which has been found to be an abuse of process, but only "in very unusual circumstances". (This seems to me to be the basis for the apparent two-stage approach to an *Aldi* type case.)

Cranway Ltd v Playtech

43 In *Cranway Ltd v Playtech* [2008] EWHC 550 (Pat) the first action had been struck out for failure to comply with a practice direction dealing with the requirements for a pleading. There was no appeal against that decision. An application to strike out a second action on the grounds that it was an abuse of process because the first action had been struck out was dismissed. Lewison J applied the approach in the *Securum* case, stating that the court must take a broad view of the reasons why the original action was struck out and the stage at which it was struck out. At para 20, he concluded that:

> "the reason why a claim is struck out is an important factor in deciding whether a subsequent claim is or is not abusive. In the present case I did not strike out the original claim because it was an abuse of process."

He also bore in mind that the first claim had been struck out at a very early stage in its life.

Aktas v Adepta

44 This is an important judgment, as it seeks to draw together the different strands of case authority. On the facts it is a case in the first category. The claimant's first action was struck out for failure, due to mere negligence, to serve a claim form in time. A second action was struck out as being an abuse of process. The defendant contended that the discretionary

provisions of the Limitation Act 1980 to extend time for commencing the second action could not be invoked because, in any event, the second action fell to be struck out as an abuse of process. Rix LJ considered both "lines" of authority: *Johnson v Gore Wood & Co* and the *Aldi* case; and the *Arbuthnot Latham* and *Securum* cases. *C (A Child)* was not cited. He concluded that the second action was not an abuse of process.

45 His essential reasoning was as follows. 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. The *Arbuthnot Latham* and *Securum* cases were both cases where the conduct in the first action had been an abuse of process. Applying this approach, he concluded that a mere negligent failure, in the first action, to serve a claim form did not fall into any of these categories and was not an abuse of process; thus the second action was not an abuse of process.

46 I note two further points in Rix LJ's judgment. First, at para 53, Rix LJ considered the *Aldi* case and *Stuart's* case [2008] 1 WLR 823 and their relationship with the *Arbuthnot Latham* and *Securum* cases. The former cases held that the finding of abuse (in the second action) was a judgment which was either right or wrong, albeit that the decision to strike out for abuse was ultimately a matter for the court's discretion, citing, inter alia the judgment of Lloyd LJ in *Stuart's* case, at para 24: see para 42 above. Rix LJ continued [2011] QB 894, para 53:

> "The finding of abuse is of course likely to result in a discretionary decision to strike out for abuse, but the dicta in the *Arbuthnot Lantham* and *Securum Finance* cases indicate and the latter case illustrates that, where a first action has been struck out for abuse of process it does not necessarily follow that a second action will be."

47 Secondly, at para 92, Rix LJ recognised that, in the era of the CPR, there was a "(possibly) new argument" that emphasises the importance of any misuse of court resources and that there is an important public interest bound up in the efficient use of court resources. He continued:

> "However, to seek to turn that proper concern, in such a case as these, into a surrogate for the doctrine of abuse of process is to my mind a disciplinarian view of the law of civil procedure which risks overlooking the overriding need to do justice."

Maritime Transport Ltd v Mills

48 Here the first action was struck out for failure to comply with a second unless order. There had previously been a series of procedural defaults by the claimant and one prior unless order. The claimant's application for relief from sanctions was refused. The claimant then commenced a second action. The district judge applied an *Aldi* case balancing approach and declined to strike out the second action as an abuse. On appeal, the defendant argued that the judge ought to have approached the issue in line with the *Securum* case and with *C (A Child)* which was now

A cited for the first time. Judge Gregory allowed the defendant's appeal. The *Securum* and *Arbuthnot Latham* cases and *C (A Child)* were cited in detail as were the *Aldi* case and *Stuart's* case.

49 At paras 20–22 of his judgment, (unreported) 22 June 2017, the judge considered the different approaches derived from the two lines of authority, namely *Securum* /*C (A Child)* and *Johnson v Gore Wood & Co* /*Aldi*. He rejected the argument that *Aldi* is the correct approach. *Johnson v* B *Gore Wood & Co* was not a case concerned with procedural default, such as in *C (A Child)*. He concluded by preferring the *C (A Child)* approach: in the instant case, there should be a presumption in favour of strike out, absent any good reason advanced by the claimant. Nevertheless he went on to consider the district judge's decision applying the *Aldi* approach: para 23. At para 34, he concluded, on the facts, and that on either approach, the C second action should be struck out as an abuse. The district judge in his balancing of all factors had given insufficient weight to the disproportionate and wasteful use of court resources and failed to give consideration to the impact of the Jackson reforms on the litigation with its significantly greater emphasis on the need to deal with cases justly and at proportionate cost; and also to the importance rightly attaching to enforcing compliance with the D rules, practice directions and orders.

