

IN THE SUPREME COURT OF BELIZE, A.D. 2009

CLAIM NO. 354 of 2009

**WORLDWIDE PROPERTY
MANAGEMENT LIMITED**

CLAIMANT

AND

**BELIZE OFFSHORE CENTRE
LIMITED**

DEFENDANT

CITY HOLDINGS LIMITED

1st INTERESTED PARTY

IT SOLUTIONS LIMITED

2nd INTERESTED PARTY

Hearings

2009

4th December

2010

15th January

8th February

16th February

10th March

Ms. Lisa Shoman SC for the Applicants/Defendants.

Mr. Eamon Courtenay SC and Mrs. Ashanti Arthurs Martin for the Claimant.

LEGALL J.

JUDGMENT

1. The defendant and the first interested party filed an application to the

court for orders that the first interested party be joined as a defendant to the claim in this matter. The application also requested the court to strike out the claim as an abuse of the process of the court. By consent of the claimant an order was made that the first interested party, City Holdings Ltd., be joined as a second defendant in the claim.

2. The application to strike out the claim on the ground that it is an abuse of the process of the court is based on the following circumstances. The claimant filed a claim, No. 545 of 2006 dated 6th October, 2006, which initially named City Holdings Limited as a defendant. IT Solutions Limited was added subsequently on 14th February, 2007, as a defendant. The said claim form states the claim as follows:

“The Claimant WORLDWIDE PROPERTY MANAGEMENT LIMITED, whose registered office is situate at #16 Albert Hoy Avenue, Belama Phase 1, Belize City, Belize claims against the Defendant City Holdings Limited whose registered office is situate at #35 barrack Road, Belize City, Belize rescission of the sale of 13,500 shares numbered 1-13,500 in the undertaking called Belize Offshore Center Limited to the defendant on the ground that the sale was in breach of Article 105 of the Company’s Articles of Association, was fraudulent and was without consideration.”

3. After a defence to the claim was filed, and after several failures by the claimant to comply with orders made at case management, the

defendants applied on 19th April, 2007 for the claim to be struck out on the ground that it did not disclose a cause of action. The application was refused by the Registrar who proceeded to make a further case management order with respect to amending the statement of claim and filing and serving of witness statements. The claimant filed and served witness statements, but not within the time ordered at the case management conference by the Registrar. The trial of the claim was set for 18th October, 2007; but on the 17th October, 2007 the claimant served the defendants with a notice of discontinuance of the claim.

4. On the said 16th October, 2007, the said claimant brought a second claim No. 467 of 2007. This second claim named a new party as defendant – Belize Offshore Center Limited – and named two other parties, the defendants named in the first claim, as interested parties. This second claim does not mention the identical reliefs of the first claim. The second claim, claims the following:

“An order for the rectification of the register of Members of the Defendant Company BELIZE OFFSHORE CENTER LTD. by removing the name CITY HOLDING LIMITED, the First Named Interested Party from the register of members of the Defendant Company and reinstating the name of the said Claimant WORLDWIDE PROPERTY MANAGEMENT LIMITED thereon pursuant to section 33 of the Belize Companies Act Chapter 250 on the ground that the Claimant’s name as the owner of the said 13,500 shares in the said Belize

Offshore Center Ltd. was without sufficient cause, omitted from the register of Members of the said Defendant Company.”

5. The second claim was served on the defendant and the first interested party and a date for hearing was set for 7th December, 2007. The affidavit of Mr. Glenn D. Godfrey, attorney-at-law, states that at the hearing the matter was adjourned sine-die because the claimant had served the claim not within the time prescribed by the Rules. According to Mr. Godfrey, the defendant filed a defence to the claim within the time prescribed by the Rules. But about ten months after filing the defence, there being no application from the claimant for a new hearing date, an application was made on behalf of the defendant and the first interested party to the Registrar for a new date for hearing, which was set by notice dated 10th September, 2008 for hearing on 23rd October, 2008 at 9:00 a.m. before my brother Awich J. The notice was addressed to Messrs. Pitts & Elrington, attorneys for the Claimant, Messrs. Glen D. Godfrey & Co., attorneys for the defendant, and Mr. Michael Peyrefitte, attorney for the second interested party.
6. Before the date of the new hearing, new attorneys-at-law were consulted by the claimant, namely Messrs Courtenay, Coye and Co., who requested from the defendant copies of the pleadings in the second claim, including the claim form, statement of claim, and defence. The pleadings were supplied to the new attorneys-at-law, even though at the time they were not entered on the record as

representing the claimant. The date when these pleadings were supplied to the new attorneys were not given in evidence. And the notice of the hearing as we saw above was not served on the new attorneys-at-law, probably because they were not on record. There is, in other words, no evidence that the notice of the date of hearing – 23rd October, 2008 – of the second claim was served on, or brought before the hearing, to the attention of the new attorneys-at-law for the claimant.

