Strike out - appeal against a decision of the Master of 13 January 2021.

# [2021]JRC196

**ROYAL COURT**
**(Samedi)**

**27 July 2021**

**Before : T. J. Le Cocq, Esq., Bailiff, sitting alone.**

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| **Between** | **Badrul Huda** | **Plaintiff** |
| **And** | **Minister for Health and Social Services** | **Defendant** |

**Advocate I. C. Jones for the Plaintiff.**

**Advocate J. P. Rondel for the Defendant.**

**JUDGMENT**

**THE BAILIFF:**

1. This is an appeal by Badrul Huda ("the Plaintiff") against a decision of the Master of 13th January 2021, in which the Master for the reasons that he set out in his Judgment of that date (under reference Huda v Minister for Health and Social Services [2021] JRC 007 ("the Judgment")) refused to strike out the answer of the Minister for Health and Social Services ("the Defendant").

2. The Plaintiff's Notice of Appeal contains two grounds. The first is that the Defendant's answer should have been struck out by the Master as a result of the Defendant's failure to complete a discovery exercise in accordance with the Order of the Court of 6th August 2020 ("the Court Order") which was, in express terms, an "unless order". The second ground is that because the Master did not strike-out the Defendant's answer pursuant to Rule 6/13(d) of the Royal Court Rules 2004 (as amended) (Rule 6/13D), the Master permitted an abuse of the process of the Royal Court and it was no longer possible for the Plaintiff to receive a fair trial.

3. The Judgment was typically comprehensive running to some 91 paragraphs. The background to this application is set out in Paragraph 3 – 11 of the Judgment which, for ease of reference, I set out below:

***"Background***

***……***

***3. The central relevant events leading to the present proceedings were summarised at paragraphs 9 to 33 of my previous decision which I also adopt. They began at the end of June 2016 with a complaint by patient A. This complaint led to a referral about the plaintiff's conduct being made on behalf of the defendant to the General Osteopathic Council ("GOC" ) in August or September 2016 in breach of the defendant's own procedures – the precise timing of the referral is in dispute. The plaintiff was then suspended from practice on 7th November 2016. On 2nd December 2016, the GOC wrote to the plaintiff to indicate that it had found a case to answer. The plaintiff's suspension was lifted subject to certain conditions on 5th January 2017. However, the final hearing did not take place until 19th – 25th July 2018. Following an application on behalf of the plaintiff to the GOC that there was no case to answer, the complaint against the plaintiff was dismissed.***

***4. In my previous judgment I found there was an arguable claim of misfeasance in public office on the basis of untargeted malice (see paragraphs 80-84). The persons alleged to have acted in such a manner against the plaintiff on behalf of the defendant are Lorraine Wells, Mary Campfield, Miss Christine Blackwood and Dr Susan Turnbull.***

***5. Although the defendant is described as being the Minister for Health, the individual holding the position at the time of the relevant events was former Senator Andrew Green.***

***6. Following the previous judgment being handed down, the parties were directed to seek to agree directions in relation to discovery (and amendment to pleadings following discovery) to reflect the previous judgment (see paragraph 5 of the Act of Court of 17th February 2020). This direction led to the Act of Court dated 15th April 2020 where the parties were required to provide discovery by Friday, 31st July 2020.***

***7. The same Act of Court identified the email accounts to be searched by the defendant as well as the search terms to be used for each email account and the periods of the search. Those periods were generally for 29th June 2016 to 20th July 2018. 36 email addresses were identified. The main argument concerned the extent of the time period applicable for searches of email accounts. I ruled that the period of searches was to be for the period***

***from the date of patient A's complaint until the GOC ruled there was no case to answer. However, in the case of Mr. Chris Dunne, the then Director of Community Care, the period was extended until the plaintiff's complaint to the States Complaints Board ("SCB") was concluded on 26th October 2018.***

***8. At the hearing on 15th April the defendant was represented by Advocate Lacey of Lacey Advocates. I encouraged her to consider using e-discovery providers to carry out the searches I had required using appropriate artificial intelligence tools. This was because I regarded this as more efficient than someone within the information technology department of the States applying search terms to email accounts over a two-year period. My concern was the amount of data that might have to be searched. Advocate Lacey reassured me that she was very familiar with the States' systems and so expert assistance would not be necessary. I made it clear that I expected compliance with the deadline I had set.***

