ST. GEORGE WEST COUNTY
PORT OF SPAIN PETTY CIVIL COURT

RULING ON ABUSE OF PROCESS

CITATION: Givonne Knights v. Michelle Rampersad

TITLE OF COURT: Port of Spain Petty Civil Court

FILE NO(s): No. 464 of 2012

DELIVERED ON: 18th February 2013

CORAM: Her Worship Magistrate Nalini Singh
St. George West County
Port of Spain Petty Civil Court Judge

REPRESENTATION:

Ms. Givonne Knights appeared in person

Mr. Richard Thomas appeared for the defendant.

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1.0 THE APPLICATION

1.1 This is an application to stay these proceedings on the basis that it constitutes an abuse of the process of the Court.

2.0 CHRONOLOGY

2.1 By ordinary summons dated and filed on the 4th April 2012 (hereinafter referred to as the "previous proceedings"), the claimant Givonne Knights issued proceedings against the defendant Michelle Rampersad for the sum of $10,000.00 TT as monies owed under an incomplete contract between the parties.

2.2 On the 2nd July 2012, the defendant entered her first appearance in the matter. Liability was denied and leave was granted to defend the matter. Directions were then given that the defence in the matter was to be filed and served on the claimant on or before the 31st July 2012 failing which the matter may have proceed undefended.

2.3 The defence was accordingly filed in the Petty Civil Court Registry Port of Spain on the 26th July 2012 and served on the claimant on the 27th July 2012.

2.4 The matter came back on the Court's list on the 2nd August 2012 and was adjourned on four occasions following this date. The matter was then fixed for trial in the presence of both litigants for the 19th November 2012.

2.5 On the 19th November 2012, the matter came up for trial and the defendant and her attorney appeared. The claimant did not appear and the matter was accordingly struck off of the Court's list.

2.6 On the 21st November 2012, the claimant then re-filed an ordinary summons against the defendant (hereinafter referred to as the "present proceedings") but this time, she claimed the sum of $14,990.00 TT as monies owed under the incomplete contract between the parties. It was the same contract which formed the basis of the initial proceedings between the claimant and the defendant.

2.7 The defendant was served with the present proceedings on the 24th January 2013 and entered an appearance to these proceedings on the 28th January 2013. On this date, counsel for the defendant asked that the present proceedings between the claimant and the defendant be stayed on the basis of an abuse of the process of the Court.

3.0 THE SUBMISSIONS

3.1 Legal Arguments advanced by the Defendant

3.1.2 The trust of the defendant's submission for a stay is that these proceedings are an abusive duplication of legal process. According to counsel the claimant is seeking the relief in respect of the same cause of action against the same defendant as was already sought in the first matter which was struck off the list for non appearance of the claimant. In these circumstances it is submitted that there is a strong presumption in favour of a stay.

3.2 Legal Arguments advanced by the Claimant

3.2.1 The claimant's position on this submission is that it rests in the discretion of the judge whether the Court should grant a stay in the present proceedings. She submits further that it was through a mistake that she did not appear on the date fixed for her trial. In the circumstances she is asking that the present proceedings be allowed to remain on the Court's list and not be struck out on the grounds of abuse of process.

4.0 THE ISSUE

4.1 The issue which arises for determination is whether it is an abuse of process to seek to litigate, in subsequent proceedings, issues which have been raised (but not adjudicated upon) in earlier proceedings which have themselves been struck out.

5.0 THE LAW

5.1 Before considering these rival submissions, it is necessary to delve into the law on point.

5.2 The judgments below illustrate that once there has been contumelious conduct on behalf of a claimant, in such circumstances, the claimant may well find that if he brings fresh proceedings after the original proceedings are struck out they could be stayed because of his conduct.

5.3 Pre new rules cases

5.3.1 1. Janov v. Morris [1981] 1 W.L.R. 1389

5.3.2 In 1978 the plaintiff brought an action against the defendant for damages for breach of a contract for the sale of a yacht. There was an unexplained delay by the plaintiff in proceeding with the action and on the 21st March 1980 a master ordered that the action be dismissed for want of prosecution unless the plaintiff served a summons for directions by the 1st April 1980. The plaintiff failed to comply with this order and no explanation was given for this non-compliance. On the 2nd July 1980 the action was accordingly dismissed for want of prosecution.