The parties' submissions

50 The Defendant submits:

(1) The district judge erred in law in applying the *Aldi* approach to abuse of process. In a case of non-compliance with an unless order in a first action, E the correct approach to a second action is that set out in the *Securum* case [2001] Ch 291 and, more particularly, *C (A Child)* [2002] CP Rep 6: a second action will be struck out unless the claimant can show special reason why it should be allowed to proceed.

(2) Indeed, post-Jackson reforms and in particular the addition of CPR r 1.1(2)(f) and the amendment to CPR r 3.9 and the Court of Appeal decisions in *Mitchell's* case [2014] 1 WLR 795 and *Denton's* case [2014] F 1 WLR 3926, the approach of the court should be even stricter. Very special reason or wholly exceptional circumstances have to be shown by the claimant, before allowing a second action to proceed.

(3) The principle applies even where there is a single instance of non-compliance with an unless order, "and no more than that".

(4) In the present case, no such exceptional circumstances or even special G reason can be shown. First the Claimant was guilty of "a whole series of procedural failings" in the First Action. The First Action was struck out for a wholesale disregard of the rules. It was also struck out when those proceedings had reached the point of trial. Secondly, the Claimant did not apply for relief from sanctions in respect of District Judge Shaw's order (despite being aware of that possibility) nor seek to appeal against the order of Deputy District Judge Jones. Thirdly, the fact that the Claimant was a H litigant in person is not a special reason, and in any event at the crucial point where relief from sanctions was being considered, he was legally represented.

(5) In any event, even if the *Aldi* approach to abuse of process is properly to be applied, District Judge Stuart erred in his balancing of the relevant factors

here. The factors outlined in (3) above are such that the commencement of the second action was an abuse of process.

51 The Claimant submits:

(1) The district judge was correct to apply the approach in the *Aldi* case. Further, his assessment of the relevant factors was detailed and correct and there is no basis upon which this court should interfere with that assessment. He considered both the first and second stage of the *Aldi* approach. The relevant factors in the present case clearly militate towards a finding that the Second Action is not an abuse.

(2) There is no provision in the CPR which automatically prohibits the commencement of a second action after a first action has been struck out: cf CPR r 3.4(4) which envisages a second action on condition that the costs of the first action have been paid.

(3) Even if the correct approach is that set out in the *Securum* case and *C (A Child)*, then, first, a second action cannot be struck out unless the claimant's conduct in the first action amounted to an abuse of process or was at the least "inexcusable"; in the present case, the Claimant's conduct in the First Action was neither an abuse of process nor inexcusable. Secondly, even if *C (A Child)* establishes that there is no need for the first action to have been an abuse of process, in any event in the present case there is clearly special reason to allow the second action to continue.

(4) In any case, whether under the *Aldi* case or *Securum* /*C (A Child)*, it is essential to consider the circumstances of, and reasons underlying, the striking out of the First Action. In the present case, there was no wholesale disregard of the rules nor contumelious conduct. First the Claimant was a litigant in person who at all times tried and purported to comply with the rules and orders made. Secondly there was, at most, only one instance of failure to comply with a court order; that failure was technical and was not intentional nor involved the Claimant in deliberately ignoring or flouting the order. Thirdly, the decisions of Deputy District Judge Jones and District Judge Shaw were made of their own motion and the former was curious, if not capricious; there was no complaint of non-compliance with the rules or orders by the Defendant. Fourthly, the fact that the Claimant was a litigant in person at all material times, save for one brief period, is relevant to a consideration of his conduct. Fifthly, there is a good explanation for why the Claimant did not in any event apply for relief from sanctions or seek to appeal against the order of Deputy District Judge Jones.

Discussion

(1) Analysis of the case authorities

52 First, the line of cases of the *Arbuthnot Latham* case [1998] 1 WLR 1426, the *Securum* case [2001] Ch 291 and *C (A Child)* [2002] CP Rep 6 are authority for the following:

(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: the *Securum* case, para 34, citing the *Arbuthnot Latham* case, and *Aktas v Adepta* [2011] QB 894, paras 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 v Adepta*, paras 72 and 90.

