



[2022] JMSC Civ 217

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2022CV00892

BETWEEN	STEVEN SYKES	1st CLAIMANT
	LYNDEN NUGENT	2nd CLAIMANT
AND	KINGSTON & ST. ANDREW MUNICIPAL CORPORATION	1st DEFENDANT
AND	THE NATURAL RESOURCES CONSERVATION AUTHORITY	2nd DEFENDANT
AND	THE TOWN AND COUNTRY PLANNING AUTHORITY	3RD DEFENDANT

IN CHAMBERS

Mr. G. Goffe, instructed by Myers, Fletcher & Gordon for the Claimants

Ms. S. Smith instructed by the Bennett-Cooper Smith for the first Defendant

Mr. M. Ricketts instructed by Morjorn Wollock for the 2nd and 3rd Defendants

Ms. A. Thompson instructed by Nunes, Scholefield, DeLeon & Co. for the Interested Party

Heard: December 2 & 13, 2022

Disclosure - Application to strike out statement of case - Whether breach of order for specific disclosure – Whether legal professional privilege or relevance reasons to withhold

WINT- BLAIR, J

[1] This is an application to strike out the second defendant's statement of case for what the claimants' claim is non-compliance with the order of Master S. Reid(Ag) for specific disclosure. In the alternative, they seek an unless order within one day of any order granted by this court with costs.¹

[2] The claimants ground their application in Rule 28.14(2) of the Civil Procedure Rules ("CPR"). The following orders were made on August 12, 2022:

1. *"The first Defendant shall permit inspection of the Minutes of the Meeting of the Building and Town Planning Committee on the 17th November 2021, that was disclosed in its List of Documents filed on the 27th of May 2022.*
2. *The first Defendant shall file an amended List of Documents within 3 days of the date of this order and, within the same period, allow inspection of the minutes of the meeting of the first Defendant's Council at which it was decided that it did not require evidence of the service of a Notice of Intention to carry out the Building Works in respect of the construction of the cell tower at 1 Alysham Heights, Kingston 8, as stated in the Affidavit of Xavier Chevannes filed on May 17, 2022.*

¹ Filed on August 23, 2022

3. *The second Defendant shall file an amended List of Documents within 3 days of the date of this order and, within the same period allow inspection of:*
 - i. *The minutes of the meeting of the Town and Country Planning Authority held on the 16th of November 2021;*
 - ii. *The minutes of the meeting of the second Defendant, held on the 16th of November 2021; and*
 - iii. *The community survey referred to in the Affidavit of Peter George Knight filed on the 27th of May 2022.*
4. *Costs of this application to the Claimants.*
5. *The Claimants' Attorneys-at-law to prepare, file and serve Formal Order."*

[3] The claimants contend that despite requests for compliance the second defendant has failed and or refused to comply with the said orders. The minutes are necessary for the trial of the substantive claim which is set for hearing on December 20, 2022. At the time of filing the trial date was October 26, 2022.

[4] The claimants rely on the affidavit of Kesha Grant which states that at the hearing before the learned Master, the parties were ordered to file written submissions. The claimants and the first defendant complied with that order. However, the second defendant did not. They adopted the submissions of the first defendant and argued at the hearing that only a portion of the minutes were relevant and they should not be ordered to disclose the entire document.

[5] On August 17, 2022, the first defendant filed an amended List of Documents, disclosing the full minutes of the meeting held on November 16, 2021. The claimant's Attorney-at-law requested inspection of the document and a complete copy without redaction was sent by the first defendant's Attorney-at-law. On the same day, the

second and 3rd defendants filed an amended List of Documents but disclosed only extracts of the second and 3rd defendants' minutes of meetings held on November 16, 2021. They claimed a right to withhold the full documents on two grounds, that of relevance and legal professional privilege. The second defendant argues that the minutes purportedly contains legal advice from the second and 3rd defendants' Attorneys-at-law. These grounds had not been raised at the hearing before the Master.