***9. On 9th July 2020 Advocate Rondel took over conduct of the case from Advocate Lacey.***

***10. On 6th August 2020 the deadline for the defendant's discovery exercise was extended to close of business Friday, 28th August 2020. Paragraph 2 of the Act of Court of 6th August 2020 provided as follows:-***

***"2. if the Defendant fails to provide discovery pursuant to the deadline extended by paragraph 1 of this order, then the Defendant's answer will be struck out automatically without further order…."***

***11. This order followed a summons issued by the defendant on 4th August 2020. The plaintiff had indicated it was minded to apply for judgment. However, I indicated that I would take some persuasion to grant judgment as a result of which the summons was dealt with by consent leading to the Act of Court of 6th August 2020. I had also indicated that an unless order was justified because of the length of time the Modernisation and Digital Department of the States (which looks after the States IT systems generally) had taken to comply with the orders I had made on 15th April 2020."***

4. The procedural background relied upon by the Plaintiff in this appeal is set out at Paragraph 1.2 of the Plaintiff's skeleton argument which I also adopt for ease of reference. It is as follows:

*"(i) On 15th April 2020, the Court, having heard argument, made an order for general discovery ("the Discovery Order") pursuant to Rule 6/17 of the Royal Court Rules 2004 (as amended) ("the Rules"). The Discovery Order detailed, inter alia, that the Defendant was required to search various email accounts as per a schedule, which was attached to and formed a part of the Discovery Order. The deadline for compliance with the Discovery Order was 31st July 2020:*

*(ii) On 17th June 2020, Lacey Advocates, on behalf to the Defendant wrote to the Plaintiff requesting an extension to the deadline specified in the Discovery Order.*

*(iii) On 23rd June 2020, the Plaintiff responded, explaining that no extension would be agreed;*

*(iv) On 25th June 2020, the Plaintiff wrote again to the Defendant raising various queries. These queries were raised in response to the indication of the Defendant that the matter would be returned to Court;*

*(v) On 8th July 2020, the Plaintiff wrote again seeking a response from the Defendant to (iii) and (iv) above. It is noted that at this point the deadline in the Discovery Orders was less than 3 weeks away;*

*(vi) On 9th July 2020, the Plaintiff is advised that Lacey Advocates' retainer has been terminated and that Advocate James Rondel of the Law Officers' Department was coming on to the record;*

*(vii) On 31st July 2020, the Defendant files its first affidavit of discovery (the "First Affidavit") in accordance with the deadline. Within the First Affidavit, the Defendant concedes that it has failed to comply with the Discovery Order;*

*(viii) On 4th August 2020, the Defendant serves a summons on the Plaintiff seeking an extension to the deadline specified in the Discovery Order;*

*(ix) On 6th August 2020, the Court orders by consent that the deadline for the Discovery Order is extended to 31 August 2020. That order for an extension was an 'unless order' which specified that failure to comply with the Discovery Order by 31st August 2020 would result in the automatic strike-out of the Defendant's Answer;*

*(x) On 28th August 2020; the Defendant provided a second affidavit of discovery (the "Second Affidavit");*

*(xi) By letter dated 7th September 2020, the Plaintiff invited the Defendant to apply to the Court for relief from sanction because it was clear from the content of inter alia the Second Affidavit that the Defendant had, by its own admission failed to comply with the terms of the Unless Order; and*

*(xii) On 17th September 2020, the Plaintiff served a summons seeking the strike out of the answer of the Defendant;*

*(xiii) On 20th October 2020 the Master heard the strike-out application and thereafter made various further orders for the parties to comply with pending his decision;*

*(xiv) On 13th January 2021 the Master handed down the decision refusing the strike-out application at the same time as ordering the Defendant to pay the Plaintiff's costs on the indemnity basis;*

*(xv) On 20th January 2021, the Plaintiff served the notice of appeal giving rise to this hearing.*

**The Law**

5. The jurisdiction on appeal from the Master in matters such as this has been frequently stated. I could refer many cases in this regard but suffice it to say that in AC Mauger & Sons Ltd v Allscot Ltd [2011] JRC 048 the Court said:

***"This Court should apply the traditional test for appeals from the Master, namely that this Court was entitled to come to its own decision on the matter whilst having due regard to the decision of the Master."***

6. The Court has in other cases made the point that the Master is an experienced procedural judge and before that a litigation lawyer that the Court was in general terms minded to pay a high measure of regard to the exercise of his judgment and discretion.