A (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": *C (A Child)*, paras 24–25 and the *Cranway* case [2008] EWHC 550 (Pat) at B [20].

53 Secondly, *Johnson v Gore Wood & Co* [2002] 2 AC 1, the *Aldi* case and *Stuart's* case [2008] 1 WLR 823 are all cases of the *Henderson v Henderson* type of abuse, where the first action has been resolved by way of adjudication or settlement and where it is said that issues which should have been brought in the first action are being sought to be relitigated. In such C cases:

(1) Whether a second action raising matters which could have been, but were not, raised in the first action is an abuse of process is not a matter of discretion, but is a judgment to be made by the first instance judge, assessing and balancing all the relevant factors in the case.

(2) On appeal from a first instance judge's decision, the appeal court will interfere only where the judge has taken into account immaterial factors, D omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him or was wrong: *Stuart's* case, para 82.

(3) Even if there is a finding of abuse of process, the court still has a remaining discretion not to strike out, but only in very unusual circumstances: *Stuart's* case, para 24 and *Aktas v Adepta*, para 53.

E **54** Thirdly, there is a tension between these two lines of authority, which Rix LJ sought to address in *Aktas v Adepta*, at para 53. Even if, as there suggested, the first category of case is to be regarded as an example of the general principles established in *Johnson v Gore Wood & Co* and the *Aldi* case, it is difficult to see how, in a "procedural" case, the two approaches can be applied in tandem. If both approaches are to be applied, it is not clear at what point in the analysis the "special reason" identified in F *Securum*/*C (A Child)* comes into consideration: in the first stage of the assessment of all relevant factors or at the second stage of residual discretion, if abuse is found; nor is it clear what factors come into play in the second stage, if all relevant factors have been considered in the first stage.

55 Against this background, I conclude as follows:

(1) Where a first action has been struck out for procedural failure, the G court should apply the *Securum*/*C (A Child)* approach I set out in para 52 above. Even if the *Aldi* case and *Stuart's* case 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 the *Securum* case, *C (A Child)* and *Aktas v Adepta* of cases of procedural failure. Indeed the *Securum* case and *C (A Child)* were not considered in either *Johnson v Gore Wood & Co* or the *Aldi* case. In H *Aktas v Adepta*, Rix LJ did not indicate disapproval of the *Securum* case.

(2) However given the introduction, since those cases, of amendments to CPR r 1.1 and given developments in *Mitchell's* case [2014] 1 WLR 795 and *Denton's* case [2014] 1 WLR 3926, the "special reason" exception identified in the *Securum* case and *C (A Child)* 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 v Adepta*, para 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.

(2) Application to the facts of the case

56 On the basis of the foregoing analysis, I accept the Defendant's first two submissions of principle set out in para 50 above. It follows that, strictly, the judge erred in law in applying the *Aldi* approach. This was entirely understandable, since he did not have the benefit of the Court of Appeal's decision in *C (A Child)*. Nevertheless, on this basis, I consider the position afresh, applying the principles set out above. I turn first to examine the circumstances in which the First Action came to be struck out.

"Whole series of procedural failings"

57 The defendant contends that, in the First Action, there were at least five failures on the part of the Claimant to comply either with a CPR rule or with a court order and that this constitutes a "a whole series of procedural failings". I do not agree.

58 As to the first alleged breach, which was a failure initially to serve particulars of claim compliant with the CPR, this was at most a highly technical breach. Initially, the particulars of claim were endorsed on the claim form. The Claimant as a litigant in person sought to comply with the provisions and did set out some particulars of claim: see para 4 above. There may have been a failure to comply precisely with the detailed rules found in paragraphs 7.3 to 7.5 of CPR Practice Direction 16 as regards the details of the oral or written agreement relied upon.

59 The second alleged breach was the failure to comply with the unless order of Deputy District Judge Pollard by failing to serve particulars of claim. Whether or not this was a breach is, to say the least, contentious. First, plainly the Claimant sought to comply with that order by serving the four-page particulars of claim which he served on 18 October 2010. Secondly the Defendant itself at no point alleged that what he did serve did not comply. Of course, it appears that Deputy District Judge Jones took the view, some nine months later and of his own motion, that there was non-compliance with this order. However, District Judge Swindley on taking stock of the case as a whole, had previously considered those particulars and did not consider that there had been non-compliance.

60 The third breach is said to be failure to comply with the general directions imposed by District Judge Swindley's case management order dated 10 January 2011, in failing to serve witness evidence or a disclosure list within the time set by those directions. However, it is the case that the Defendant was also late with its disclosure list. Moreover, once again, no

A complaint of non-compliance was made by the Defendant at the time. If this was a breach of the order of 10 January 2011, in my view it was technical.