7. The second claim came up for hearing on 23rd October, 2008 before Awich J. There was an appearance for the defendant and the second interested party, but no appearance by or for the claimant. Awich J dismissed the claim on the said 23rd October, 2008. The order dismissing the claim was perfected on 5th November, 2008 and served on the said date on the attorneys-at-law on record for the claimant, Pitts and Elrington, and the new attorneys-at-law Courtenay Coye & Co. although the latter were not, at that time, officially on record for the claimant.
8. By notice dated 31st December, 2008, the claimant, through their new attorneys, who were at that time not on record for the claimant, applied to the court for an order to set aside the order of Awich J. who had dismissed the second claim. The application was served on the said 31st December, 2008 on the defendants. According to the notice, the application was set to be heard on 17th March, 2009 before Awich J. The new attorneys-at-law were officially on record for the claimant on 17th March, 2009 by filing a notice of change of attorneys.

9. On the said 17th March, 2009, after hearing Mr. Eamon Courtenay SC for the claimant, Mr. Aldo G. Reyes and Mr. Michael Peyrefitte for the defendant and the interested parties respectively, Awich J dismissed the application to set aside the dismissal order made on 23rd October, 2008. The learned judge dismissed the application for the reason that the “applicant had no good reason for failing to attend the hearing on 23rd October, 2008” which was the date the second claim was dismissed for non-appearance of the claimant. There was no appeal against the dismissal.
10. The claimant filed a third claim dated 13th April, 2009. The parties to the third claim are the same as the second claim, but different from the first claim. Both the second and third claims have the identical wording of the reliefs claimed, which are different from the wording of the first claim.
11. The above is the factual basis of the application to dismiss the third claim as an abuse of the process of the court. The response of the claimant to the application is that the two claims which were dismissed, were separate; and had different causes of action though based on the same facts. Moreover, says the claimant, in neither of the two claims were there a trial by the court or a determination on the merits of the claims. The claimant, says learned senior counsel, is given a discretion to discontinue a claim under Part 37 of the Supreme Court (Civil Procedure) Rules 2005 (the Rules) and he is authorized, it was submitted, under Rule 37.8 to bring a subsequent claim against the same defendant based on the same facts. Therefore there was no

abuse of the process of the court, especially in a case where there was no trial or hearing on the merits of the claims; and one claim was struck out for non-appearance and the other discontinued.

12. It was submitted on the part of the applicant, that the claimant had on several occasions failed to comply with several orders of the court made at case management. Moreover, says the applicant, the claimant failed on several occasions to comply with the Rules which have resulted in “squandering the court resources.” In relation to the submission of the claimant that the claims raise different causes of action, learned senior counsel for the applicant submitted that though the wording of the claims are different, they all have the same effect or goal: registering the 13,500 shares back in the name of the claimant. Moreover, says learned senior counsel, the fact that the first and second claims were not heard on the merits, was wholly the fault of the claimant. There is no doubt that the claimant failed to comply with case management orders and the Rules. And there is much merit in the argument that the claims have the same goal.

13. The issue to be decided on the application is whether on the facts of the case, the third claim would amount to an abuse of the process of the court. Learned senior counsel for the applicant tells the court that this is the only issue she relies on in support of her application. She submitted several authorities in support of the application. But before examining the authorities, it would be helpful to consider the facts that gave rise to the claims.