7. In terms of the Law applicable to the Court's discretion where striking-out for breach of its Orders is concerned, both parties rely upon the case of Newman v de Lima [2018] JRC 155, a Judgment

of the Master. In referring to a relief from sanctions issue and the overriding objective, the Master in that Judgment referred to the case of Denton v TH White Limited [2014] 1WLR 3926 quoting from it as follows:-

> ***"24. We consider that the guidance given at paras 40 and 41 of the Mitchell case remains substantially sound. However, in view of the way in which it had been interpreted, we propose to restate the approach that should be applied in a little more detail. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]". We shall consider each of these stages in turn identifying how they should be applied in practice We recognise that hard-pressed first instance judges need a clear exposition of how the provisions of rule 3.9(1) should be given effect. We hope that what follows will avoid the need in future to resort to the earlier authorities."***

8. In paragraph 29 of Newman, the Master said this:

> ***"29. The Defendant had failed to apply for a variation before the time limit had expired as required by paragraphs 19 and 20 of Practice Direction RC17/05. These paragraphs states:***
>
> > ***"19. It is essential that any party who wishes to vary a direction takes steps to do so as soon as possible and in particular before any time limit for compliance with the direction has expired.***
> >
> > ***20. Any such application shall be accompanied by an appropriate written summary and submissions setting out what steps have been taken to adhere to the timetable set, why the previous directions have not been complied with, what variation is sought and its impact on any directions previously given."***

9. At paragraph 45 *et seq* of Newman the Master said:

***"45. There are also other helpful observations in Denton which apply to the conduct of litigation in this jurisdiction. I therefore refer to paragraphs 40 and 41 of Denton which state:***

***"40. Litigation cannot be conducted efficiently and at proportionate cost without (a) fostering a culture of compliance with rules, practice directions and court orders, and (b) co-operation between the parties and their lawyers. This applies as much to litigation undertaken by litigants in person as it does to others. This was part of the foundation of the Jackson report. Nor should it be overlooked that CPR r 1`.3 provides that "The parties are required to help the court to further the overriding objective". Parties who opportunistically and unreasonably oppose applications for relief from sanctions take up court time and act in breach of this obligation.***

***41. We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b), where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as envisaged by the new CPR r 3.8(4)."***

***46. Where I consider that a different approach should be taken to Denton relates to the exercise of discretion. The third stage of Denton was directly affected by the two factors listed in 3.9(1) if the CPR. The Court of Appeal in Denton stated that these factors were:-***

***"…. of particular importance and so particular weight should be given at the third stage, when all the circumstances of the case are considered."***

***47. In my judgment in this jurisdiction, the discretion is a more general one. This discretion still requires me to consider whether the case can be dealt with justly and at proportionate cost and any relevant factors listed in Rule 1/6. However, I consider that I am also required to look at the case as a whole and the nature of the proceedings in particular, what is in issue where some form of strike out of a claim is contemplated. In cases involving a failure to issue a summons for directions (albeit pre-dating the overriding objective), the Royal Court has noted that the most severe sanction of striking out a***

***plaintiff's claim should not be applied if there are other sanctions which could be applied which would enable justice to be done between the parties – see for example Viera v Kordas [2014] JRC 042 at paragraph 19 and Mayhew v Bois Bois [2016] JRC 024 at paragraphs 8 and 9. Whether the failure is to issue a summons for directions required by the Rules or a failure to comply with a particular order. I consider that the same approach should be taken to imposition of sanction which has the effect of striking out a claim or counterclaim or an answer, thus depriving a party of their day in Court.***

***48. I also consider it may be possible to make orders which fall short of striking out the entire claim. Depending on breach it may be possible to limit the sanction to striking out part of a case or that if a particular step is not complied with part of the case will be struck out or evidence may not be adduced on a particular issue. There is also the sanction of costs.***