5.3.3 The limitation period for the cause of action was not expected to expire until 1984 and so on the 9th September 1980 the plaintiff brought a second action against the defendant raising the same cause of action as was raised in the first action.

5.3.4 On the application of the defendant, the master struck out the second action as an abuse of the process of the court.

5.3.5 On appeal by the plaintiff, the master's order was set aside. The defendant appealed, arguing that the since the previous proceedings had been struck out it was an abuse of process to allow the claim to be prosecuted again in the second action. The plaintiff submitted that since the period of limitation for the cause of action had not expired, he was entitled to bring a second action at any time within the limitation period notwithstanding that the first action had been struck out because of his failure to comply with a peremptory order of the court.

5.3.6 It was held that where an action was dismissed on the ground of the plaintiff's disobedience of a peremptory order of the court and the plaintiff commenced a second action

within the limitation period raising the same cause of action, the court had a discretion to strike out the second action on the ground that it was an abuse of the court's process. In exercising that discretion the court had regard to the principle that court orders were made to be complied with. Further, since there was no explanation by the plaintiff for his failure to comply with the peremptory order made in the first action, the commencement of the second action was held to be an abuse of the process of the court and the court exercised its discretion to strike it out.

5.3.7 On the matter of the plaintiff's disobedience of a peremptory order of the court Lord Justice Watkins observed at page 1395F that:

> "To behave in such a way is in my judgment to treat the court with intolerable contumely. This is a matter which can properly be taken into account in the exercise of the court's discretion".

The point was also made by Lord Justice Watkins at page 1395F that:

> "A prospective litigant must be deemed to know that upon taking out a writ endorsed with a claim for monetary or other relief, his conduct of the action thereby brought into being will be governed thereafter by rules and orders of the court. A failure to conform to any one of these may cause him to be penalised even to the extent of having his action struck out".

5.3.8 I pause to note that nothing in this case suggests that it is open to a court to strike out a case from its list on the basis of abuse of process in the absence of intentional and contumelious default or inexcusable or contemptuous conduct exhibited by the claimant. That said it cannot be ignored that in *Janov v. Morris (supra)* there were instances of intentional and contumelious

default *and* inordinate, inexcusable delay on the part of the claimant so, against this backdrop it must come as little surprise that the second matter was in fact struck off of the court's list for abuse of process.

5.3.9 2. Gardner v. Southwark LBC (no. 2) [1996] 1 W.L.R 561 CA Civ

5.3.10 This case concerned three personal injury claims. Each had been struck out under Ord. 17 r. 11(9) whereby an action would be automatically struck out where there was no request for a hearing for 15 months from the close of pleadings. This rule was introduced to deal with "the scandal of delay" in the civil courts. Each of the plaintiffs then commenced new actions within the limitation period, but each of their new actions were struck out. On appeal it was held that the plaintiffs would not be precluded from bringing the new matters before the court.

5.3.11 In this case the abuse of process submission was overruled because the court took the view that a matter being automatically struck out (by operation of court rules) was distinct from the category of cases where the claimant willfully refused to comply with a peremptory order of a court.

5.3.12 This being the decision of the court, I cannot ignore the distinction which was made by Lord Justice Waite between the automatic operation of court rules and conduct which was classified as dilatory and disobedience or defiance by the claimant as evinced from the willful refusal to comply with an peremptory order of a court. This is how it was set out:

> "No contumely, no contumacious conduct (assuming that there be any difference between the two) and no contempt or defiance of the Court's orders is involved in

the process of suffering an automatic strike-out of proceedings. There may well be, of course, circumstances showing dilatoriness or absence of excuse which disqualify the plaintiff from obtaining reinstatement of his action on the principles approved in Rastin, but that is a very long way from saying that such a shortcoming amounts to disobedience or defiance of the kind that is involved when the first action has been struck out for failure to comply with an unless order. In the former case, the mere march of time past the milestones set in the automatic directions programme has deprived the plaintiff of his action. In the latter, the Court has made an order specifically addressed to the plaintiff (or other party concerned) demanding performance of a step which, if disobeyed, amounts to a contempt of court and becomes the subject of the punitive sanction of dismissal of the suit". (emphasis mine).