14. The claimant company had three directors – Harold Young, Amir Sosa and Raymond Brown. Amir Sosa was also employed by a company known as Cititrust International Inc. which was owned and managed by Joy Vernon Godfrey, wife of Glen D. Godfrey who was a director of the first and second named defendants.
15. Raymond Brown, having been approached by Mr. Godfrey to invest in the first defendant company, paid between US \$80,000 and US \$100,000 for 13,500 shares in the same defendant company. The shares were placed in the name of the claimant company which was incorporated under the laws of Belize with registered offices situate at 35 Barrack Road, Belize City.
16. The first defendant company was incorporated in Belize on 5th February, 1996 for the purpose of acquiring property named the Belize Offshore Center, located at the said 35 Barrack Road, Belize. The first defendant company acquired the property which is a three storey building in which is housed the offices of Mr. Glenn Godfrey, Cititrust International Inc. where Amir Sosa worked and was also the registered office of the claimant company.
17. In a document dated 9th May, 2002 entitled TRANSFER OF SHARES, the claimant company, described in the document as the transferor of the shares, in consideration for the sum of \$13,500, transferred its 13,500 shares in the Belize Offshore Center Ltd., to City Holdings Ltd. the second defendant or first interested party. Signing the transfer of shares document on behalf of the claimant

- company, was the said Amir Sosa; and signing on behalf of City Holdings Ltd. was Joy Vernon Godfrey. Amir Sosa died on 8th February, 2007 about four months after the date of the first claim.
18. Raymond Brown, director of the claimant company, swore that he paid US \$80,000 to US \$100,000 for the 13,500 shares in the first defendant company and this was not denied by the defendants. The said amount of shares in the said defendant company was transferred in May 2002, about six years after the said first defendant company was incorporated, for \$13,500. This too was not denied. The transfer document does not state whether the \$13,500 were US or Belize dollars. The claimant alleges that the Belize Offshore Center is valued at millions of dollars. And has tendered particulars of mortgages granted to the first defendant company by lending institutions, including Capital Life Insurance Company Ltd. and Belize Bank, all of Belize City. The total amount of these mortgages exceed \$2,500,000 Belize dollars, according to the mortgage documents tendered as RB 1. The mortgages were not denied by the defendants.
 19. The claimant therefore submitted that the claimant ought to be allowed to litigate the issues raised in the third claim as the circumstances of the transfer of the shares ought to be litigated by the court. The applicant objects on the ground that the claim is an abuse of the process of the court. Learned senior counsel for the applicant relied on the following authorities in support of her submission: *Securum Finance Ltd. v. Ashton* 2000 3 W.L.R. 1400; *Wallis v.*

Valentine 2002 EWCA 1034; Lace Coordinates Ltd. v. Nem Insurance Co. Ltd. 1998 W.L. 104266; Janov v. Morris 1981; and Mohabir v. Phillips (TT) No. 30 of 2002.

20. In *Securum*, a Mr. and Mrs. Ashton on 28th January, 1987 signed a guarantee which prescribed their obligations to a bank. In August, 1989 the bank commenced proceedings against them to enforce their obligations under the guarantee. These proceedings were struck out by the court because of delay in December 1997. The present proceedings were commenced by the bank in September, 2008 and were brought to enforce the rights of the bank to their property under a legal charge dated 7th March, 1989 given by Mr. and Mrs. Ashton to secure their obligations under the guarantee. The property under the legal charge was the home of the Ashtons.

21. The Ashtons, having obtained an order that struck out the earlier proceedings, applied for an order to strike out the present proceedings on the ground that it was an abuse of the process of the court for the bank to pursue in the present claim the same claim that the court struck out in the earlier proceedings. The court pointed out that, although the cause of action in the present proceedings, were not the same as that on which the earlier proceedings were based, they were common elements in both claims. The court considered that one of the questions to be answered was whether it was an abuse of process to seek to litigate, in subsequent proceedings, issues which had been raised, but not adjudicated upon, in earlier proceedings which were themselves struck out? The court held that it was no longer open to a

litigant whose action was struck out for delay to rely on the principle that a second action commenced within the limitation period would not be struck out, save in exceptional circumstances. The court held that the court had to consider the over-riding objective of the Rules which required doing justice in each case.

22. One principle that comes out of the decision of *Securum* is that in deciding whether to strike out a claim on the ground of abuse of process, the court should pay attention to the over-riding objective of the Rules, which is to enable the court to deal with cases justly. For me, *Securum* lays down the broad principle of doing justice in the case and at the same time considering the need to allot the courts limited resources to other cases. What would be the just thing to do in the circumstances of this application, bearing in mind the limited resources of the court? I will answer this question below.