***49. I have referred to these different possibilities available to the Court because they are all illustrative of the more general discretion available to the Court where a party has not complied with a Court order. In reaching this view, it should not be forgotten that procedure is a means to an end namely a trial or settlement and breaches should be kept in that context. The key issue is therefore the effect of any non-compliance and whether or not a fair trial can take place after a breach. I accept I have to also take into account, if it is right to impose a sanction for non-compliance whether that non-compliance was either deliberate or there is no justification for it. In every case there will always come a point where the conduct of a party in ignoring Court orders will lead to the ultimate sanction of a case being dismissed even if a trial could still take place. This judgment should not therefore be taken as any indication that non-compliance of any Rules and Practice Directions is acceptable, will be tolerated, or will not, in appropriate cases lead to the ultimate penalty of a claim or answer being struck out.***

10. I take these to be the principles that I apply in considering this matter and indeed there does not appear to be any dispute between the parties that this is the appropriate approach to be taken.

11. It may at this point be worth noting that in a judgment issued after the instant case in the case of Camilla de Bourbon des Deux Siciles v Strang and Others [8 April 2021] JRC 109 the Master was then considering whether or not an unless order had been breached. He made the following observation at Paragraph 78:

***"…. An unless order is a serious obligation intended to make it clear to a party that if they do not comply with court orders that a sanction may follow."***

I agree.

**The Order**

12. The Order which was breached by the Defendant was as I have indicated in the quote from the Judgment above, in the following terms:

> ***"If the Defendant fails to provide discovery pursuant to the deadline extended by Paragraph 1 of this Order, then the Defendant's answer will be struck-out automatically without further order …."***

13. It is common ground that the Defendant was in breach of the Order set out above and, therefore, *prima facie* on a strict application of the Order in its term the answer would be deemed to be struck-out.

**The Judgment**

14. After setting out the background of the matter above, at paragraph 33 of the Judgment the Master reflected on the fact that there was serious force in the Plaintiff's criticism of the failure by the Defendant to explain a document preservation policy where litigation was reasonably in contemplation and that the Defendant only appeared to have started to take steps to preserve documents at the directions hearing on 15th April 2020. The Master made it clear that any party, when proceedings are threatened, should be taking steps to preserve documents. Similarly any lawyer when instructed should be putting their clients on notice of the obligation to preserve documents. With this also I can only agree.

15. Because of these concerns the Master explained that he had required the Defendant to file a further affidavit to answer those various points; a further affidavit was filed on 28th October 2020. The Master also sought further submissions from counsel by way of analysis of a number of emails in part because he needed to assess the seriousness of the significance of a failure to comply with any court order. He nonetheless indicated that *prima facie* there appeared to have been a serious failure. The Master at Paragraphs 39 – 42 of the Judgment observed that he had a discretion as to whether or not to give effect to an unless order.

16. In referring to the further affidavit the Master said that it contained an explanation as to who was responsible for documentation and what policies were in place. In particular, the Master referred to paragraphs 19 and 20 of the affidavit which were in the following terms:

> ***"19. I did not write to the relevant employees in relation to data retention as I ordinarily would have done. I can only explain the submission as being as a result of a substantial document retention exercise which had already taken place in respect of this dispute and therefore I did not consider contacting the relevant individuals in relation to document retention, or to ask them to preserve their documents and records in circumstances where they had already been subject to certain disclosure requirements. Whilst I should have nonetheless written to the relevant employees, and put them on notice to retain all of their documents and records, the complaints made by the Plaintiff and the necessity for internal investigations to be conducted, as well as the subject access request and the States Complaints Board Hearing led to a large amount of documents, and indeed the documents which go to the heart of the Plaintiff's dispute with the Defendant being retained and indeed disclosed to the Plaintiff.***
>
> ***20. I regret not having not taken further steps to ensure that all electronic records and emails in respect of this case are identified, downloaded and preserved. However, I reiterate this was not intentional."***

17. At paragraph 48 *et seq* of the Judgment, the Master then entered into a discussion of the issues before him before reaching a conclusion.