[6] Emails from counsel for the claimants seeking inspection of the non-redacted minutes sent on August 17 and 18, 2022 were met with no response. The one-day trial of the claim was then scheduled for October 26, 2022. The claimants were not able to file their written submissions on September 5, 2022 as ordered by Palmer, J and were likely not going to be ready for the trial date which would cause the trial date to be vacated.

[7] The issues to be decided in this application are:

1. Has there been a breach of the orders of Master Reid(Ag.)
2. If so, should the second defendant's statement of case be struck out for non-compliance with the said orders.

[8] The claimants submit that there was an objection to the construction of a cell tower by Digicel (Jamaica) Limited ("Digicel"). The defendants approved Digicel's applications before the objections were received without consulting the residents and before the statutory minimum period for filing objections had expired. The first claimant is the president of the citizens' association in the affected area.

[9] The claimant submits that the second defendant filed an amended List of Documents and disclosed extracts of the minutes and the community survey. They also listed sections of documents in Schedule 1, Part 2 claiming lack of relevance or legal professional privilege. Inspection of the community survey and Digicel's application for planning permission has not been allowed despite there being no right to withhold inspection.

[10] The claimant submits that the orders of Master Reid(Ag.) concern specific disclosure under Rule 28.6(1). Further, that the importance of Rules 28.14(3) and (4) are that the court is concerned only with compliance of its orders and not with the defaulting party's reasons for non-compliance. The claimant admits that the order of Master Reid(Ag.) did not specify disclosure of Digicel's application for planning permission, however they should be allowed to inspect same and there has been no explanation for the refusal to permit inspection. There has been no appeal from the orders for specific disclosure. The orders are clear and do not speak to extracts of the minutes of the meeting specified. The opportunity to raise legal professional privilege was before the Master, the second defendant having not availed itself of that opportunity cannot do so now as at this late stage, it constitutes an abuse of process. On the issue of legal professional privilege the claimant relies on **Simmonds v Jamaica Co-operative Credit Union League Limited**² and **Waugh v British Railways Board**³.

[11] The second defendant in response submitted that on June 1, 2022, it filed and served its List of Documents in compliance with the orders of Palmer, J. Further, on August 12, 2022, Master Reid(Ag.) ordered the second defendant to comply with the orders set out herein. On August 17, 2022, the second defendant filed and served the amended List of Documents including an extract of the minutes of the meeting of the 3rd defendant held on November 16, 2021 as well as the community survey referred to. A right to withhold inspection of parts of the minutes in Schedule 1, Part 2 of the amended List of Documents was claimed by the second defendant with its reasons duly stated as per Rule 28.15(1) of the CPR. The claimants have taken issue with this position.

[12] The second defendant submitted further that, disclosure in the Supreme Court is governed by Part 28 of the CPR. The words directly relevant are defined in **Rule 28.1(4)**. The second defendant relies on the case of **Miguel Gonzales and Suzette**

² [2015] JMSC Civ 179

³ [1980] AC 521

Saunders v Leroy Edwards,⁴ for the meaning of directly relevant, citing paragraph [22] in support of their submissions.

[13] Further, Rule 28.15(1) grants a right to withhold disclosure or inspection. If a party does not agree with that claim of right, that person may apply to the court for an order for disclosure under Rule 28.15(5). The court may also examine the document to decide whether any claim brought under Rule 28.25(5) is justified.

[14] The second defendant submit that in its initial list of documents did not disclose the minutes of the meeting of the second and third defendants, nor the community survey. After the orders of August 12, 2022, the second defendant complied by filing and serving an amended List of Documents on the claimants' attorneys. The amended List of Documents stated that the second defendant had exercised its right under Rule 28.15(1), stating the reasons for disclosing only a part of the minutes. The reasons are that the matters contained in the minutes are not directly relevant to the case at bar. The meetings of the Town and Planning Authority ("TCPA") and the Natural Resources Conservation Authority ("NRCA") consider not only matters pertaining to the business of the Authorities but also other applications which do not form the subject of the claim. Additionally, part of the minutes of the second defendant's meeting was withheld from inspection on the ground of legal professional privilege.