61 The fourth breach alleged is that on 20 June 2011, the date of trial, the Claimant had failed to comply with "previous orders and rules". This, the Defendant says, must have been the case because that was the basis upon which Deputy District Judge Jones made the final unless order. However in my judgment, these involved no further breaches than those already alleged.

B **62** Finally, there was the failure to comply with the unless order of Deputy District Judge Jones. There was no failure to comply with paragraph 2 of that order relating to the service of a witness statement. However, District Judge Shaw concluded that there was a failure to serve particulars of claim in compliance with paragraph 1. As to this, I proceed on the basis that the document served on 4 July 2011 did not constitute "a fully C pleaded particulars of claim" in the manner required by the terms Deputy District Judge Jones's order. At the time, the Claimant himself recognised that he might not be complying with the letter of the unless order; he considered that what he had previously done was adequate and he took the view that it was "unnecessary" to repeat it. The Claimant took a conscious decision not to seek to improve upon the particulars of claim which he had already served, at least as regards the facts alleged, despite the terms of the D order. On the other hand, and despite saying this, the Claimant did seek to set out the legal basis of his claims; which, as indicated in para 11 above, was the only part of Deputy District Judge Jones's order which was "new". I accept the finding of District Judge Stuart at para 26 that the Claimant did not know how else to express his claim: see para 23 above. What is more, it appears that at the time of submitting the 4 July document he did not have E the precise terms of the order made by Deputy District judge in front of him.

63 Thus, in my judgment, there was, on the part of the Claimant, one failure to comply with part of a court order (paragraph 1 of Deputy District Judge Jones's order), one possible, highly technical, breach of the rules as to pleading particulars of claim at the outset, and possibly one, highly contestable, breach of the first unless order.

F (1) Was the Claimant's conduct in the First Action an abuse of process?

64 First, in the light of my conclusions above, there was not, in the First Action, a *wholesale* disregard of the rules. Secondly, the First Action was not struck out for inordinate and inexcusable delay. As to the third basis of abuse of process, I do not consider that the Claimant's overall conduct in the First Action was contumelious. First, up until the 4 July 2011 document, the G Claimant sought at all times to comply with rules and orders. Secondly, in that document, he set out a lengthy and detailed factual case in his witness statement. Thirdly, in fact he did make an attempt to set out the legal basis of his claims. (I note that the CPR requirement is to plead *facts* and not law.) Whilst what he submitted was not always clearly expressed or even easy to read, I consider that the Claimant was attempting to set out his case on the facts.

H **65** As regards the Claimant's position as a litigant in person, I bear well in mind the observations of Tomlinson LJ in *Elliott v Stobart Group Ltd* [2015] CP Rep 36, paras 39–40 (referring to the observations of Moore-Bick LJ in *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472, para 44) (set out in the judgment: para 23 above). However

the facts of *Elliott's* case are not comparable to those in the present case. Unlike the findings made in *Elliott's* case (at paras 25, 26 and 40), here it is not clear that the Claimant understood what the order of Deputy District Jones required him to do and the Claimant *did* take steps to seek to comply with the order. Moreover, as a litigant in person, I do consider that some allowance is to be made for the likelihood that the Claimant would not be fully conversant with the details of pleading rules in the CPR practice directions or with the distinction between pleading facts and law, and what may or may not amount to a "cause of action" or a legal basis of the claim. As to the Defendant's submission that at the critical time the Claimant was in fact legally represented, I address this in para 71 below.

66 When set against all this background, I do not consider that the Claimant's apparent irritation expressed in the 4 July document amounted to scornful and insulting behaviour on his part or was a deliberate flouting of the court's orders.

(2) Was the Claimant's conduct in the First Action otherwise "inexcusable"?

67 As I have said, it appears that the Claimant was conscious that he might not be complying with the letter or even the spirit of Deputy District Judge Jones's order. On the other hand, as District Judge Stuart found, the Claimant did not know what more he could do. The Defendant had never complained about his previous particulars of claim. That unless order was made in very unusual circumstances. The Claimant provided a detailed witness statement, in compliance with the same order and he attempted to set out the legal bases of his claim.

68 The Claimant's conduct stands in stark contrast to the conduct of the claimant in *C (A Child)* [2002] CP Rep 6 and in the *Maritime Transport* case 22 June 2017: see paras 36–37 and 48 above. Whilst the present case does not concern a failure at an early stage of an action (as in the *Cranway* case [2008] EWHC 550 (Pat) and *Aktas v Adepta* [2011] QB 894), neither is it a case of repeated and persistent disobedience to court orders.