23. The next case the applicants relied on was *Wallis v. Valentine* above to support the submission that the claimant filed the third claim as a form of harassment of the applicants and therefore it amounted to abuse of the process. The basis for this submission is a letter dated 21st October, 2007 written on behalf of the claimant to the attorneys for the applicants. The letter states:

“Our client has instructed us to inform you that he is aware that there exists in addition to the charge against the 13,500 shares in favour of IT Solutions, a substantial charge against the principal asset of Belize Offshore

Center Ltd. In the circumstances our client doubts very much whether the 13,500 shares would be of any value on the open market. He is therefore not willing to make any payment whatsoever with respect to costs.”

24. I cannot see how the letter could be interpreted that the claimant’s motive for filing the claim is to harass the applicants. All the letter is saying is that because of the substantial charges on the principal assets of the No. 1 Defendant, the claimant doubts the shares would be of any value on the open market.

25. In *Wallis*, which was a case of defamation, the Court of Appeal agreed with the finding of the trial judge that the claimant was pursuing a vendetta against the defendant, rather than seeking a vindication of his reputation. There had been three previous sets of proceedings between the claimant and another person on the one hand, and the defendant on the other hand. The defendant applied for an order that the action be struck out as an abuse of process, and one of the grounds was that the claimant was pursuing a vendetta against the defendant designed to cause the defendant expense, harassment and commercial prejudice rather than a vindication of his reputation. The court struck out the action as an abuse of the process, because the court was satisfied that the claimant was pursuing a vendetta rather than a vindication of his reputation. Sir Murray Stuart Smith said:

“The relevant principles when considering strike out for abuse of process have recently

been stated in the judgment of Simon Brown LJ., with whose judgment Nourse and Waite L.JJ. agreed, in *Broxton v McClelland* (1995) E.M.L.R. 485 at 497-498:

“(1) Motive and intention as such are irrelevant (save only where ‘malice’ is a relevant plea): the fact that a party who asserts a legal right is activated by feelings of personal animosity, vindictiveness or general antagonism towards his opponent is nothing to the point.

(2) Accordingly the institution of proceedings with an ulterior motive is not of itself enough to constitute an abuse: an action is only that if the Court’s processes are being misused to achieve something not properly available to the plaintiff in the course of properly conducted proceedings. The cases appear to suggest two distinct categories of such misuse of process

(i) The achievement of a collateral advantage beyond the proper scope of the action.

(ii) The conduct of the proceedings themselves not so as to vindicate a right but rather in a manner designed to cause the defendant problems of expense, harassment, commercial prejudice or the like beyond those ordinarily encountered in the course of properly conducted litigation.

(3) Only in the most clear and obvious case will it be appropriate upon preliminary application to strike out proceedings as an abuse of process so as to prevent a plaintiff from bringing an apparently proper cause of action to trial.”

26. But the court in *Wallis*, as it did in *Securum*, laid down the general principle that in deciding whether to strike out a claim the court should pay attention to the over-riding objective of dealing with the cases justly.

27. In *Lace Coordinates Ltd.*, above the plaintiffs claimed damages against the defendant for breach of a contract of insurance, in relation to the plaintiff's stock and machinery which were lost or stolen. The plaintiff claimed that such loss occurred in circumstances entitling the plaintiff to damages under the terms of the contract of insurance. After a defence was filed, the plaintiff issued a summons for directions, not within the time prescribed by the Rules of Court, but about 13 months late. The summons was heard on 11th March, 1994, and the Master made certain orders, concerning managing the case, including the period within which the action must be set down for trial.

28. About three years elapsed, before the plaintiff, on 18th July, 1997 took a step to carry the action forward, in disregard of all the orders made by the Master. It was submitted at the hearing, that the plaintiff was guilty of abuse of the process of the court because of the delay, the failure to comply with the orders and disregard for the Rules. The Court of Appeal recognized the general principle that an action may be struck out for contumelious conduct, which is conduct that amounts to a deliberate failure to comply with specific orders of the court, or a series of separate inordinate or in accusable delays in complete disregard of the Rules of Court. The Court of Appeal has

also recognized that a wholesale disregard of the Rules is an abuse of process of the court. But Hirst L.J, giving the judgment of the court, recognized the importance of dealing with cases justly. He said:

“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 the investigating question of prejudice”
(emphasis mine)

The learned judge continued:

“Although inordinate and excusable delay alone, however great, does not amount to abuse of process, delay which involves complete, total or wholesale disregard, put it how you will, of the rules of court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so, the action will be struck out or dismissed on that ground.” Emphasis mine

29. The court struck out the claim after finding that “every time limit was disregarded and every relevant court order broken by the plaintiff. But the court clearly pointed out that each case must be decided on its own facts, and that:

“The court is required to examine the plaintiff’s conduct by reference to the overall interest of justice and fairness ... I have no hesitation in holding that, providing

the consideration of justice and fairness are met, the action should be struck out”
(emphasis mine)

30. Once again the court is highlighting the need to be fair and just in considering an application to strike out a claim for breach of the Rules, delays or non-compliance with orders of the court.
31. In *Janov v. Morris* above the plaintiff on 7th August, 1978 filed an action against the defendant for breach of contract. A defence was filed denying the contract and making a counterclaim. On 23rd May, 1979 the defendant delivered to the plaintiff, further particulars of the defence and counterclaim which had been requested. The plaintiff took no further step in the action until 10th March, 1980, a period of about 10 months from when the particulars were delivered. On an application to strike out the claim, the court made an order that the claim would be struck out unless the plaintiff served a summons for directions by 1st April, 1980.
32. The plaintiff failed to comply with the order, and the claim was struck out on 2nd July, 1980. Another action was brought by the plaintiff in which he relied on precisely the same cause of action as the claim which was struck out. The defendant applied to strike out the second claim as an abuse of the process of the court. The judge initially struck out the second claim; but subsequently rescinded that order. The defendant appealed. The Court of Appeal, in allowing the appeal,

referred to the case of *Tolley v. Morris* 1979 2 A.E.R. 561 and quoted from the judgments of Lord Diplock:

“Disobedience to a peremptory order would generally amount to such “contumelious” conduct as is referred to in *Burkett v. James* and would justify striking out a fresh action for the same cause of action, as an abuse of the process of the court.” see Lord Diplock at p 571

Lord Edmund Davis in the said case agreed with Lord Diplock and said:

“But I must make one qualification. I am not presently persuaded that a person who starts an action within the limitation period is liable to have it struck out as constitutes an abuse of the process of the court, for the sole reason that a previous suit instituted by him in respect to the same cause of action was itself struck out on the ground that his disobedience to the court’s orders (peremptory or otherwise) amounted to contumelious default.”.

33. The court said that it had a discretion to be exercised having regard to the particulars circumstances of the case. The main reason for allowing the appeal was because having regard to the circumstances the plaintiff failed to provide explanations for the 10 months delay and the reasons for his failure to comply with the unless order made by the court. The court held that:

“Because there had been no explanation by the plaintiff for his failure to comply with the peremptory order made in the first action and there was no indication that he was likely to comply with orders made in the second action, the commencement of the second action was an abuse of the process of the court and the court would exercise its discretion under Ord. 18, r 19(1)(d) to strike it out.”

34. In this case before me explanations were given by the claimant for non-appearance to the second action as will be shown below.
35. In *Mohabir v. Phillips, Civil Appeal No. 30 of 2002 (T.T.)* the appellant had filed three writs of summons against the respondent. The first writ of summons was withdrawn. The second was deemed dismissed for being inactive for more than two years since its filing in February, 1999 in accordance with the Rules of Court. The respondent applied to strike out the third writ on the ground, among others, that it was an abuse of the process of the court. The judge at first instance struck out the third writ of summons, because he felt that the appellant could not escape from the defence that the action was statute barred, and struck it out as being frivolous, vexatious and an abuse of the process of the court.
36. The appellant appealed on the ground that the learned judge erred in holding that any period of limitation applied to actions for specific performance. The Court of Appeal held following *Talmash v. Mugleston (1826) 4 LJ 200 Ltd.* that “a suit for specific performance

is within neither the words nor the purview of the statute of limitations.”. But the court proceeded to consider, what it described as a “burning question.” In the words of the court, the question is the following:

“Is the filing by a litigant over a period of time, of three writs in respect of the same cause of action without reasonable explanation an abuse of the process of the court?”