Sir Thomas Bingham MR made the same point when he stated that:

"The context in which the present questions arise for decision is novel. The regime introduced by Ord 17, r 11 of the County Court Rules is a newcomer to the procedural scene. It is therefore asked: is automatic striking-out under Ord 17, r 11(9), in the context of this new regime, to be treated as if it were contumacious disobedience; or should the plaintiff be treated as if, in the absence of any contumacious disobedience, an action had been dismissed for want of prosecution when the plaintiff was still in time to proceed again and had now done so? In the latter situation it is, I think, clear that the Plaintiff could proceed again. That was why the House of Lords declined to strike out the action in Birkett v James [1978] AC 297, [1977] 2 All ER 801.

> The object of the new procedural regime, as counsel for the Defendants have urged, is quite plain. It has been described in earlier cases. It is intended to encourage the expeditious conduct of litigation and strongly to discourage delay. But, as it seems to me, a plaintiff who for reasons of negligence, ignorance, dilatoriness, lethargy or mistake fails to apply for a hearing date before the guillotine date and so suffers the consequences of Ord 17, r 11(9), cannot be treated as if he were guilty of wilful or contumacious disobedience. The rules do not vary the ordinary rules which the Court has habitually observed, and nothing short of a clear provision should, in my judgment, deprive a plaintiff of what is otherwise a potentially important right". (emphasis mine).

5.3.13 In my view in light of the distinction which was made in this case, the case said nothing different from what was said in *Janov v. Morris (supra)* regarding the willful refusal to comply with peremptory orders of the court and the unwillingness of the court to sanction this conduct.

5.3.13 3. Arbuthnot Latham Bank Ltd. v. Trafalgar Holdings Ltd. [1998] 2 All E.R. 181 CA (Civ Div)

This case was decided just before the implementation of the new rules in England. It was recognised in this case as well that for an action to be struck out as an abuse, the case required either an intentional and contumelious default or some inexcusable contemptuous conduct by the claimant, albeit this was thought to be illustrated by something as extreme as a "wholesale

disregard of the rules". Lord Woolf M.R., who has been daubed the architect of the new regime, said this at pages 191 to page 192:

> "We think that the change in culture which is already taking place will enable courts to recognise for the future, more readily than heretofore, that a wholesale disregard of the rules is an abuse of process as suggested by Parker LJ in *Culbert v Stephen Westwell & Co Ltd.* While an abuse of process can be within the first category identified in *Birkett v James* it is also a separate ground for striking out or staying an action (see *Grovit v Doctor* [1997] 2 All E.R. 417 at 419, [1997] 1 WLR 640 at 642–643) which does not depend on the need to show prejudice to the defendant or that a fair trial is no longer possible. The more ready recognition that wholesale failure, as such, to comply with the rules justifies an action being struck out, as long as it is just to do so, will avoid much time and expense being incurred in investigation questions of prejudice, and allow the striking out of actions whether or not the limitation period has expired". (emphasis mine).

5.4 The impact of the new rules on abuse of process applications

5.4.1 4. Securum Finance Ltd v. Ashton (No.1) [2001] Ch. 291.

This was the first case after the implementation of the new rules in England, which considered the question of abuse of process in the context of a second matter being filed after the first was struck out. It appears that the court's position regarding disobeying peremptory orders was buttressed by the fact that a flagrant breach of the new rules of the court would be sufficient to warrant dismissal on the grounds of abuse of process.

5.4.2 The facts of this case are that in 1989, a bank commenced proceedings against two guarantors of a loan. They had granted the bank a legal charge over their property. In 1997 those proceedings were struck out for delay. In 1998 the plaintiff -as the bank's assignee, brought a second action against the defendant guarantors to enforce the bank's rights to payment under the legal charge and to enforce its security by orders for possession and sale of the mortgaged property.

5.4.3 The defendants contended that the second action involved re-litigating issues raised in the first, and applied to strike it out on, among other grounds, abuse of process. The judge declined to strike it out and the matter was appealed.

5.4.4 It was held that the claim involved re-litigating an issue already raised in the earlier proceedings and as such was an abuse of process.