[15] The second defendant takes issue with the claimant indicating that there was an order for specific disclosure. Arguing that the court did not determine whether the issue of what was directly relevant to the matter in issue nor that which was necessary to dispose fairly of the claim or the factor of cost.

[16] The second defendant reminded the court that the sanction of striking out is draconian and to be used sparingly where there are several other options open to the court to achieve fairness between the parties. It is a matter for the court to decide whether the second defendant has a right to withhold disclosure and not the claimant.

⁴ [2017] JMCA Civ 5

[17] Finally, the substantive claim concerns judicial review, it is doubtful whether the substantive matter can be properly resolved if the second defendant's statement of case is struck out in whole or in part.

[18] The factors to be considered in this application are:

- a. Whether the order of Master Reid (Ag.) was for specific disclosure
- b. Has the second defendant complied with the orders of the learned Master
- c. Has the respondent on the application, advanced any good reason for failing to disclose the documents specified in the order of Master Reid(Ag.)
- d. The merits of the case
- e. Prejudice to be caused by the grant or refusal of the orders sought
- f. The weight to be given to the respondent's conduct during the claim
- g. Delay
- h. What impact would delay have on the trial
- i. Whether the conduct of the respondent amounted to an abuse of the process of the court.
- j. The application of the overriding objective
- k. What is the appropriate remedy

Whether the order of Master Reid (Ag.) was for specific disclosure

[19] An application for disclosure was filed⁵ and served on the second defendant on the basis that it was evident from the second defendant's statement of case and

⁵ June 27, 2022

affidavit evidence, that it had documents that it had not disclosed. The application sought the filing of an amended list of documents by the second defendant and inspection of the minutes of meeting and community survey referred to above. The court granted the orders prayed on August 12, 2022.

[20] The amended list of documents was filed by the second defendant on August 17, 2022. Emails were sent by counsel for the claimants on August 17, 2022 concerning the failure of the second defendant to allow inspection as ordered by the court. Mr. Goffe, counsel for the claimants, also indicated that what he had received were extracts of the minutes, that any right to withhold inspection based on relevance was already determined by the learned Master from which order there has been no appeal. Further, any claim to legal professional privilege was not raised before the learned Master and were the court to consider it now, it would fail the dominant purpose test. See **Simmonds v JCCUL** [2015] JMSC Civ 179. He then requested minutes of the meetings without redaction, the community survey and the application for planning permission by Digicel dated November 15, 2021. There was no response, another email was sent on August 18, 2022, warning of the without notice application pursuant to Rule 28.14(2) for failing to respond. There was no response.

[21] There is no reference to the rule governing specific disclosure in the notice of application filed on August 23, 2022. The application was grounded on Rules 28.14(2) and 28.14(3). The claimants however specifically referred to the extract of the minutes and redactions to the said extracts in their grounds. They put the issue of non-disclosure and inspection before the learned Master who ruled in their favour. The second defendant had been put on notice in the email sent by Mr. Goffe that this issue remained unresolved. The second defendant can hardly complain to this court that the application before the learned Master was one for specific disclosure as standard disclosure orders had been made at a case management conference. The language used in the orders, the length of time given in the orders and the factual circumstances surrounding the making of the orders (redacted extracts of the minutes) all indicate that the orders were for a specific class of documents. This court cannot go behind the orders to undertake a review thereof.

Has the second defendant, complied with the orders of the learned Master.

[22] The orders made on August 12, 2022, in relation to the second defendant, outlines that within three days of the date of the order, inspection of the various documents indicated was to be allowed to take place. Up to August 18, 2022, there had been no inspection. The claimants state that the second defendant sent a redacted extract of the minutes of meetings and claimed a right to withhold the full document on the grounds of relevance and legal professional privilege. This was set out in its amended List of Documents filed on August 17, 2022.

[23] The second defendant in its submissions, argues that the inspection sought by the claimant was done via email. The second defendant had made it clear in its Notice to Inspect, that inspection of all documents listed in Part 1 of Schedule 1, would be facilitated on any weekday between 8:30am to 4:30pm upon notice of agreement to the date and time for the proposed inspection. The second defendant's response asserts that there is nothing to suggest that counsel for the claimants visited or attempted to visit for inspection or asked for copies of the documents. They make bold to say that had counsel visited its offices, then inspection of the documents would have taken place. Further, that the claimants were in possession of the community survey as they had received it from the first defendant.