18. At paragraph 54 of the Judgment he said this:

> ***"54. In relation to the present case, the defendant is firstly in breach of paragraph 4 and the schedule to the Act of Court of 15th April 2020. The email accounts required to be searched have not been searched because they had not been preserved by the defendant prior to the making of the order."***

19. At paragraph 55 the Master said:

> ***"55. This breach is serious because, as noted above, discovery plays a significant role in relation to the resolution of the vast majority of disputes before the Royal Court."***

20. At paragraphs 56 and 57, the Master went on to say:

> ***"56. In this case the breach is more serious because the defendant has failed to follow its own policies and procedures, such as they are, and has failed to adhere to the requirements of Practice Direction RC17/07. Paragraphs 3 to 5 of that Practice Direction provide as follows:-***
>
> ***"3. As soon as a party is aware that litigation is contemplated, that party must immediately take all reasonable steps to ensure that potentially discoverable documents are preserved.***
>
> ***4. As soon as a party retains a legal representative, that legal representative must inform its client of the need to preserve all potentially discoverable documents.***
>
> ***5. The party and its legal advisers in either case shall take all reasonable steps to ensure that no potentially discoverable document is destroyed pursuant to any document retention policy or otherwise in the ordinary course of business."***
>
> ***57. In this case the defendant had at least four separate opportunities to preserve documents:-***
>
> ***(i) When the plaintiff wrote to Senator Green on 20th November 2016 complaining of the Jersey's handling of the matter and asserting that the actions of Senator Green had caused him upset and damaged his reputation and loss of earnings. I consider that litigation was in reasonable contemplation at this stage given the assertions of damage to reputation and loss of earnings.***
>
> ***(ii) If litigation was not in reasonable contemplation when the plaintiff complained at the end of 2016 including making a subject access request for relevant documents, litigation was clearly in contemplation when a letter before action was sent on 28th March 2017. I do not regard the fact that this letter was threatening defamation proceedings in England as significant. The underlying factual complaint namely a referral by the defendant of the plaintiff to the GOC was at the heart of the threatened proceedings. The obligation to preserve potentially discoverable documents should have been triggered on receipt of this letter at the latest.***

***(iii) Further opportunities were missed when Advocate Jones sent his letter before action dated 13th December 2018 and when proceedings were served in July 2019.***

***(iv) If the defendant had applied, its own policies properly either when the plaintiff first complained or when the first letter for action was sent then all of the email accounts would have been preserved. Even if steps had been taken as late of service of the proceedings the email accounts of the most significant individuals involved i.e. Senator Green and Miss Blackwood could have been preserved using the back-up tapes I am now informed are in place."***

21. At paragraph 64 of his Judgment the Master says:

***"64. I should therefore have been told prior to making the order of 6thAugust 2020 that ten email accounts had been lost irretrievably and that what was expected by the Act of Court of 15th April 2020 in terms of what searches were going to be carried out and which email accounts were going to be searched, could not be given effect to. This is a very serious failing. I should also have been provided with the detailed explanations I have now received."***

22. He carried on at paragraphs 65 and 66 in the following terms:

***"65. Returning to the second question formulated in Newman, is there any excuse for these breaches? In my judgment there is not because had the defendant applied its own policies and procedures then the relevant documents would have been preserved. The defendant should also have come to court with the information that has now been provided. It should not have taken an order from me requiring such information to have led to its production and the admissions now made. This is particularly troubling when the defendant is a government minister.***

***66. There is therefore no justification for the breach and to be fair to the defendant, Miss Adkins in her third affidavit did not advance any justification for failure to preserve email accounts."***

23. In the Judgment the Master then turned to consider whether or not the breach of the unless order, which he had clearly viewed as very serious, should nonetheless not lead to the Defendant's

answer being struck out. He referred to his own judgment in Powell v Chambers [2018] JRC 169 from which, at Paragraphs 68 of the Master's Judgment, he quoted the following extract:

> ***"68. I observed that each case had to be considered on its own facts but that the underlying approach might be encapsulated by the following:-***
>
> ***"An unless order was an order of last resort, not made unless there was a history of failure to comply with other orders. It was the party's last chance to put its case in order.***
>
> ***Because it was the last chance, a failure to comply would ordinarily result in the sanction being imposed.***
>
> ***The sanction was a necessary forensic weapon which the broader interests of the advanced to exonerate the failure.***
>
> ***It seemed axiomatic that if a party intentionally flouted the order he could expect no mercy.***
>
> ***A sufficient exoneration would almost invariably require that he satisfied the court that something beyond his control had caused the failure.***
>
> ***The judge would exercise his judicial discretion whether to excuse the failure in the procedural inefficiencies causing the twin scourges of delay and wasted costs. The public administration of justice to contain those blights also weighted heavily. Any injustice to the defaulting party, though never to be ignored came a long way behind the other two. (Hyler Information Systems Ltd v. County City Council, [1997] 1 W.L.R. 1666, CA)."***

