Case No: D0QZ6M06

IN THE COUNTY COURT AT CENTRAL LONDON

Royal Courts of Justice
Thomas More Building
Strand
London
WC2A 2LL

Date: 30/07/2018

Before :

HHJ RICHARD ROBERTS

- -

Between :

MR MOHAMMED SAJID	**Respondent/ Claimant**
- and -	
MS DEEKA NUUR	**Appellant/ Defendant**

- -
- -

Ms Rosamund Baker (instructed by **Glen Solicitors**) for the **Respondent/Claimant**
Mr Charles Bagot QC (instructed by **Duncan Lewis Solicitors**) for the **Appellant/Defendant**

Hearing dates: 20 April 2018 and 7 June 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HHJ ROBERTS

HHJ ROBERTS :

Introduction:

1. This is the Appellant's appeal against the decision of DDJ Hay (the DDJ) on 24 October 2017, in which he refused the Appellant's application to set aside judgment. In addition, the Appellant issued an application dated 6 April 2018 seeking an order striking out the Respondent's claim, pursuant to CPR 3.4, alternatively seeking summary judgment for the Appellant pursuant to CPR 24.2 and in any event, permission to rely upon a replacement skeleton argument.

2. There are before me an appeal hearing bundle and a composite bundle of authorities for appeal. References to page numbers in the footnotes are to the appeal hearing bundle. The appeal hearing bundle includes:

   i) Skeleton argument on behalf of the Respondent, dated 15 March 2018[1];

   ii) Skeleton argument on behalf of the Respondent, dated 17 April 2018[2];

   iii) Appellant/Defendant's replacement skeleton argument on appeal, dated 17 April 2018[3].

   In addition, Ms Baker seeks permission to rely upon a supplemental skeleton argument on behalf of the Respondent, dated 19 April 2018 (which is not in the court bundle).

3. I grant Mr Bagot permission to rely upon his replacement skeleton argument, dated 17 April 2018 and Ms Baker permission to rely upon her supplemental skeleton argument, dated 19 April 2018. I am grateful to both Counsel for their skeleton arguments and oral submissions.

Background

4. The Respondent is the registered freehold proprietor of a residential property situated at and known as 10, Collins Avenue, Stanmore, Middlesex HA7 1DL (the Property). The Appellant entered into occupation of the Property pursuant to an assured shorthold tenancy agreement dated 8 February 2010, with a term of 12 months commencing on 8 February 2010, at a rent of £346.15 every four weeks.

5. On 12 May 2014 the ceiling in the ground floor bedroom collapsed. The Appellant issued proceedings against the Respondent (Claim No. A01UB218) for breach of section 11 of the Landlord and Tenant Act 1985[4]. The Respondent filed and served a Defence and Counterclaim, dated 14 November 2014[5]. In the counterclaim, the Respondent alleged the Appellant was in breach of tenancy by not paying the rent at all and by damaging the property.

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[1] Pages B1-12
[2] Pages B13-25
[3] Pages B26-42
[4] See Particulars of Claim, dated 30 September 2014, pages E3 – E7.
[5] Pages E8-E12

6. The Appellant filed and served a Defence to Counterclaim[6], in which she stated at paragraph 4[7],

> "The Claimant admits rent arrears but the Defendant is required to prove the extent of any such claimed. For the avoidance of doubt the Claimant will seek to set off against any arrears of rent, sums due by way of damages in respect of her claim for disrepair. The allegation that the Claimant caused damage to the Property is denied and the Claimant will respond upon service of a fully particularised statement of case."

7. The Respondent did not pay the correct court fee for the counterclaim. The court sent two letters to the Respondent's solicitors seeking payment of the correct court fee:

   i) By a letter dated 21 November 2014[8], from the court to the Respondent's solicitors it was said,

   > "In order for the counterclaim to be considered this carries a fee based on the amount of counterclaim you are requesting. The counterclaim will not be considered without this fee."

   ii) By a letter dated 9 March 2015 from HM Courts and Tribunal Service, Mr Vaccheta, Civil Enforcement Section, said[9],

   > "Your papers (and fee £610) are returned for the reason(s) indicated below:-
   > The correct fee is £2,500.
   > Please NOTE that as of 09 March 2015 certain county court fees have changed."

8. In his witness statement, dated 20 October 2017, the Respondent says at paragraph 4[10],

> "I was already struggling with a bankruptcy claim for not paying my debts hence could not pay for increased court fee of £2,500 and my counterclaim could not proceed. I was also struggling to pay my solicitors hence they also could not continue with the defence of the matter."

9. On 20 February 2015 the Respondent issued proceedings (claim number B00UB244) under Section 21 of the Housing Act 1988 seeking possession of the Property.

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[6] Pages E13-E14
[7] Page E13
[8] Page E61
[9] Page E63
[10] Page E44

10. On 27 April 2015 Deputy District Judge Gilford ordered[11],

> "1. The Defendant give the claimant possession of 10 Collins Avenue, Stanmore, Middlesex, HA7 1DL on or before 11 May 2015.
>
> 2. The Defendant's request to postpone possession before expiry of 14 day period giving at least 3 clear days' notice, time estimate 15 minutes, on a date to be notified."

11. With reference to the Appellant's claim for breach of covenant to repair, on 26 May 2015, District Judge Banks ordered on the papers[12],

> "1. The counterclaim be struck out on the grounds that the Defendant has not paid the prescribed fee nor established entitlement to exemption.
>
> 2. Each party within 14 days of service of this order file and serve a directions questionnaire.
>
> 3. Any party affected by this order may apply within 7 days after service for it to be varied or set aside."

12. The Respondent did not file and serve a directions questionnaire by 9 June 2015, as ordered by District Judge Banks.

13. On 8 July 2015 the Appellant moved out of the Property.

14. On 4th March 2016 District Judge Banks ordered[13],

> "1. The Defendant having failed to file a Directions Questionnaire pursuant to the order dated 26 May 2016, the defence be struck out.
>
> 2. The Defendant be debarred from defending the claim whether as to liability or as quantum.
>
> 3. Judgment be entered for the Claimant for damages of an amount to be decided by the Court.
>
> ...
>
> 8. Any party affected by this order may within 7 days after the order has been served apply for it to be varied, stayed or set aside."