[24] There is no affidavit before this court explaining the second defendant's position on the orders made by the learned Master. It is only through submissions that it has sought to advance these points. There is therefore no evidence before the court upon which the court can act concerning the second defendant. Nevertheless, I will look at the submissions raised before the court concerning compliance.

[25] The notice of application filed in the matter before the learned Master on June 27, 2022, prayed for orders for an amended List of Documents and a right to inspect documents said to be in existence pursuant to rule 28.12.

[26] In my view, the documents which are the subject of this application were not disclosed. It is being submitted, that they are protected by legal professional privilege

which meant that inspection would have been prohibited. The issue of the minutes being directly relevant has been decided and does not arise here. The second defendant would not have permitted inspection on the ground of legal professional privilege, this is an inference drawn from the assertion they now make to withhold inspection in this application. Therefore, the second defendant when it submits, that had the claimant visited its offices, it would have permitted inspection is taking inconsistent positions. The second defendant cannot be said to have complied with the orders of the court, in that it ought to have raised this issue of legal professional privilege before the learned Master and failed to do so.

The Merits of the Case

[27] The substantive claim concerns judicial review of the actions of the defendants. The claimants by way of an amended fixed date claim form, seek orders of certiorari to quash the first defendant's building and planning permission granted to Digicel to erect a cellular transmission tower at 1 Aylsham Heights, Kingston 8, in the parish of St. Andrew. In addition, an order of certiorari to quash the second defendant's environmental permit granted to Digicel to erect the said cellular transmission tower.

[28] The evidence in support of the claim came from the president of the citizens' association in the Durie Drive area. He asserts that a notice of intention to carry out building works was attached to the gate at 1 Aylsham Heights, Kingston 8. The second claimant wrote to the first defendant seeking information. The first defendant responded stating that Digicel had made an application on November 9, 2021 which had been approved. A favourable community survey had been submitted along with the application. Fifty residents of the community signed notices of objection and have been opposed to the application for many years. The affiant asserts that the application was granted before the expiry of the statutory period for notices of objection to be filed in breach of the law. Any decisions taken in reliance on the community survey filed with the application would be irrational. Further, the defendants would have taken irrelevant considerations into account and failed to take relevant ones into account. They also

assert that the law has not been followed in the decision to grant the application to Digicel.

[29] The second defendant through its affiant Xavier Chevannes, City Engineer deposed that he had knowledge of the application for building permission granted to Digicel. The KSAMC treated the application as it did all others, as emergency applications due to the spread of COVID-19. The KSAMC considered the applications for the construction of cell towers in the Aylsham Heights area and other areas to be necessary for the protection of the health, safety and welfare of persons. This facilitated the work from home policy which aimed at slowing the spread of COVID-19 by facilitating better telecommunication services. The KSAMC did not require the evidence of service of a Notice of Intention to carry out building works in respect of the cell tower. It is admitted that the KSAMC granted conditional approval of Digicel's application on November 16, 2021.

[30] Sarah Dawson, Planning Officer deposed that pursuant to the directives of the third defendant all applications for planning permission for the construction of cell towers were submitted to it for assessment and approval. The third defendant communicated its grant of approval to the first defendant by letter dated November 16, 2021. No planning permission was granted by the first defendant to Digicel as alleged by the claimants. Both the planning approval and building approval were communicated to Digicel.

[31] Peter Knight, CEO of the National Environmental Protection Agency deposed that his agency provides technical and administrative support for the second and third defendants as well as the Land Development and Utilisation Commission. By letter dated November 15, 2022, the NRCA/NEPA received an application from Digicel for an environmental permit to construct a telecommunication tower at 1 Aylsham Heights, Kingston 8, St. Andrew. By letter dated November 15, 2022, the first defendant submitted an application for planning permission for the lands at 1 Aylsham Heights, Kingston 8, St. Andrew, requesting comments and recommendations within twenty-one days.