24. The Master concluded that had those principles applied and there was nothing more in this jurisdiction then the unless order would have taken effect in its terms. However, he made the statement that the Court possessed a more general discretion than set out above and, at Paragraph 72 of the Judgment said this:

> ***"72. In my judgment, I have to balance these extremely serious and inexcusable breaches against what discovery has been provided in order to decide whether I should vary the effect of the unless order. Therefore I asked both parties for an analysis of the defendant's discovery to try to ascertain***

***whether the material disclosed told the whole or most of the story so that a trial could proceed safely or whether there might be significant gaps in respect of material disclosed such as to prevent a fair trial."***

25. The Master considered the analysis carried out by the Advocates of the documentation that had been provided whilst acknowledging the Plaintiff's submission that it was difficult to know what had not been provided. I will not in this judgment set out the detailed explanation of the analysis in the Judgment. In reaching his final decision, the Master expressed the view that the Plaintiff's criticisms really amounted to specific discovery requests and reflected that a number of failures to provide information which now could not be remedied were troubling. In particular, at paragraph 86 of the Judgment he said this:

***"86. The failure to preserve Miss Blackwood's account is the most troubling because she was one of the decision makers and the most senior person involved who decide to make a referral. Senator Green, although the Minister of Health at the time only appears to have become involved after the plaintiff complained, and so what is most pertinent is what he may have been told about why a referral had been made. The same applies to other missing accounts as their involvement is about the handling of the plaintiff's complaint including the complaint to the States Complaint Board and they were only involved after the decision to refer has been made."***

26. In paragraph 87 of the Judgment he quotes an extract from the Leeds United Football Club v Admatch [2011] JRC 016A in relation to considering whether or not a case should be struck out. In that case Sir Michael Birt, then Bailiff stated the following:

***"I draw from the above authorities the conclusion that it is a strong thing to strike out a defence and there must be an abuse of process such as to render further proceedings unsatisfactory or prevent the court from doing justice or, to quote Page Commissioner, a party must have flouted or ignored the Court's orders or persistently conducted himself in a way that evinces an unwillingness to engage in the litigation process on an equal footing with the other parties."***

27. The Master's final conclusion is to be found at paragraph 88 of the Judgment which is in the following terms:

***88. In this case although I am extremely troubled as set out above by parts of the defendant's conduct and its failure to preserve documents, I do not consider that this conduct convinces me of the unwillingness to engage in the litigation process on an equal footing with other parties. In addition, a significant number of documents have been disclosed so that a large part of the factual matrix is known. Discovery has been provided from four of the five individuals named in the order of justice. Some emails sent to Miss Blackwood have also been recovered and disclosed from other email accounts. Furthermore, the duty of discovery is ongoing. The queries raised by the plaintiff which I have summarised above do require further investigation by the defendant both by further searches and by making enquiries of the individuals who may have sent or received the relevant emails. This may produce a fuller picture. Lawyers were also involved in both the defamation proceedings and the States Complaint Board hearing and so, if their files have not been reviewed already (as they should have been) they can be reviewed now for any relevant material. I have therefore concluded on balance however that a safe trial can still proceed notwithstanding the serious and inexcusable breaches that have occurred and so I should not the unless order to take effect even though in part it has been breached. I stress however that this has not been an easy decision and I came very close to allowing the unless order to take effect and the answer on liability to be struck out. If the Defendant's procedures do not change to comply with the relevant practice directions in future cases, the same forbearance may not be shown."***

28. The Judgment appeared to rely on the Admatch case set out above. It is right at this point to note that on my reading of that case, it was not concerned with the consequences of a breach of an unless order (although an unless order had been breached as part of the procedural background) but rather to a general application to strike out on the grounds of abuse of process. It is not clear from the judgment in that case that the Court intended the statement to apply in cases where there was a breach of an unless order.

29. It is equally clear in the Judgment that the Master viewed this decision as a very close thing and described the exercise of his discretion as *"forbearance"*. He imposed a *"price"* for permitting the Defendant to continue to defend the claim which was to answer additional queries raised by the Plaintiff's legal advisers at its own expense and for them to take further procedural steps. He also made a costs order that the Defendant must pay the Plaintiff's costs on an indemnity basis.