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[11] Page E67
[12] Page E64
[13] Page D2

15. On 15 July 2016 District Judge Banks ordered[14],

> "1) Judgment be entered for the Claimant for damages of £8,000.
>
> 2) The Defendant pay the Claimant's costs of the claim.
>
> 3) ...
>
> c) the Defendant's application for permission to appeal is refused on the ground that an appeal has no real prospect of success."

16. On 1 August 2016 the Respondent's solicitors wrote an email to the Appellant's solicitors saying[15],

> "Our client wish to initiate money claim against your client Ms Nuur.
>
> Could you please confirm you can accept service of fresh claim. In alternative, please provide us the service address."

The Respondent's solicitors sent a chasing email on 2 August 2016[16].

17. The Appellant's solicitor replied on 2 August 2016[17], saying,

> "We acknowledge receipt of your emails.
>
> We confirm that we are not instructed by our client in relation to the Money Claim.
>
> Please forward all correspondence directly to Ms Nuur."

18. The Respondent's solicitors replied to this email the same day, requesting[18], "Service address of your client." On 4 August 2016 the Respondent's solicitors sent a further email, saying[19], "Further to my below email, could you please provide address for your client."

19. By an email on 4 August 2016 the Appellant's solicitors replied to the Respondent's solicitors, saying[20],

> "As we have already clarified, we are not instructed in relation to your client's money claim against Ms Nuur and we do not accept service of the money claim proceedings.

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[14] Page D3
[15] Pages E75-76
[16] Page E75
[17] Page E74
[18] Page E74
[19] Pages E73-74
[20] Page E73

> Unfortunately, we do not have the new correspondence address for the client."

20. The Appellant applied for her costs and by a default costs certificate dated 5 May 2017, it was ordered[21],

> "As you have not raised any points of dispute on the claimant's bill of costs, the costs of the claim have been allowed and the total sum of £23,707.73 is now payable."

21. In May 2017 the Appellant instructed Messrs Duncan Lewis to commence enforcement proceedings by way of statutory demand in respect of her judgment for £8,000 for claim number A01UB218, plus costs of £23,000.

22. The Respondent issued a claim form, dated 26 May 2017, seeking rent arrears of £37,000 and interest of £3,316.84[22]. The claim form was served on the Appellant at the Property. The Appellant had, as the Respondent knew, left the Property on 8 July 2015.

23. By an email to the Appellant's solicitors on 27 June 2017 at 10:33 am.[23], the Respondent's solicitors say,

> "I have spoken to my client and he is away at the moment. He will be available to receive service of notice from this Monday (03rd July)."

24. The Appellant's solicitors replied at 12:59 the same day[24], saying,

> "Your client is not truthful as he was at his work place today and was served with the statutory demand. If the sum set out in the statutory demand is not discharged with (sic) the time to do so, we will issue a petition without any further notice.
>
> Please confirm that you are instructed to accept service of the petition."

25. On 27 June 2017 the Respondent applied for judgment in default[25].

26. On 28 June 2017 judgment was entered against the Appellant[26].

27. By an email to the Respondent's solicitors, dated 18 July 2017[27], the Appellant's solicitors say,

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[21] Page D4
[22] Pages E1-2
[23] Pages E39-40
[24] Pages E39
[25] Page G1
[26] Page D5
[27] Page E36

> "We are yet to receive the copy of the claim form with particulars and fail to see why you are not willing to provide us with a copy.
>
> It is bizarre that despite being aware that we were on the court record for our client, you issued, on your client's behalf, a money claim without asking us if we are instructed to accept service or indeed providing a copy or notifying us when we first corresponded with you. Furthermore, having requested for a copy of the claim form, you have deliberately refused to provide us with copies of the claim form with particulars."

28. On 20 July 2017 the Appellant applied to set aside and/or strike out the default judgment[28]. She filed a witness statement, dated 20 July 2017, by Simran Kaur, trainee solicitor, in support of the application[29]. Ms Kaur says at paragraph 12,

> "In respect of Mr Uppal of Glen Solicitors conduct, it is believed that his conduct in this matter was improper as he had a number of opportunities to inform us that he had issued a claim at Court on the 26 May 2017. Moreover, knowing full well that we are the instructed solicitors for the Defendant in her previous matters, Mr Uppal had deliberately failed to question whether we would accept service of the notice on the Defendant's behalf and in any event decided to serve the application on the Defendant's previous address."

29. The Respondent filed a witness statement in response, dated 20 October 2017[30]. The Appellant and Respondent both filed skeleton arguments, dated 19 October 2017[31] and 23 October 2017[32] respectively.

30. On 31 October 2017, the DDJ gave judgment[33] and ordered that[34],

> "1. The Defendant's application to set aside judgment is dismissed.
>
> 2. The Defendant shall pay the Claimant's costs summarily assessed at £2,500."

Appeal

31. The Appellant appealed the DDJ's decision by a notice of appeal, dated 10 November 2017[35]. On 17 November 2017 His Honour Judge Luba QC granted permission to appeal[36].

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[28] Pages E17-18
[29] Pages E19-22
[30] Pages E43-46
[31] Pages H9-11
[32] Pages H1-8
[33] Pages F1-12
[34] Page D6
[35] Pages A1-12

Ground One

32. The Appellant submits that the DDJ erred in law in finding that the claim form was properly served. Mr Bagot submitted that the Respondent could and should have applied for alternative service on the Appellant's solicitors and/or daughter, pursuant to CPR 6.15.

33. CPR 6.9(2) provides that an individual must be served at their usual or last known residence. CPR 6.9 provides,

> (3) Where a claimant has reason to believe that the address of the defendant referred to in entries 1, 2 or 3 in the table in paragraph (2) is an address at which the defendant no longer resides or carries on business, the claimant must take reasonable steps to ascertain the address of the defendant's current residence or place of business ('current address').
>
> (4) Where, having taken the reasonable steps required by paragraph (3), the claimant –
>
> ...
>
> (b) is unable to ascertain the defendant's current address, the claimant must consider whether there is –
>
> (i) an alternative place where; or
>
> (ii) an alternative method by which,
>
> service may be effected.
>
> (5) If, under paragraph (4)(b), there is such a place where or a method by which service may be effected, the claimant must make an application under rule 6.15.