[32] The third defendant considered the application for planning permission on November 16, 2021 and granted its approval. The second defendant's approval was granted on the same date subject to the verification of the community survey. By letter on November 16, 2021, the third defendant indicated to the first defendant that it had granted its approval for planning permission subject to the conditions and favourable comments of the National Works Agency. The second defendant by letter of even date advised the first defendant that it too had approved the environmental permit subject to conditions and the favourable comments of certain government agencies. At the time the affidavit was drafted, the environmental permit and planning permission had not been issued to Digicel as the matter was pending discussion, review and a decision regarding the verification of the community survey.

[33] On December 29, 2021, the affiant received an email objecting to the development. He responded on December 30, 2021, advising that the second and third defendant approved the development on November 16, 2021, subject to verification of the community survey. Deliberations in the matter are ongoing and the law was followed in the grant of the application.

[34] There are issues joined on the substantive claim. The actions of the defendants are justiciable and capable of review by this court. The position taken by each side is not without merit.

The Explanation

[35] In **Attorney General v Universal Projects Ltd** [2011] UKPC 37, Lord Dyson, who delivered the decision of the Board, had this to say:

"...To describe a good explanation as one which 'properly' explains how the breach came about simply begs the question of what is a 'proper' explanation. Oversight may be excusable in certain circumstances. But it is difficult to see how inexcusable oversight can ever amount to a good explanation. Similarly, if the explanation for the breach is administrative inefficiency."

[36] Context and circumstance are the primary factors in the analysis and evaluation of the part 26.7 requirements. Thus, what may be considered a good explanation may vary not only in the evaluation under each limb in the circumstances of each case, but also with the stage of proceedings; for example, what may be a good explanation when the filing of an application occurs early in the process may not be so later on. It is for the claimant to show that there has been a failure of the second defendant to disclose without providing a reasonable explanation. A failure to meet this standard as set out in the rules, will attract the potential for the imposition of a sanction.

[37] The claimant in the affidavit of Kesha Grant states that the claimant's application was for specific disclosure, the parties were ordered to file written submissions. The claimants and the first defendant complied, the second defendant did not. The second defendant adopted the submissions of the first defendant, which argued that only a portion of the minutes were relevant and they should not be ordered to disclose the entire document. The second defendant has filed no affidavit in response nor has it alleged that this is not an accurate reflection of what transpired. The second defendant therefore accepts the affidavit of Kesha Grant and has itself placed no evidence before this court. This has weakened the second defendant's position considerably as its objection to this application is without any evidential foundation.

[38] To date, the full minutes have not been inspected as ordered. The second defendant's explanation has not gone so far as to state why the issues now raised were not raised before the learned Master.

The actions of the second defendant have increased the litigation proceedings in this claim and reduced the available time of the court. The second defendant gave no thought to its position until after the orders of August 12, 2022 had been made. This is not the fault of the claimants.

Whether prejudice and/or delay to be caused by the grant or refusal of the orders sought

[39] A striking out of the case of the second defendant would affect the trial of the matter. The trial date is now fixed for December 20, 2022. The conduct of the second defendant during the proceedings has led to delay in that, this application had to be brought. This is the second application for disclosure in this matter. I would not describe the conduct of the second defendant as an abuse of process nor has it occasioned inordinate delay. Its conduct has been less than ideal and has put the claimants' to expense and lessened the time necessary for preparation for trial. That being said, however, the prejudice to the second defendant outweighs its failing. In all the circumstances, a fair trial is still possible. The court is capable of applying the appropriate remedy.

Striking Out

[40] Rule 26.3 is set out below:

“26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court –
(a) that there has been a failure to comply with a Rule or practice direction or with an order or direction given by the court in the proceedings;

(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or

(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.”

[41] The imposition of an unless order, with the sanction of striking out a party's statement of case, is no less subject to the doctrine of proportionality than the exercise of the judge's power to strike out a statement of case (see **Lambeth LBC v Onayomake** (2007) The Times, 2 November 2007 where striking out for a minor default was regarded as disproportionate).