5.4.5 In arriving at this decision, the principle of law regarding the impact of the new rules on abuse of process applications was set out quite succinctly by Lord Justice Chadwick:

> "For my part, I think that the time has come for this Court to hold that the "change of culture" which has taken place in the last three years – and, in particular, the advent of the Civil Procedure Rules – has led to a position in which it is no longer open to a litigant whose action has been struck out on the grounds of inordinate and inexcusable delay to rely on the principle that a second action commenced within the limitation period will not be struck out save in exceptional cases. The position, now, is that the court must address the application to strike out the

second action with the overriding objective of the CPR in mind – and must consider whether the claimant's wish to have "second bite at the cherry" outweighs the need to allot its own limited resources to other cases. The courts should now follow the guidance given by this Court in the *Arbuthnot Latham* case – in a passage at page 1436H-1437B:

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

5.4.6 Following the shift in the approach to case management following the new rules, it seems to me that the question I must ultimately decide is whether the failure to appear in court on the date upon which the trial was fixed to commence, is conduct which can really be categorized as willful or contumacious disobedience or blatant contemptuous failure to comply with the peremptory order of the court and more so conduct which deservedly calls for the claimant to be debarred or precluded from having a "second bite at the cherry" in light of the court's need to

allot its own limited resources to other cases. This was best stated by Briggs J at paragraph 22 of **Wahab v. Khan & Others [2011] EWHC 908** as this:

> "…It follows that a careful assessment of the question whether this third type of potential abuse is demonstrated in any particular case requires an analysis both of the claimant's conduct of the earlier claim, and the reasons for its being struck out, as well as an appreciation of the extent to which the combined effect of the first and second claims may place a disproportionate burden on the court's resources, as well as a balancing of those factors against the reasons why the claimant wishes to have a second bite of the cherry".

5.4.7 Indeed there is no denying that orderly case management is a very pertinent factor to consider under abuse of process applications against the backdrop of the new rules. This is emphasized in the case of **Clark v. University of Lincolnshire and Humberside [2000] 1 W.L.R. 1988** where Lord Woolf MR made the point at paragraphs 35 to 35 that:

> "34. The courts' approach to what is an abuse of process has to be considered today in the light of the changes brought about by the CPR. Those changes include a requirement that a party to proceedings should behave reasonably both before and after they have commenced proceedings. Parties are now under an obligation to help the court further the overriding objectives which include ensuring that cases are dealt with expeditiously and fairly. (CPR 1.1(2)(d) and 1.3.) They should not allow the choice of procedure to achieve procedural advantages. The CPR are, as Pt 1.1(1) states, a new procedural code. Parliament recognised that the CPR would fundamentally change the approach to the manner

in which litigation would be required to be conducted. That is why the Civil Procedure Act 1997 (s 4(1) and (2)) gives the Lord Chancellor a very wide power to amend, repeal or revoke any enactment to the extent he considers necessary or desirable in consequence of the CPR.

35. Whilst in the past, it would not have been appropriate to look at delay of a party commencing proceedings other than by judicial review within the limitation period in deciding whether the proceedings are abusive, this is no longer the position. Whilst to commence proceedings within a limitation period is not in itself an abuse, delay in commencing proceedings is a factor which can be taken into account in deciding whether the proceedings are abusive. If proceedings of a type which would normally be brought by judicial review are instead brought by means of an ordinary claim, the court in deciding whether the commencement of the proceedings is an abuse of process, can take into account whether there has been unjustified delay in initiating the proceedings".

5.5 The decision in an abuse of process application is one involving the application of the court's discretion

5.5.1 That said the ultimate decision of the court in applications such as this is really one involving the court's discretion. This much was made clear in the case of **Stuart v. Goldberg Linde [2008] EWCA Civ 2** where it was said by Lord Justice Lloyd at paragraph 24 that:

"The court's power to strike a claim out is discretionary, but it does not seem to me that on an application to strike out a claim based on the proposition that the

proceedings are an abuse of the process of the court, on the principle of *Johnson v Gore Wood,* the case is likely to turn on the exercise of a discretion, at any rate if the court decides in favour of the application. Either the proceedings are an abuse of the process, or they are not. It could not be right to strike the case out (on this ground) unless the court is satisfied that the claim is an abuse of the process, and if the court were so satisfied, it would be only in very unusual circumstances that it would not strike the claim out. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536, [1981] 3 All ER 727, [1981] 3 WLR 906 Lord Diplock spoke of the court's inherent power to prevent misuse of its procedure and of the court's "duty (I disavow the word discretion) to exercise this salutary power". I note that Longmore LJ has expressed the same view, agreeing with Thomas LJ, in *Aldi Stores Ltd v WSP Group plc and others* [2007] EWCA Civ 1260 at para 38. Judgment in this case was delivered after we had heard argument, but at our invitation the parties provided additional written submissions about it".