34. CPR 6.15 deals with service of the claim form by an alternative method or at an alternative place and provides,

> 6.15
>
> (1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.
>
> (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service.

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[36] Pages D7-8

(3) An application for an order under this rule –

(a) must be supported by evidence; and

(b) may be made without notice.

(4) An order under this rule must specify –

(a) the method or place of service;

(b) the date on which the claim form is deemed served; and

(c) the period for –

(i) filing an acknowledgment of service;

(ii) filing an admission; or

(iii) filing a defence.

35. In his witness statement, dated 20 October 2017[37], the Respondent said:

i) The Appellant's solicitors said in an email dated 4 August 2016 that they had no instructions to accept service and did not have the new correspondence address for the Appellant;

ii) He tried the Appellant's mobile number but could not reach her.

iii) He called the Appellant's daughter's, Ms Verba's, mobile. She was rude on the telephone and warned him not to call again. She did not give him any address for the Appellant.

iv) He contacted a Mr Ian Clay, Housing Officer of Harrow Council, requesting the address of the Appellant but Mr Clay refused to disclose any information to him.

v) He contacted the Appellant's neighbour, Ms Hafsa, who said she had not heard anything since the Appellant moved out of the property.

vi) He asked his son to search for the Appellant's Facebook profile or other social media sites for any clue as to her address but he could not find anything on social media.

Judgment of DDJ

36. The DDJ addressed the question whether the Respondent should have applied to the Court for permission to serve the claim form at the address of the Appellant's former solicitors. He acknowledged that the word, "must" in CPR 6.9(5) is mandatory, and said[38],

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[37] Pages E43-46
[38] Pages F5-F7

"17 The word 'must' is mandatory and one goes back to the first part of that sub-rule 'if ... there is such a place'. In my view, one has to take a realistic and practical approach to such situations and when the words are 'if ... there is such a place', it is not realistic or practical to read them as saying if there 'may' be such a place. Where solicitors have said the previous year that they are not instructed and they do not know where their, by then, previous client is, that does not amount to a situation which there 'is' a place where or a method by which service may be effected.

18 I do not find that there was an obligation upon this claimant to make an application under Rule 6.15 when it was entirely speculative whether, by 2017, those solicitors may have come by another address for their previous client. I do not find that a duty lay upon him to ask them a second time to see whether a change had come about. ...

19 Before I turn to apply Rule 13.3 I must deal with the fact that in the middle part of 2017 the defendant's solicitors re-opened contact with the claimant's solicitors to enforce the judgment for disrepair, and this led to correspondence between the two firms. The date on which they re-opened contact was 26th June. That was 12 days after the expiry of the time for filing a defence. The defendant argues that the re-opening of contact placed on the claimant's solicitors an obligation to notify the defendant's solicitors of the existence of the rent arrears claim. In my view, the time for filing a defence having expired, the claimant's solicitors were under no such obligation. Had contact been initiated within the 14 day period, I might have hesitated to reach that conclusion. However, I am satisfied on the strength of first instance decisions in the High Court that after the 14 days have expired it is not possible for a defendant to lodge a defence without obtaining relief from sanction. Alternatively, if I were wrong about that, I would say that it is not incumbent on a claimant's solicitors to the existence of the claim so that, adversely to their own client's interests, steps would probably be taken to thwart his request for a default judgment.

...

21 Importantly, in the context of Rule 13.3, when I asked Ms Kaur what defence her client would be able to advance on the merits, she was not able to say. I did also enquire if either side knows the way in which the figure for which judgment was entered for disrepair, namely the £8,000, was arrived at, and neither party is able to throw any light on that. There is no reason therefore for me to suppose that the tenant's liability for the outstanding rent was brought into the calculations as a reducing factor upon the damages that she would otherwise

> have received for the disrepair. The size of the outstanding rent at £40,000 and roundness of the figure of £8,000 are separate confirmation of that. That figure seems to me to be one at which the court simply assessed the loss of the use of the premises or part of the premises to the tenant. Therefore, not only does the defendant not advance a defence, but there does not on any approach appear to be a defence. On any view, the claim for the rent arrears is one which the tenant is not able to oppose on the merits, and so cannot be said to have a real prospect of successfully defending the claim."

Respondent's submissions

37. Ms Baker submits in her skeleton argument, dated 15 March 2018[39],

> "13. The Judge was entitled to reject the argument that service on Ms Nuur's daughter's telephone number could have been alternative service ('the Argument') when concluding that there was no alternative place at or method by which service may be effected.
>
> (a) The suggestion of service via Ms Nuur's daughter's telephone number would not have satisfied the most important factor under CPR 6.15 (that the method ensures that the contents of the claim form are communicated to Ms Nuur: *Abela v Baadarani* [2013] UKSC 44) in that:
>
> (i) there was no evidence before the Judge that the contents of a claim form could be communicated via Ms Nuur's daughter's mobile number;
>
> (ii) there was no evidence before the Judge that communication to Ms Nuur's daughter would mean communication to Ms Nuur;
>
> (iii) in fact, the Judge found that Ms Nuur's daughter had showed herself to be 'unwilling to pass on information or to be a conduit or else ... unaware of where [Ms Nuur] was'. Ms Nuur has not challenged this finding of fact.
>
> (b) The Judge found that there was no obligation upon Mr Sajid to make an application under CPR 6.15 when the method of service was 'entirely speculative' and that reasoning applies equally to service via Ms Nuur's daughter's mobile number.
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> [...]

[39] Pages B4-5

> 14. [...] (d) Ms Nuur's main argument in respect of CPR 6.9(4)(b) and (5) was that Mr Sajid could have made alternative service on Ms Nuur's solicitors. This argument was expressly dealt with at length and rejected by the Judge. Ms Nuur has not sought to appeal against that rejection."

Appellant's submissions

38. The Appellant submits that:

    i) There was no real evidence that the Respondent had taken serious steps to locate the Appellant by, for example, making searches of the electoral roll or engaging enquiry agents to do so;

    ii) The Respondent should have made an application for alternative service upon the Appellant's daughter and/or the Appellant's solicitors.