37. Kamgalloo JA, having observed that the appellant was never interested in pursuing the first writ of summons because he felt the respondent could not sell the land, and which summons prayed for the identical relief as the second summons, said:

“The appellant has not offered even a plausible explanation why he has had to file three writs for the same cause of action, so on the face of it his conduct should amount to an abuse of the process of the court and he should not be allowed to proceed with the instant action.” Because however the matter was never argued either before the judge below or before us on this aspect of abuse of process, this court is of the view that it would be unfair to the litigants to decide this appeal on this ground. This court has serious reservations, given the facts outlined earlier, about the bona fides, of the appellant in this litigation. However it appears that the learned judge below from his reasons, was minded to give the appellant his day in court. The respondent

has only challenged (unsuccessfully) one of those reasons given by the learned judge, so that the justice of the case would demand that this matter be remitted for trial.”. (emphasis mine)

38. The court therefore did not decide that the third action was an abuse of the process of the court; but remitted the matter for trial and fixed a timetable for the pleadings. But it is clear from *Mohabir* that the summonses filed prayed for identical reliefs and the applicant did not offer even a plausible explanation why he filed three writs for the same cause of action; and the court found that the appellant was never interested in pursuing the first claim. These are distinguishing features from the case before me, in that in this case the three claims were not the same cause of action; even though I agree with learned senior counsel for the applicant that the effect or goal of the claims is the same. Moreover, it could not be properly said that the claimant was never interested in pursuing the first claim. But what is noteworthy about *Mohabir* is the finding of the court that the justice of the case would demand that the matter be remitted for trial.
39. It seems to me that the court has a discretion to strike out a case as an abuse of the process where there has been contumelious conduct on the part of the claimant, that is to say, conduct which shows a deliberate failure to comply with specific orders of the court, or where the claimant was guilty of a series of separate, inordinate and inexcusable delays, in complete disregard of the Rules of the Court.

The facts of this case show several failures to comply with orders of the court, delays and various breaches of the Rules of Court by the claimant. But before exercising the discretion to strike out a claim as an abuse of the process of the court, although there are non-compliance with orders and breach of the Rules, the court ought to look at the facts and circumstances of the particular case in question and the need of the court to allot its own limited resources to other cases, and ask itself the question: Is it just and fair that the claim should be struck out as an abuse of the process of the court? This is the general principle of the cases examined above.

40. Let us examine once again the circumstances of this case. The claimant with respect to the first claim had conceded at the first case management conference that the claim did not disclose a cause of action, and was granted leave to amend the statement of claim. The claimant failed to comply with several extensions of time to file the amended statement of claim and also failed to comply with the time period ordered by the court to file witness statements. Just before the first claim came up for trial, the claimant, as we saw above, discontinued the claim.
41. The second claim was not served within the time prescribed by the Rules. At a hearing on 7th December, 2007, the claim was adjourned sine-die because, according to Mr. Godfrey, of breach of the Rules as to service. For about ten months after the matter was adjourned the claimant did not take any steps to resuscitate the matter by applying for a new date. It was the defendant who applied for a new date

which was set for 23rd October, 2008, where, as we saw above, it was dismissed for non-appearance by or for the claimant. There seems to have been an explanation for the non-appearance by or for the claimant. In an affidavit in this matter, dated 12th November, 2009 sworn to by Aldo Reyes, attorney-at-law, is exhibited as A.R. 4, another affidavit by Santiago Gomez dated 31st December, 2008 who seems to be giving an explanation for the non-appearance of the claimant or his attorneys at the hearing on the 23rd October, 2008. At paragraphs 6 and 7 of his affidavit, Mr. Gomez who was the local agent for the claimant swore as follows:

“6. On 23rd October, 2008 at approximately 9:45 a.m. my office received a call from the office of Pitts & Elrington asking if we knew that we had court that morning.

7. Prior to that we were never notified of the date as we had previously received a notice setting the date for the 28th October, 2008 and were working and preparing for that date.”

42. This witness in paragraph 9 of his said affidavit said that his new attorneys checked with his previous attorneys to enquire why the new attorneys were not informed of the date of hearing 23rd October, 2008, and was told by the previous attorneys that when they received the notice of 23rd October, 2008 hearing, as they had already delivered the file in relation to the claim to the claimant, they did not know who

were the new attorneys of the claimant and did not know where to send the notice.

43. It seems to me that the above is a plausible explanation why the claimant or his new attorneys did not attend the hearing on 23rd October, 2008. It is noted that the notice had fixed the hearing at 9:00 a.m. on 23rd October, 2008. As the authorities examined above clearly show, the court before exercising the discretion to strike out a claim as an abuse of the process, would consider whether there were explanations by the offending parties for their actions, and what would be just and fair in the circumstances of the case.