30. I have set out the Master's Judgment at some length as it was clear that the Master viewed the failings of the Defendant as serious and that certain of the failings, could not now be remedied.

**The Plaintiff's contentions**

31. The Plaintiff's arguments in this appeal are relatively straightforward.

32. The Plaintiff points to the quotations from the Judgment set out above and points to the section in the Admatch case quoted at paragraph 26 above, but makes the submission that whilst the Master considered a willingness of the other party to engage in the litigation process on an equal footing, he did not consider the other limb of the test he set out which is a flouting or ignoring of the Court's Orders. The Plaintiff submits that where the Defendant has flouted and ignored the Court's orders, as it was submitted was the case here, then the Master should have applied the principles in Admatch and given the unless order its effect.

33. The Plaintiff goes onto to argue that the Master's assertion that a "large part of the factual matrix is known" is difficult to justify in the circumstances where it is clear that information has been deleted in contravention of a discovery order. The Plaintiff argues, with which I have some sympathy, that it cannot be an answer to a failure to comply with discovery obligations to simply invite the Court to look at the documentation that has been disclosed. In addition to the documents that can no longer be provided from Ms Blackwood and Senator Green the Plaintiff argues that the email account of Mr Dunne is of equal importance as it was he who directed the investigation into the Plaintiff's complaint and he was at the forefront of the complaint handling before the States Complaints Board. Significant email traffic would have been anticipated. The Plaintiff complains that we are left to speculate on what might have been there and the Plaintiff is denied certainty and the documentation he is entitled to see.

34. The Plaintiff goes on to argue that the Defendant should not be allowed to maintain its defence in circumstances where it has taken action to prejudice the possibility of the Plaintiff receiving a fair trial. The Plaintiff, in his skeleton argument, says:

> ***"The Defendant is not allowed to profit or even have the possibility of profiting from actions that it has taken in relation to discover more material, i.e. destroying it. It is submitted that it would be the definition of an abuse of process."***

35. In summary, really, the Plaintiff's case is that it is difficult to reconcile the Master's material findings with his ultimate decision.

36. The Plaintiff further makes the submission that there is no basis for the Master to show forbearance. Forbearance is not an appropriate approach.

37. Advocate Lacey, the Defendant's former legal adviser, had urged the Court to rely her own expertise and familiarity with the Minister's policies and procedures in carrying out the discovery exercise. It appears, without justification, so the Plaintiff argues, that the Defendant has been shown the benefit of the doubt in circumstances where, it is suggested, other litigants might not be.

38. In support of this somewhat difficult submission the Plaintiff relied on the case of Oleg Sheyko v Consolidated Minerals Limited [2021] JRC 006, where even though there was not an unless order in place, the Master struck out the Defendant's answer and counterclaim having concluded that the various discovery orders applicable in that case had been breached by the Defendant. It is not suggested by the Plaintiff that the facts in that case are similar to the facts in the instant case but the Plaintiff calls upon that case as illustrative of the Master's approach to similar issues.

39. At the time of the filing of the skeleton argument of the Plaintiff on 9th March 2021, the Plaintiff argued that the Defendant remained in breach of Orders of the Court because they had not answered the additional queries raised or checked the files that the Master had required in the Judgment.

**The Defendant's contentions**

40. The Defendant argues that the Court should uphold the Master's decision and dismiss the appeal. The Defendant relies on the Master's assessment that a safe trial can still proceed and therefore argues that the correct and proportionate decision has been reached by the Master.

41. The Defendant argues that to strike out its answer would be to drive it from the seat of justice where the Plaintiff's Order of Justice contains a number of serious and wide-ranging allegations in relation to the conduct of public officials. It is argued that the record would then show that there had been some form of misfeasance in public office and the Plaintiff would not have to prove that serious allegation.

42. I do not fully understand this argument. It would, so it seems to me, very often be the case that where a pleading was struck out because of the failure to comply with orders of the Court (as opposed for example, as disclosing no cause of action) then the consequence would always be substantial for the party whose pleading was struck out. I cannot see that it is an argument

against striking out to say that the other parties case, which contains unwelcome allegations, would thereby succeed.