39. Mr Bagot argues that the DDJ was wrong in finding at paragraph 21 of his judgment, "Not only does the defendant not advance a defence ..." and at paragraph 31 that the Respondent had "a meritorious claim for the full amount of the rent arrears", given that the Appellant had said in her Defence to the counterclaim at paragraph 4,

> "The Defendant is required to prove the extent of any such claimed. For the avoidance of doubt the Claimant will seek to set off against any arrears of rent, sums due by way of damages in respect of her claim for disrepair[40]."

Finding on Service and CPR 6.15

40. I find that the DDJ erred in law in finding that the claim form was properly served. Having found that:

    i) The Respondent had reason to believe that the Appellant no longer resided at her last-known address;

    ii) The Respondent, having taken reasonable steps, was unable to ascertain the address of the Appellant's current residence;

    it was mandatory, as the DDJ acknowledged, that the Respondent consider whether there was an alternative place or alternative method by which service may be effected. Whilst it is true that the Appellant's solicitors had said to the Respondent's solicitors on 2 August 2016 that they were not instructed in relation to the Respondent's money claim and on 4 August 2016 said that they did not have an address for the Appellant, no further attempt was made to contact the Appellant's solicitors before serving the claim form on 26 May 2017. In my judgment, there is a difference between threatening proceedings in August 2016 and actually issuing proceedings in May 2017. Furthermore, the Appellant's solicitors remained on the court file as acting for the Appellant. For these reasons, and bearing in mind that it is mandatory to consider alternative service, such an application for alternative service upon the Appellant's solicitors should have been made.

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[40] Page E13, paragraph 4

41. Furthermore, the application should have sought in addition alternative service on the Appellant's daughter by way of notification that proceedings were to be issued. The notification could have stated that the proceedings would be left in a sealed envelope at the offices of the Appellant's solicitors, Messrs Duncan Lewis.

Finding on setting aside judgment under CPR 13.3 (1)

42. Further, even if there had been valid service upon the Appellant, the DDJ erred in not setting aside judgment under CPR 13.3(1)[41] on the grounds that the Appellant had a real prospect of successfully defending the claim and the application was made within approximately three weeks, which I would judge on the facts of the present case to be promptly. The grounds for defending the claim were:

    i) The Appellant had stated by way of Defence to the counterclaim in Claim No. A01UB218 that although she admitted rent arrears, she put the Defendant to proof as to the extent of the arrears. The DDJ was wrong to approach the application on the basis that there was "a meritorious claim for the full amount of the rent arrears"[42].

    ii) The Appellant had a judgment for £8,000 damages and £23,707.73 costs, which she was entitled to have set off against any judgment against her.

43. Furthermore, in exercising his discretion, the DDJ should have taken into account the fact that earlier on the same day that the Respondent applied for judgment in default, namely 27 June 2017, the Appellant's solicitors had contacted the Respondent (at 10:33 a.m.) and the Respondent's solicitors never informed the Appellant's solicitors that proceedings had been issued against the Appellant and served on the Property and furthermore that they were applying for judgment in default that very day. Furthermore, the Respondent's solicitors had told the Appellant's solicitors that the Respondent was away, which was untrue as he was at his place of work that very day.

44. In summary, in my judgment, the DDJ erred in not setting aside judgment. I order that the appeal be allowed and the default judgment be set aside.

Abuse of the process

45. In his judgment the DDJ said[43],

> "26. ... the court has a discretion to exercise when considering any application to strike out an action and considering any excuse that there may be for the misconduct of the previous action. In exercising that discretion, the court should start with

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[41] 13.3 (1) In any other case, the court may set aside or vary a judgment entered under Part 12 if
(a) the defendant has a real prospect of successfully defending the claim; or
(b) it appears to the court that there is some other good reason why-
    (i) the judgment should be set aside or varied; or
    (ii) the defendant should be allowed to defend the claim.
(2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.

[42] Page F10, paragraph 31

[43] Pages F10-11

> 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.
>
> 30 The conclusion that I have come to having regard to the overriding objective is that the court's resources have not, thus far, been unduly employed in dealing with this claim, it having been served at the last known address and default judgment having been obtained. There has been nothing more than a set of administrative steps which have resulted in judgment. In the previous proceedings, due to the non-payment of the issuing fee, the counterclaim occupied no part whatever of the court's resources. Its non-payment was due, first of all, to the failure to provide the full amount in time and then to the claimant's inability to provide the amount to which the fee had increased.
> ...
>
> 31 It seems to me it would be unbalanced to allow a procedural misstep which is said to have been caused by financial difficulty to disentitle the landlord who otherwise has, whichever way one looks at it, a meritorious claim for the full amount of the rent arrears. It is unbalanced not to allow him to proceed to obtain the sums to which he is entitled arising out of the same set of circumstances that gave rise to the tenant's entitlement to damages for disrepair and indeed the costs. To allow the tenant to have the advantage of judgments in the region of £31,000 and to deny the landlord the rent arrears arising for the same period strikes me as exceedingly unjust.
>
> 32 The other important consideration when I apply the overriding objective to this case is that the court resources that have thus far been employed in relation to this new claim have been minimal. In this respect the argument that the defendant advances is a circular one. There is a default judgment already in place and it is only her wish to have that default judgment set aside and then to contest the proceedings by way of applying to strike them out that raises the prospect of more court resources being utilised. So that consideration does not operate against the claimant. Rather, it operates against the defendant."