69 In my judgment, taking account of all these circumstances, the Claimant's failure to comply with part of the unless order of Deputy District Judge Jones was understandable and not inexcusable.

(3) Relief from sanctions

70 The Claimant did not apply for relief from sanctions in relation to District Judge Shaw's order. As a matter of analysis, it is not clear whether this is a factor in considering whether the Claimant's conduct in the First Action was an abuse of process or otherwise inexcusable, or rather whether it falls for consideration at the stage of "very unusual circumstances". It seems to me that it should be the latter, since "abuse of process" or "inexcusable" concern the circumstances leading to the strike out of the First Action. In that event, in principle, such a failure would militate strongly against the court finding "very unusual circumstances". However, as I have found that in fact the conduct in the First Action (other than the failure to apply for relief) was neither an abuse of process nor inexcusable, then in this case, I do not go on to consider whether there are "very unusual circumstances". In this context, it is not clear to me that in a case where an action is struck out for, say, a single act of non-compliance with rule,

A practice direction or order, a failure to apply in that action for relief from sanctions necessarily bars the commencement of a second action: see the *Cranway* case, at para 2, where there was no appeal against the decision striking out the first action.

71 However, I go on to address the failure to apply for relief from sanctions on the assumption that it falls properly to be considered as part of the question whether conduct of the First Action was an abuse of process or
B otherwise inexcusable. In many, if not most cases, such a failure to apply for relief from the sanction of a strike out for non-compliance with an unless order would be a strong factor in concluding that the conduct in the first action was inexcusable. However in the present case, I consider that that failure would not lead to such a conclusion. True it is that as at 4 August 2011, the Claimant had legal representation who indicated that an
C application for relief from sanctions was in the offing. At the same time there was a request for disclosure, to which the Defendant did not respond. However, the Claimant's evidence, which I accept, is that at the time when he could have made such an application he had no further funds to maintain that legal representation nor the emotional fortitude to advance the fight at that stage. He remained a litigant in person. In my judgment, on the particular facts of this case the failure to apply for relief from sanctions, in
D circumstances where the Claimant's conduct was not otherwise an abuse of process or inexcusable, would not be sufficient to render that conduct an abuse or inexcusable.

(4) The Aldi case

72 Finally, I consider the position if, as a matter of principle, it is correct
E to apply the *Aldi* approach to the question whether the Second Action is an abuse of process. This was the approach applied by District Judge Stuart. (Whilst there is some ambiguity in para 34 of the Judgment, he considered both the first stage of assessing all factors and also the second stage of discretion.)

73 In the Judgment, the judge took account of a wide range of relevant
F factors in the case. He considered both the use of court resources and doing justice; the fact that the First Action had not been litigated; his view that the Claimant, understandably, considered that he had obeyed the first unless order by serving a "fully pleaded" particulars of claim and that there had been no complaint from the Defendant or the court; that the Claimant had not known what to do to comply with the second unless order; that he could take limited account of the Claimant's position as a litigant in person; that
G the Claimant had suffered the adverse consequence of having to pay the costs of the First Action; and that it was likely that Carillion would bring the Defendant into the action in any event. He took account of the more robust approach indicated by *Mitchell's* case [2014] 1 WLR 795 and *Denton's* case [2014] 1 WLR 3926. Delay was not a relevant consideration and that there was no adverse effect on the availability of witnesses. Taking account of all
H these factors he concluded that the Second Action was not an abuse. In my judgment, applying the test in *Stuart's* case [2008] 1 WLR 823, para 82, there would be no basis for this court to interfere with his balancing of the relevant considerations. I would add, specifically addressing the important concern of limited *court* resources, that in the present case the Second Action will proceed in any event, at least as regards Carillion.

Conclusions

74 I conclude as follows:

(1) Whilst District Judge Stuart erred in his approach to the question whether the Second Action is an abuse of process, nevertheless, I am satisfied that the Claimant's conduct in the First Action was neither an abuse of process nor inexcusable and thus that the Second Action should not be struck out as an abuse of process.

(2) If, contrary to the foregoing, the judge was correct in applying the principles in the *Aldi* case, he took account of all relevant factors and there is no basis for finding that his decision was wrong. It follows that the Defendant's appeal is dismissed.

Appeal dismissed.

GIOVANNI D'AVOLA, Barrister