5.5.2 Against this backdrop, all that remains now is to apply my discretion to the facts that confront me in this application.

5.6 Re-filing has been held to be an abuse of the process of the court

5.6.1 I start from the position that there is no doubt that if the original matter is struck off a court's list, the re-filing of second proceedings may very well give rise to an abuse of the process of the court notwithstanding there wasn't even a trial on the merits of the case in the original

matter. This point has been clearly stated in the case of **Wahab v. Khan & Others [2011] EWHC 908** where at paragraph 16 Briggs J said that:

> "The bringing of a second claim where an earlier claim based upon the same facts or seeking the same relief has failed may give rise to a number of different types of what may loosely be called an abuse of process".

5.6.2 Indeed the case of **Buckland v. Palmer [1984] 1 WLR 1109** is an example of where the court struck out the second matter on the basis that the re-filing was considered to be an abuse of process. This was a case where the entire original claim was settled and then a second claim was made against the defendant in the name of the plaintiff for a larger sum based on the same facts which founded the original claim. It was held that the second claim was an obvious abuse of process and was struck out since the original proceedings existed but was stayed. It was further held that since the original claim was not adjudicated upon, that claim could be revived and proceeded with.

5.6.3 The facts of the case are that the plaintiff and the defendant were involved in a road traffic accident. The plaintiff's car was damaged as a result of the collision. The defendant accepted liability for the accident and furnished the plaintiff with his insurance particulars. The plaintiff passed on the information to her insurers who informed her that they had a "knock for knock" agreement with the defendant's insurance company and would therefore reimburse her for the cost of repairs less £50 which was the excess that she was expected to payout of her own pocket.

5.6.4 The cost of repairing the plaintiff's car was estimated at £1142. On the 28th April 1982, the plaintiff commenced proceedings against the defendant for £50 as the "uninsured excess on car insurance" and £5 in court fees. On the 6th May 1982, the defendant paid the £50 and £5 costs into court indicating that he disputed the plaintiff's claim and wished to make a counterclaim. The plaintiff accepted the £55 and her action was stayed by operation of the County Court Rules.

5.6.5 The plaintiff's insurers then realised that the defendant was not insured and on the 17th September 1982, the plaintiff's insurers, using the plaintiff's name by subrogation, commenced a second action against the defendant in respect of the collision claiming the sum of £1,142 as the cost of repairs to the plaintiff's car less the £50 which was already paid by the defendant. The county court registrar dismissed the defendant's application to strike out the second action as an abuse of the process of the court.

5.6.6 On appeal it was held that where proceedings were in existence based upon a particular cause of action, it was in principle an abuse of the process of the court to bring a second action based upon the same cause and the second matter was struck out.

5.6.7 In arriving at this decision Sir John Donaldson M.R. made the point at page 1114H that:

> "Whilst I dislike procedural technicality and, on the facts of the instant appeal, the defendant's argument [viz that the second proceedings were an abuse of process] might be thought to have no other justification, in reality there are wider issues

involved. The public interest in avoiding any possibility of two courts reaching inconsistent decisions on the same issue is undoubted and this alone would suggest that two actions based upon the same cause of action should never be allowed. Equally clear is the public interest in there being finality in litigation and in protecting citizens from being 'vexed' more than once by what is really the same claim. Against this must be set the public interest in seeing that justice is done. It will not be done if, for example, a plaintiff accepts payment of a small sum which is only part of his claim in the belief that the remainder is not in issue and will be paid in due course. These competing public interests will be differently reconciled on the differing facts of particular cases and this is best achieved if we hold, on principle and on the authorities to which I have referred, that (1) it is an abuse of the process of the court to bring two actions in respect of the same cause of action but (2) where there has been no judgment in the first action, that action can, in appropriate circumstances, be revived and amended so as to enable there to be an adjudication upon the whole of the plaintiff's claim. Should the original claim be brought in the county court and the enlarged claim be outside its jurisdiction, that court has power to transfer the whole matter to the High Court". (emphasis mine).