Appellant's submissions

46. Mr Bagot submits that the DDJ erred in law in not striking out the claim as an abuse of the process of the court. He argues that the long line of authority concerning whether a second identical claim should be allowed to proceed where the first claim has been struck out pre-dates the 2013 Civil Justice Reforms, the amendment of the overriding objective[44] and the guidance given in *Mitchell v Newsgroup Newspapers*

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[44] CPR 1.1:
(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
(a) ensuring that the parties are on an equal footing;

2014 1 WLR 795, as re-stated in *Denton v TH White* [2014] 1 WLR 3926. Mr Bagot argues that there is a real risk of undermining the change in culture regarding procedural compliance if a party whose counterclaim is struck out and who does not seek relief from sanctions is instead allowed to bring a second identical claim. In *Securum Finance Ltd v Ashton* [2001] Ch 291, a case in which the first claim was dismissed for inordinate and inexcusable delay, the Court of Appeal said,

> "34. For my part, I think that the time has come for this Court to hold that the "change of culture" which has taken place in the last three years - and, in particular, the advent of the Civil Procedure Rules - has led to a position in which it is no longer open to a litigant whose action has been struck out on the grounds of inordinate and inexcusable delay to rely on the principle that a second action commenced within the limitation period will not be struck out save in exceptional cases. The position, now, is that the court must address the application to strike out the second action with the overriding objective of the CPR in mind - and must consider whether the claimant's wish to have "second bite at the cherry" outweighs the need to allot its own limited resources to other cases. The courts should now follow the guidance given by this Court in the *Arbuthnot Latham* case - in a passage at page 1436H-1437B:
>
> "The question whether a fresh action can be commenced will then be a matter for the discretion of the court when considering any application to strike out that action, and any excuse given for the misconduct of the previous action: see *Janov v Morris* [1981] 1 WLR 1389. The position is the same as it is under the first limb of *Birkett v James*. In exercising its discretion as to whether to strike out the second action, that court should start with the assumption that if a party has had one action struck out for abuse of process some special reason has to be identified to justify a second action being allowed to proceed."

47. Mr Bagot submits that the Respondent's failure to pay the appropriate fee or to obtain a fee remission in the first proceedings in respect of his counterclaim was intentional and contumelious, and an abuse of process. He argues that this was not a mere oversight as the Respondent was twice reminded by the court, on 21 November

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(b) saving expense;
(c) dealing with the case in ways which are proportionate –
  (i) to the amount of money involved;
  (ii) to the importance of the case;
  (iii) to the complexity of the issues; and
  (iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
(f) enforcing compliance with rules, practice directions and orders.

2014[45] and 9 March 2015[46], and the counterclaim was not struck out until DJ Bank's order of 19 May 2015, six months after the counterclaim was signed. He referred to the Court of Appeal case of *Janov v Morris* [1981] 1 W.L.R. 1389, which was a case involving the breach of an Unless Order. Dunn LJ stated that the power to strike out:

> "Should be exercised only where the court is either satisfied that there has been an intentional and contumelious default – for example, disobedience of a peremptory order of the court – or that there has been inordinate and inexcusable delay."

48. Mr Bagot submits that the DDJ fell into error in seeming to excuse the non-payment of the fee on the basis that the Respondent did not have the funds: "Non-payment was due ... to the Claimant's inability to provide the amount to which the fee had increased"[47]. The DDJ continued, "It would be unbalanced to allow a procedural misstep which is said to have been caused by financial difficulty to disentitle a landlord ..."[48]. Mr Bagot submits that there was no evidence before the court that the Respondent did not have funds, simply a bare assertion. But in any event, this ignores the point that if the Respondent could have shown he was impecunious at the time, he would have been entitled to fee remission. Mr Bagot says that this was therefore no excuse at all for the failure to comply with the mandatory obligation to pay the court fee for issuing a counterclaim.

49. Mr Bagot argues that the DDJ failed to apply the correct test of whether the Respondent could satisfy the burden of identifying a 'special reason' to justify the second claim being allowed to proceed. He referred to *Arbuthnot Latham Bank Ltd and others v Trafalgar Holdings Ltd* [1998] 1 WLR 1426, a case involving inordinate and inexcusable delay, per Lord Woolf MR at 1436H to 1437A:

> "The question whether a fresh claim can be commenced will then be a matter for the discretion of the court when considering any application to strike out that claim, and any excuse given for the misconduct of the previous claim: 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 claim, that court should start with the assumption that if a party has had one claim struck out for abuse of process some special reason has to be identified to justify a second claim being allowed to proceed."

50. Mr Bagot submits that had the DDJ applied the correct test, he would have found that the Respondent could not discharge that burden of establishing a special reason to justify the second claim being allowed to proceed. The DDJ would have then set aside judgment in default and struck out the second claim as an abuse of process. The DDJ had not done this, instead finding that it would be "unbalanced not to allow [the Respondent] to proceed to obtain the sums to which he is entitled"[49]. His finding that

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[45] Page E61
[46] Page E63
[47] Page F10, paragraph 30
[48] Page F10, paragraph 31
[49] Page F10, paragraph 31

it would be "exceedingly unjust" to "allow the tenant to have the advantage of judgments in the region of £31,000 and to deny the landlord the rent arrears for the same period" ignored the fact that the Respondent was the author of his own misfortune in having chosen to bring the rent arrears action by a counterclaim but then knowingly allowed it to be struck out. Mr Bagot submits that:

i) The DDJ's approach is contrary to the *Janov* line of authority in relation to second claims where the first claim has been struck out for intentional and contumelious default and in any event, the DDJ applied the wrong test and the wrong burden.

ii) The DDJ failed to take into account (or to take into account properly) the civil justice reforms, the amended overriding objective and the guidance in *Mitchell* (as restated in *Denton*) when considering whether the second claim was an abuse of process.

iii) The DDJ wrongly held that none of the court's resources had been used (and held against the Appellant the additional use of resources which the set aside would engender). The correct finding was that there had been misuse of the court's resources, which is of itself an abuse of process.

iv) The DDJ failed to consider the Respondent's failure to pursue his remedies in the first claim (whether by seeking fee remission, seeking relief from sanctions or appealing) and whether this made the second claim an abuse of process.

51. Mr Bagot submits that the allocation of the court's limited resources is a matter which the court is required to take into account by that part of the overriding objective which is referred to in CPR 1.1(2)(e)[50]. In *Securum Finance Ltd v Ashton* [2001] Ch 291, the Court of Appeal said,

> "30. The power to strike out a statement of case is contained in CPR Rule 3.4. In particular, Rule 3.4(2)(b) empowers the court to strike out a statement of case (which includes part of a statement of case - see Rule 3.4(1)) if it appears to the court that the statement of case is an abuse of the court's process; but that does not limit any other power of the court to strike out - see Rule 3.4(5). In exercising that power the court must seek to give effect to the overriding objective set out in CPR Rule 1.1 - see Rule 1.2(a). The overriding objective of the procedural code embodied in the new rules is to enable the court "to deal with cases justly" - see Rule 1.1(1). Dealing with a case justly includes "allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases".