44. What causes some amount of judicial uneasiness or judicial suspicion, is the meagre price of \$13,500 for which the shares were transferred to the second defendant company, when the said amount of shares, about six years earlier, were bought for \$80,000 to \$100,000 US dollars. The question which would arise is this: Did Sosa commit a fraud on the claimant company, as alleged, by transferring the shares at such a price, when the company in which the shares were bought, had a mortgage from several banks in the sum of millions of dollars and had property worth millions. Moreover, the claimant states that it has not received any money for the purported transfer of the 13,500 shares. In the light of these issues which raise a suspicion of fraud, would justice and fairness dictate that the claimant be allowed to litigate the issue in court about the transfer of the shares?

45. It seems to me that the equitable jurisdiction of the Supreme Court would not allow its discretion to be used in favour of any party against whom there is a suspicion or a likelihood of fraud without some form of investigation. As Lord Denning says in *Lazarus Estates Ltd. v. Peasley 1956 1 Q.B. 702 at p712*, “fraud unravels everything.” The essence of the claimant’s case, is that the 13,500 shares had been fraudulently transferred; that a fraud was perpetuated against it. Clauses 6, 8 and 11 of the statement of case in the third claim certainly raise issues of fraud. The clauses are as follows:

“6. On or about the 9th day of May, 2002 the said Amir Sosa without the knowledge of the other two Directors of the Claimant, in the absence of any agreement for sale between the Claimant and the 1st Named Interested Party purportedly executed and caused the Claimant’s seal to be affixed to a purported Instrument of Transfer of Shares transferring the Claimant’s 13,500 shares in the Defendant Company to the 1st Named Interested Party.

8. No consideration was paid by the 1st Named Interested Party to the Claimant for the said 13,500 shares although the consideration disclosed on the Transfer Instrument was \$13,500.00

11. On the 6th October, 2006 the Claimant herein filed A claim Form in the Supreme Court alleging that its

13,500 shares in the defendant had been fraudulently transferred to the 1st Named Interested Party and petitioning the Court for a rescission of said transfer.”

46. When one considers the claim and the facts as shown above, a suspicion or likelihood of fraud cannot be easily dismissed. The Supreme Court, the guardian of the rights of the individual, would be amiss in its duty if it turned away a litigant who alleged fraud against its property, especially where the evidence in support of the allegation, raises a suspicion or likelihood that a fraud may have been perpetuated against him or his property. Such a litigant, in my view, ought to have his case litigated on its merits. Justice and fairness require that it should be so, even though the litigant had committed breaches of the Rules and orders made at case management.

47. The allegation of fraud may not have any merit. It may turn out at the trial, after detailed probing of the evidence by a skillful cross-examiner, that any suspicion or likelihood of fraud may be groundless, but the court should not, in the circumstances of the case prevent a litigant from access to the court to prove the allegation.

On the question of access to the court, I have, with the greatest respect, to agree with the view of Lord Millett in *Johnson v. Gore Wood Co. 2002 A.C. 1* where he said:

“It is one thing to refuse to allow a party to relitigate a question which has already been decided, it is quite another to deny him the

opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953).”

48. The above views are particularly relevant to the Independent Commonwealth Caribbean countries, one of which is Belize, which have written Constitutions which, in my view, may well guarantee a constitutional right of access to the court. In the light of that right, the views of Auld LJ in *Bradford and Bingley Society v. Seddon* 1999 4 *A.E.R.* 230, are appropriate:

“The need for caution

A further pointer in the direction of requiring the party raising the issue of abuse to establish it, and against that of obligating the claimant to persuade the court that there are ‘special circumstances for his ‘relitigation, is the need for caution before striking out claims without a full hearing of their merits and demerits.”.

49. For the reasons given above, I refuse the application to strike out as an abuse of the process of the court, claim No. 354 of 2009. This claim was filed on 13th April, 2009. An acknowledgment of service was filed on 14th May, 2009 and the No. 1 and 2 defendants filed a defence on 4th

June, 2009. In order to further manage the process I order a case management conference for 3rd May, 2010.

50. **Conclusions:**

I make the following orders:

1. The application to strike out claim No. 354 of 2009 and enter judgment for the applicants is dismissed.
2. A case management conference with respect to the claim No. 354 of 2009 is fixed for 3rd May, 2010 at 9:00 a.m.
3. The applicants to pay to the claimant costs, to be agreed or taxed.

Before concluding the judgment, the court expresses its appreciation to learned counsel on both sides for their helpful legal submissions in this matter.

Oswell Legall
JUDGE OF THE SUPREME COURT
10th March, 2010