Griffiths L.J. agreed saying at page 1116G:

"… the rule against multiplicity of proceedings in respect of a single cause of action is soundly based on considerations of public policy designed to prevent the harassment of litigants by exposing them to the anxiety and expense of unnecessary legal proceedings; often in the past expressed in the legal maxims

nemo debet bis vexari and interest republicae ut sit finis litium. I would not therefore think it right to make this case an exception to that general rule, particularly where there exists a procedure, namely the application for the removal of the stay, which will prevent any injustice resulting to the insurance company. If an exception was to be created in this class of action, it might lead to the very undesirable result of two actions proceedings in respect of the same accident in different courts, e.g., uninsured loss claimed in the local county court, and insured loss claimed by insurers in the High Court, with the possibility of different judges taking different views on liability. Therefore, unless bound by authority to hold otherwise, I have reached the conclusion that the insurers should not have been permitted to commence a fresh action to claim the insured loss". (emphasis mine).

6.0 DISCUSSION

6.1 With this necessary quite lengthy preamble, I direct my mind to answering two questions:

1. *Can the claimant's conduct in this case really be categorized as willful or contumacious disobedience or contemptuous behavior?*

6.1.1 I am of the view that it does not. From the explanation advanced to the Court by the claimant, her absence was as a result of a genuine mix up as to the date which was set for the trial of the previous proceedings. This is not a case where the peremptory order of the court was blatantly and deliberately flouted by the claimant.

6.1.2 I hold the view that a mere mistake as to the date on which a matter is fixed to go on is not an abuse of process. Mere mistakes have not been held in any of the cases I have come across to amount to abuse of process and in my view this conduct ought not to be categorized as such. Indeed it has been my observation that this case is in diametric opposition to the types of cases I have come across where there was a very blatant and serious disregard for the rules and orders of the court. This in no way diminishes or minimizes the proper and in my view necessary strictness which must be applied to the administration of local civil courts through the application of the new rules and in the case of this claimant, her failure to observe the peremptory direction of the court was indeed met with the ultimate sanction of the court in the form of an outright dismissal of her initial claim. At the same time however, I cannot help but observe that the infraction in this case is in no way on par with the failures which have been exhibited by claimants in many of the other cases in this jurisdiction.

6.1.3 Indeed the conduct of the claimant is in no way on par with the four times the claimant's matter was before the court in the matter of **Krasnov & Ors. v. The Owners and/or Parties interested in the MV 'Diane Green' HCA No. A-04 of 2004** where the first proceedings were withdrawn without explanation, the second proceedings were withdrawn on the basis of a mistake made by the claimant in joinder of parties to the claim, the third set of proceedings were abated and ultimately struck out by the operation of the Rules of the Supreme Court of Trinidad and Tobago and the fourth and final set of proceedings were commenced after the six year limitation period had elapsed and finally struck off the court's list by Mr. Justice Myers on the grounds on abuse of process.

6.1.4 It is also in no way in the same category of conduct which confronted Mr. Justice Mon Desir in the case of **Keith Dhnoolal, Collin Dhnoolal, Oswald Dhnoolal and Stephen Dhnoolal v. F.V. Nelson, Agricultural Bank, Val Urban Development and Nina Alexander Solomon HCA No. 1753 of 1978** which was a matter which was struck out on the basis of abuse because of the inordinate delay in prosecuting the matter. Indeed the originating document in the matter was issued over 30 years before the matter was eventually disposed of on the abuse of process submission.

6.1.5 It is also in my view, not the same level of non compliance as was faced by Mr. Justice Rampersad in the case of **Wendell Steel v. Lennox Petroleum Services Limited CV 2009-04689** where the second set of (almost identical) proceedings were issued and struck out as an abuse of the court's process on the basis that the previous proceedings were far advanced when it was withdrawn to get around the consequences which would undoubtedly flow from non compliance with the court's directions to file witness statements by a certain date in that matter.