[50] 1.1-(2) Dealing with a case justly and at proportionate includes, so far as practicable-
(e) allocating to it an appropriate share of the court's resources, while taking into account the need to allocate resources to other cases.

> 31. In the *Arbuthnot Latham* case this court pointed out, in a passage at page 1436E which I have already set out, that:
>
> "In *Birkett v James* [1978] AC 297 the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration of increasing significance."
>
> The effect on other litigants of delay in the proceedings in which that delay has occurred is, now, a factor to which the court must have regard when considering whether to strike out those proceedings. But, equally, the fact that earlier proceedings have been struck out on the grounds of delay is a factor to which the court must have regard when considering whether to strike out fresh proceedings brought to enforce the same claim. The reason, as it seems to me, is that, when considering whether to allow the fresh proceedings to continue, the court must address the question whether that is an appropriate use of the court's resources having regard (i) to the fact that the claimant has already had a share of those resources in the first action and (ii) that his claim to a further share must be balanced against the demands of other litigants."

52. Mr Bagot argues that the DDJ was wrong to characterise the counterclaim as one which, "occupied no part whatever of the court's resources"[51], for which, "the court's resources were not employed in any way"[52]. Mr Bagot refers to the two letters from the court, followed by a separate consideration by a judge and a court order; allowing the counterclaim to proceed for over six months; the Appellant going to the expense of filing and serving a Defence to the counterclaim and says that the counterclaim did take up judicial time and resources, the time of court staff and incurred the Appellant in costs. He further argues that the DDJ wrongly placed the emphasis on the resources used in the duplicate claim, whereas he should have focused on the costs of the original counterclaim and then added to this the need for a fresh claim, the first one having been struck out. Mr Bagot submits that the DDJ perversely blamed the Appellant for the increased use of court resources, saying that,

> "It is only her wish to have that default judgment set aside and then to contest the proceedings ... that raises the prospect of more court resources being utilised. So that consideration does not operate against [the Respondent]. Rather, it operates against [the Appellant]"[53].

He argues it was the Respondent's default in having the original counterclaim, which the Appellant was defending, struck out which resulted in the present claim being necessary.

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[51]Page F10, paragraph 30
[52] Page F11, paragraph 33
[53]Page F11, paragraph 32

53. Mr Bagot submits that an appeal against DDJ Banks' final Order was intimated[54] but not pursued and relief from sanctions was never sought (or an appeal brought) against the strike out of the counterclaim. The Respondent's failure to pursue the remedies in the first claim was a breach of the overriding objective, which is highly relevant to the question of whether there had been an abuse of process.

Respondent's submissions

Preliminary point

54. Ms Baker submitted that many of the arguments being raised were new arguments that were not made in the grounds of appeal or the appellant's original skeleton argument, but were also not made in the Application or written submissions at first instance. She relied upon *Swain-Mason v Mills Reeve LLP* (Practice Note) [2011] 1ELR 2735, where it is said at [72],

> "The court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court."

She further referred to the case of *Crane t/a Indigital Satellite Services v Sky In-Homes Limited* [2008] EWCA Civ 978 at [21] in which it was said,

> "The Court has to be satisfied that (the party) will not be at risk of prejudice if the new point is allowed because it might have adduced other evidence at trial, or otherwise conduct the case differently."

Finding on preliminary point as to abuse of process

55. In my judgment, the essence of the arguments as to abuse of process was debated at length before the DDJ. Whilst I accept that the argument has been marshalled in a significantly more learned and forensic manner before me than in the court below, Ms Baker has been more than able to oppose the arguments, therefore I reject the Respondent's preliminary point.

Abuse of process

56. Ms Baker submits in her supplemental skeleton argument, dated 19 April 2018,

> "5. The Judge was correct to approach this case as a case in which the original strike out was due to a '*procedural misstep*' [F10/31] and not for an abuse of process or other contumelious behaviour. There was no flavour of abuse, 'contumelious' conduct or 'wholesale disregard for the rules' in Mr Sajid's failure to pay the correct issue fee.

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[54] Page E26-E27

> 6. [...] (b) In respect of the points made on fee remission in particular, Mr Sajid's possible entitlement to fee remission is a new point on which the Judge did not have the necessary evidence to decide either way and therefore this point cannot now be relied upon. In any event, even if Mr Sajid could have obtained a fee remission, there is nothing in his failure to do so that renders his conduct abusive or contumelious.
>
> [...]
>
> 8. [...] (b) in suggesting that the Judge erred in concluding that no court resources had been used in the Counterclaim, Ms Nuur is challenging the manner in which the Judge assessed this factor. It is legitimate to say that 2 template letters from a court office and an unnecessary paragraph in an order that would have been made anyway was no use of the court resources. It cannot be said that the Counterclaim entered the case management process at all is it was struck out before directions questionnaires were even filed.
>
> (c) in suggesting that the Judge erred in considering the court resources that would be used in the Claim, Ms Nuur seeks to ignore that the Judgment had been obtained and to ignore Mr Sajid's prima facie entitlement to the Judgment. When considering the practical question of court resources and whether a claimant should be permitted to use more, it would be artificial to ignore the Judgement. In any event, even if the Judge had not considered this factor, he would have reached the same result;
>
> (d) in suggesting that the Judge should have considered the hypothetical relief from sanctions application and Mr Sajid's failure to pursue one in the Counterclaim, Ms Nuur is raising a new point on which the Judge did not have the opportunity to receive evidence. Even so, according to *Davies* at [70], this consideration is not relevant unless the original strike out was for an abuse. Even if it were relevant, *Harbour Castle* at [158] demonstrates that it is not a determinative point and in this case the likely result (of Mr Sajid receiving relief from sanctions) was obvious from the Judge's findings anyway;"