43. The Defendant accepts that the failure to comply with the Order of the Court was a serious one and indeed in its skeleton argument, the Defendant concedes *"it is inevitable that as a result of its failure to preserve the relevant inboxes, that some documents would not have been preserved and, as a consequence, will not form part of the factual matrix of the case and will not be available to either the Applicant or the Court."*

44. The Defendant conceded that the first two grounds of the test set out in Newman, namely, that the failure to comply with the Order was a serious one and the default was inexcusable were met. The Defendant rather relies on the third test as not having been met because, on its argument the case can still be dealt with *"justly and at a proportionate cost".*

45. The Defendant relies on the overriding objective and on the Master's decision that, on balance, a safe trial could proceed.

46. The Defendant argues that this was an entirely appropriate exercise of the Master's discretion and that as a significant number of documents had already been disclosed a large part of the factual matrix was known. The Defendant argues that it is properly engaging with the Court process and indeed the Plaintiff had accepted that its failures were not as a result of bad faith. It is appropriate to take these matters into consideration when looking at the case as a whole and the nature of the proceedings.

47. The Defendant argues that other appropriate sanctions could have applied including full indemnity costs.

48. The Defendant goes onto argue that:

> ***"Whilst the Appellant's conclusion is correct that (emphasis added)***
>
> ***(i) He might be prejudice as a result of the Respondent serious and inexcusable breaches;***
>
> ***(ii) The Respondent may gain an advantage in respect of the same and***

***(iii) That the Court will never know what documents are being destroyed as a result of the Respondent's failings, it is also correct that if the Respondents answer is struck out the Plaintiff will have been awarded a windfall victory and the Respondent will have been irrevocably prejudiced. This is because the Respondent would have been denied the opportunity of defending itself at trial against allegations of the utmost severity which have been made by the Appellant against officers and servants of the Respondent. It is respectfully submitted that to reach such a position would be neither just nor proportionate."***

**Discussion and conclusion**

49. As I have said it is clear that the Master did not consider this to be an easy decision.

50. In bold terms, in his view, the Defendant was guilty of a serious and inexcusable breach of an unless order and concedes that it might have prejudiced the Plaintiff but that a fair trial can still take place.

51. It is difficult given that the Master in the Judgment relied on Admatch, not to conclude that whereas the Master addressed the question of whether or not the Defendant was failing to engage with the trial process on an equal footing he did not engage with whether there had been a flouting or disregard of the Orders of the Court. Had he asked himself that question, he would in my judgment inevitably have concluded that there had been.

52. On the one hand there is the risk of prejudice to a party who may otherwise have benefitted from a proper compliance with the Order of the Court and on the other hand, the prejudice to another party who if the answer is struck out the Judgment will be entered on a factual basis which remains disputed. The fact that giving a judgment does not amount to either an acceptance by the Defendant of the factual basis of the claim still less than any finding by the Court to that effect, the record would, however, reflect that judgment had been taken.

53. It is always uncomfortable for a judge to strike a case out other than in the plain circumstances where it is without merit. However, orders of the Court are to be followed and in my judgment a breach of an unless order (which is already an extremely serious order and should have placed the Defendant on the highest possible alert to comply with it) which may have prejudiced the party who, in terms of the breach of the order, is the innocent party must it seems to me other than in

the most exceptional circumstances be met with the natural consequences of that breach – namely that the pleading is struck out.

54. Accordingly with reluctance, I am driven to the conclusion that this is not a matter for forbearance but rather of a clear breach of an Order of the Court in respect of which consequences should flow. I uphold the appeal, reverse the Master's Order, strike out the answer and enter judgment for the Plaintiff.

55. I leave over the issue of costs for subsequent argument.

**Authorities**

Huda v Minister for Health and Social Services [2021] JRC 007.

Royal Court Rules 2004.

AC Mauger & Sons Ltd v Allscot Ltd [2011] JRC 048.

Newman v de Lima [2018] JRC 155.

Denton v TH White Limited [2014] 1WLR 3926.

Camilla de Bourbon des Deux Siciles v Strang and Others [2021] JRC 109

Powell v Chambers [2018] JRC 169

Leeds United Football Club v Admatch [2011] JRC 016A

Oleg Sheyko v Consolidated Minerals Limited [2021] JRC 006