6.1.6 I note further that this is not the sort of case where the claimant delayed in instituting the second set of proceedings after the original matter was struck off the court's list. The second matter was not only filed within the limitation period for so doing but, it was instituted just over a month after the first one was struck off the court's list. Against this backdrop it can hardly be said that there was an excessive and inordinate delay involved in instituting the present proceedings.

6.1.7 Indeed I find the failure in this case to be as *de minimis* and on par with the transgressions exhibited by the claimant in the matter of **Suresh Persad v. Diana Wharwood and Bankers Insurance Co. CV 2011-03517** where it was held by Mr. Justice Boodoosingh that the claimant's failures in the previous action were not so grave or inexcusable as to warrant striking out the second claim on the grounds of abuse of process.

6.1.8 Following from this I am of the view that the conduct exhibited by the claimant in this matter is not the sort which deservedly calls for her being debarred or precluded from having a "second bite at the cherry" in light of the Court's need to allocate its limited resources to the resolution of other disputes between other litigants.

2. Does this present matter place a disproportionate burden on the court's resources?

6.2.1 I am of the view that it does not. There is of course no denying that the previous proceedings did get to the doorstep of the trial before it was struck off of the Court's list and no doubt the entire pre trial management process would have to begin anew in light of the present proceedings in which no directions have as yet been given regarding the filing of a defence and a reply. I am also mindful that this is precious judicial time which can be allocated to resolving other disputes involving other litigants. And this is made all the more critical in the context of a local perspective where resources are more likely to be limited as compared to other jurisdictions such as England –a point which was made by His Lordship Mr. Justice Rampersad in *Wendell Steel v. Lennox Petroleum Services Limited (supra) at paragraph 14 of page 6.* At the same time I find that these concerns do not override the more pertinent principle that litigants deserve to have their disputes ventilated in a court of law. Indeed citizens of this country have a

constitutional right of access to the courts (section 4(a) and (b) of the Constitution) -a point which was raised by Mr. Justice Seepersad in the matter of **Steve Chairman v. Samuel Saunders CV 2012-01670 at paragraphs 24 to 25 of page 10** and in turn cited with approval by Her Ladyship Madam Justice Gobin in the matter of **Adana Paul v. Well Services Petroleum Company Limited CV 2011-03806 at paragraph 37 of page 16.**

6.2.2 In **R v. Horseferry Road Magistrates' Court, ex p. Bennett [1994] 1 AC 42, HL** Lord Lowery described the court's power to stay proceedings on the basis of an abuse of process as arising in one of two general situations:

> "…I consider that a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused…".

Admittedly this case is applicable to criminal proceedings, but I find it to be equally instructive in a civil context. (In my view it also accords with the frequently cited definition of Lord Bingham in **Attorney General v. Barker [2000] 1 FLR 759** of abuse of process as "using that process or in a way significantly different from its ordinary and proper use")

6.2.3 Applying this understanding to the matter at hand, in my judgment, where, as here, the claim raises live issues for determination and where those issues remain capable of fair determination, it is unsatisfactory and contrary to the good administration of justice and propriety for the court to be precluded from determining the substantive matter between the litigants on the

basis of what I conclude is a mere infraction and not conduct which can in any way be categorized as willful or contumacious disobedience to the peremptory order of the Court.

7.0 RESULT

7.1 It seems to me, therefore, that the good administration of justice and propriety in this case undoubtedly favours the overruling of the submissions made by counsel for the defendant.

8.0 ORDER OF THE COURT

1. I find that there is no error in legal principle in allowing the claimant to proceed with this matter and the defendant's submission is accordingly overruled.
2. The defendant is given leave to defend this matter.
3. The Court directs that the defence in this matter is to be filed and served on the claimant on or before the 19th March 2013. If this is not done leave may not be granted to file the defence out of time and the matter may proceed undefended.
4. The Court further directs that a reply, if one is necessary, is to be filed and served on the defendant on or before the 25th March 2013.
5. This case is case is now adjourned to the 26th March 2013 when it is fixed for trial.
6. The cost of this application will be costs in the cause.

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Her Worship Magistrate Nalini Singh

Petty Civil Court Judge