57. The Court of Appeal reviewed the law as to abuse of process in *Aktas v Adepta* [2010] EWCA Civ 1770. In *Aktas*, in two separate personal injury actions, the claim form was issued shortly before the expiry of the three-year limitation period prescribed by Section 11 of the Limitation Act 1980 (the 1980 Act) but was not served within the four-month period allowed by CPR 7.5. In the first case, time for service was extended, pursuant to CPR r7.6, but the claim form was still not served in time and it was set aside. In the second case, the claim form was struck out as being out of time. Each claimant issued a second claim form and applied for the court to exercise its discretion under Section 33 of the 1980 Act to disapply the primary limitation period imposed by Section 11 of the 1980 Act. In each case, the Judge held that where a

claim had been struck out as a result of a failure to comply with CPR r7.5 or r7.6, it was an abuse of the process of the court to issue a second claim, and he struck out the claim without exercising the discretion in Section 33 of the 1980 Act. The Court of Appeal held, allowing the appeals, that a mere negligent failure to serve a claim form in time for the purposes of CPR r7.5 or r7.6 was not, without more, an abuse of process; that for a matter to be an abuse of process, something more than a single negligent oversight in timely service was required, such as inordinate and inexcusable delay, intentional or contumelious default, or at least wholesale disregard of the rules. Rix LJ said at paragraph 44, when speaking of *Janov v Morris*,

> "However, there is nothing in the judgments to suggest that it is open to strike out a case for abuse of process in the absence of intentional and contumelious default or inordinate and inexcusable delay. In *Janov v Morris* there were both."

His Lordship continued at paragraph 90,

> "However, all the cases make clear that for a matter to be an abuse of process, something more than a single negligent oversight in timely service is required: the various expressions which have been used are inordinate and inexcusable delay, intentional and contumelious default, or at least wholesale disregard of the rules."

Finally, his Lordship said at paragraph 92,

> "There is of course the (possibly) new argument in the era of the CPR which emphasises the importance of any misuse of court resources. It is well to be aware of the important public interest bound up in the efficient use of those limited resources. 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. Certainly, the authorities have not gone that far, and there is nothing in the CPR themselves to indicate that a mere failure to serve in time is to be regarded as an abuse requiring or deserving anything further than the failure of the claim form itself – with the vital consequence in the absence of section 33 of losing a claim which has become time barred. Moreover, it should not be forgotten that one of the great virtues of the CPR is that, by providing more flexible remedies for breaches of rules as well as a stricter regulatory environment, the courts are given the powers and the opportunities to make the sanction fit the breach. That is the teaching of one of the most important early decisions on the CPR to be found in *Biguzzi v. Rank Leisure Plc* [1999] 1 WLR 1926 (CA)."

Findings as to abuse of process

58. I gratefully adopt the analysis of the different categories of case where an action may be struck out for abuse of process in the judgment of Morris J in *Davies v Carillion Energy Services Limited* [2017] EWHC 3206 (QB). His Lordship said,

> "(1) Analysis of the case authorities
>
> 52. First, the line of cases of *Arbuthnot*, *Securum* and *Collins* 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: *Securum* §34, citing *Arbuthnot* , and *Aktas* §§ 48, 52.
>
> (2) In this context abuse of process in the first action comprises: intentional and contumelious conduct; or want of prosecution; or wholesale disregard of rules of court: *Aktas* §§72 and 90.
>
> (3) Where the first action has been struck out in circumstances which cannot be characterised as an abuse of process, the second action may be struck out as an abuse of process, absent special reason. However in such a case it is necessary to consider the particular circumstances in which the first action was struck out. At the very least, for the second action to constitute an abuse, the conduct in the first action must have been "inexcusable". *Collins* §§24-25 and *Cranway* §20.
>
> ...
>
> 55. Against this background, I conclude as follows:
>
> (1) Where a first action has been struck out for procedural failure, the Court should apply the *Securum/Collins* approach I set out in paragraph 52 above. Even if *Aldi* and *Stuart* state general principles which are now applicable to all categories of abuse of process, I am not satisfied that there is any case authority which has specifically disapproved of the detailed analysis in *Securum*, *Collins* and *Aktas* of cases of procedural failure. Indeed *Securum* and *Collins* were not considered in either *Johnson* or *Aldi*. In *Aktas*, Rix LJ did not indicate disapproval of *Securum*.
>
> (2) However given the introduction, since those cases, of amendments to CPR 1.1 and given developments in *Mitchell* and *Denton*, the "special reason" exception identified in

> *Securum* and *Collins* falls to be more narrowly circumscribed. Where the conduct of the first action has been found to have been an abuse of process or otherwise inexcusable, then the second action will be struck out as an abuse of process, save in "very unusual circumstances". (Other terminology might equally be used to indicate this strict approach). In addition, in a case where the first action was not itself an abuse of process, whether the conduct in that action was "inexcusable" might fall to be assessed more rigorously and in the defendant's favour. However, even post-Jackson, ultimately, the importance of the efficient use of resources does not, in my judgment, trump the overriding need to do justice: see *Aktas* §92.
>
> (3) A single failure to comply with an unless order is not, *of itself*, sufficient to conclude that the second action is an abuse of process."

59. I find that in *Davies v Carillion Energy Services Limited* (supra) and *Harbour Castle Ltd v David Wilson Homes Ltd* (supra) the High Court considered abuse of process in the light of the 2013 Civil Justice Reforms, the amendment of the overriding objective and the guidance given in *Mitchell v Newsgroup Newspapers* (supra) and *Denton v TH White* (supra).

First issue – intentional and contumelious default or procedural misstep?

60. The first issue I must consider is whether the counterclaim in the first action was struck out for intentional and contumelious default. Mr Bagot submits that the failure to pay the court fee or obtain a fee remission was deliberate and to be characterised as intentional and contumelious. He submits,

> "For peremptory order, read mandatory rule. ... There should be no distinction: see the way the overriding objective groups breaches of orders and rules (and PDs) together: CPR 1.1(2)(f)"[55].

Ms Baker submits that the DDJ was correct to characterise the strike out as a 'procedural misstep'.

61. I accept the submission of Ms Baker that the Respondent's failure to pay the counterclaim fee did not amount to intentional and contumelious behaviour or a peremptory breach but was a procedural misstep. The Respondent was not in breach of even an order of the court, let alone an unless order. In my judgement, the case of *Janov v Morris* is a distinguishable authority because, unlike the present case, it involved the breach of a peremptory order, namely an unless order. The breach in the present case was a single failure to comply with the Rules and did not involve breach of a peremptory order.

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[55] Page B35, paragraph 35a

If peremptory breach, what is correct test?

62. Even if the Respondent's failure to pay the court fee should be characterised as a breach of a peremptory order, it would be necessary to consider whether that was sufficient to justify the striking out of the second proceedings as an abuse of the process. In his judgment, the DDJ said[56],

> "31. It seems to me it would be unbalanced to allow a procedural misstep which is said to have been caused by financial difficulty to disentitle the landlord who otherwise has, whichever way one looks at it, a meritorious claim for the full amount of the rent arrears. It is unbalanced not to allow [the Respondent] to proceed to obtain the sums to which he is entitled arising out of the same set of circumstances that gave rise to the tenant's entitlement to damages for disrepair and indeed the costs. To allow the tenant to have the advantage of judgments in the region of £31,000 and to deny the landlord the rent arrears arising for the same period strikes me as exceedingly unjust."

63. In my judgement, if there was a peremptory breach, the DDJ did apply the wrong test. The DDJ should not have decided the issue by considering the overall justice of the situation. Further, I reject the Appellant's contention that the correct test was whether the Respondent had established special reasons justifying a second action because I do not consider the Defendant conducted the counterclaim in the first action abusively. I find that the correct test was whether, taking all the circumstances of the case into account, the Respondent's commencement of the second proceedings constituted a misuse of the court's procedure which would be manifestly unfair to the Appellant or would otherwise bring the administration of justice into disrepute. In considering this test, I find:

i) The counterclaim in the first action was struck out for a procedural misstep and not an intentional and contumelious default.

ii) The allocation of the court's limited resources is a matter which the court is required to take into account by that part of the overriding objective which is referred to in CPR 1.1(2)(e). The DDJ said that the counterclaim, "occupied no part whatever of the court's resources" (paragraph 30), that "the court's resources were not employed in any way" (paragraph 33) and that the counterclaim, "did not get past the issuing threshold" (paragraph 33). In my judgement, these findings were all flawed because the court's resources, judicial and administrative, were employed when:

a) The Counterclaim was filed at court;

b) The Court sent the Respondent letters dated 21 November 2014[57] and 9 March 2015[58].

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[56] Pages F10-11
[57] Page E61 and paragraph 7 above
[58] Page E63

c) The Court made an order on 26 May 2015 that the counter claim be struck out.

d) The Appellant filed and served a Defence to Counterclaim.

64. Further, the DDJ wrongly considered the resources in the duplicate claim rather than considering the original counterclaim, which should have been the main focus. Finally, I agree with Mr Bagot that it was perverse of the DDJ to consider that the wasted resources would only be incurred by the Appellant defending herself in the claim when this was, absent the default judgment, her right. The DDJ said at paragraph 32, "It is only her wish to have that default judgment set aside and then to contest the proceedings ... that raises the prospect of more court resources being utilised. So that consideration does not operate against [R]. Rather it operates against [A]."

65. However, in my judgement the court resources used by the Respondent in respect of the counterclaim in the first action were not significant and were at the very lower end of the scale. These costs were of such a relatively minor order that it would not be abusive to permit the Respondent to bring a second claim. I am mindful of the dicta of Rix LJ in *Aktas v Adepta* (supra) at paragraph 92 that in a case such as this where there has been very limited use of the court's resources, it would be wrong to turn the proper concern of the court's resources into a surrogate for the doctrine of abuse of process. Furthermore, as was said by Morris J in *Davies v Carillion Energy Services Limited* (supra), "The importance of the efficient use of resources does not ... trump the overriding need to do justice".

66. Regarding the Respondent's failure to apply for relief from sanctions in the first action, this issue was considered in *Davies v Carillion Energy Services Limited and HIS Energy Limited* [2017] EWHC 3206, in which Mr Justice Morris said,

> "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, practice direction or order, a failure to apply in that action for relief from sanctions necessarily bars the commencement of a second action: see *Cranway* §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 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 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 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."

67. In my judgement, where an action is struck out for single procedural default, a failure to apply for relief from sanctions does not bar the commencement of a second action. However, if the failure to apply for relief from sanctions should be considered as part of the question whether conduct of the first action was an abuse of process or otherwise inexcusable, I find that on the facts of the present case, conduct which I have found not to be an abuse of the process or inexcusable is not rendered an abuse or inexcusable by reason of the failure to apply for relief from sanctions and/or the failure to apply to set aside the dismissal of the counterclaim or to appeal.

68. Having regard to all the matters set out in paragraphs 58 to 67 above, I conclude that as a matter of law, the Respondent's commencement of the second proceedings does not constitute an abuse of process.

Summary of findings

69. I find that:

i) The DDJ erred in finding that the claim was properly served. The Respondent could and should have applied for alternative service on the Appellant's solicitors and the Appellant's daughter pursuant to CPR 6.15. As a consequence I set aside the default judgment.

ii) The DDJ erred in not setting aside judgment under CPR 13.3(1), on the grounds that I find that the Appellant had a real prospect of successfully defending the claim and the application had been promptly made. As a consequence I also set aside the default judgment on this ground.

iii) The DDJ was correct in dismissing the Appellant's application to strike out the claim for abuse of process, albeit that I have reached this conclusion for different reasons. It follows that I dismiss the Appellant's appeal on this ground and her application, dated 6 April 2018.

Stay pending payment by Respondent of outstanding costs

70. I circulated a draft judgment to the parties on 24 July 2018. Mr Bagot sent me an email on behalf of himself and Ms Baker on 27 July 2018, in which he says,

> "In addition, Mr Bagot asks that you make a ruling in your judgment on the Appellant/Defendant's 'fall-back' position at the hearing that, if the case was not struck out as an abuse, it should be stayed pending payment by the Respondent/Claimant of the outstanding costs order from the first claim under CPR 3.4(4)(c).
>
> Ms Baker reiterates her objection raised at the hearing to this issue being dealt with as part of the appeal/application and invites you to retain your approach of <u>not</u> dealing with this issue as part of the judgment, but to require the Appellant/Defendant to issue a separate application if she wishes to pursue the point."

71. I decline to make an order that the Respondent's claim be stayed pending payment by the Respondent of the outstanding costs from the first claim because:

i) This was not sought in the Grounds of Appeal or the Appellant's Notice of Application, dated 6 April 2018;

ii) As a matter of fairness, the Respondent should have an opportunity to serve evidence in reply if he so wishes.