[42] The courts consider it important to adhere to the time limits fixed by the rules of the court or by the court itself. This principle is more important under the new civil procedure rules than that of the old procedural regime. This was the position that was adopted by the court in **Biguzzi v Rank Leisure plc** [1999] 1 W.L.R. 1926 ('Biguzzi'). These principles were succinctly summarized by McDonald Bishop JA in the case of **Commissioner of Lands v Homeway Foods and another** [2016] JMCA Civ 21 at paragraph [49] the learned judge stated that:

"In Biguzzi v Rank Leisure plc..., Lord Woolf MR made the important point that under the CPR, the keeping of time limits laid down by the Rules or by the court, itself, is, in fact, more important than it was under the old procedural regime. The clearest reflection of this, he noted, is to be found in the overriding objective and in the power of the court to strike out a party's statement of case for, inter alia, failure to comply with a Rule, practice direction or court order. Lord Woolf MR explained in that case that judges, in exercising their discretion within the scope of the CPR, should be trusted to exercise their discretion fairly and justly in the given case, while recognizing their responsibility to litigants in general not to allow the same defaults to occur as had occurred in the past. The overriding purpose of the Rules, he said, is to impress upon litigants the importance of observing time limits in order to reduce the incidence of delay in proceedings."

[43] The rules and authorities have made it clear that a judge has the discretion to strike out a party's statement of case where the party has failed to comply with the Rules or the orders of the court. However, although a judge at first instance is cloaked with the discretion to strike out, this does not mean that he or she will necessarily exercise that option as a first resort in applying the overriding objective to the circumstances of the case. The decision to strike out a party's case is considered draconian and an extreme measure that should be regarded as a sanction of last resort, other appropriate alternatives to striking may be utilized to impress upon the parties that the court will not tolerate delays (see para. [50] of **Homeway Foods** and page 1933 of **Biguzzi**).

[44] A similar issue concerning the sanction of striking out in consequence of an unless order was discussed in detail in **Barbados Rediffusion Service Ltd v Asha Mirchandani and Others (No 2) (2006)** 69 W.I.R 52 ('Barbados Rediffusion') by the Caribbean Court of Justice ('the CCJ'). The court distilled nine guiding principles that have provided insightful guidance in this area. The approach of the court, in determining whether to strike out a party's statement of case, is that the application must be holistic, and as such, a balancing exercise is necessary to ensure that proportionality is maintained and that the punishment fits the crime. Also, the court's discretion is wide and flexible and is to be exercised as "justice requires" and so it is impossible to anticipate in advance, and it would be impractical to list, all the facts and circumstances which point the way to what justice requires in a particular case (para. [51] of **Homeway Foods** and paras. [40] and [44] of **Barbados Rediffusion**).

[45] At paras. [45] to [47] the CCJ set down some salient considerations which have been set out below in point format by McDonald-Bishop in the judgment of **Homeway Foods** at para. [52]:

"(i) Strike out orders should be made either when that is necessary in order to achieve fairness or when it is necessary in order to maintain respect for the authority of the court's orders. In this context, fairness means fairness not only to the non-offending party but also to other litigants who are competing for the finite resources of the court.

(ii) If there is a real risk that a fair trial may not be possible as a result of one party's failure to comply with an order of the court, that is a situation which calls for an order striking out that party's case and giving judgment against him.

(iii) The fact that a fair trial is still possible does not preclude a court from making a strike out order. Defiant and persistent refusal to comply with an order of the court can justify the making of a strike out order. While the general purpose of the order in such circumstances may be described as punitive, it is to be seen not as retribution for some offence given to the court but as a necessary and, to

some extent, a symbolic response to a challenge to the court's authority, in circumstances in which failure to make such a response might encourage others to disobey court orders and tend to undermine the Rule of law. This is any type of disobedience that may properly be categorized as contumelious or contumacious.

(iv) It must be recognised that even within the range of conduct that may be described as contumelious, there are different degrees of defiance, which cannot be assessed without examining the reason for the non-compliance.

(v) The previous conduct of the defaulting party will obviously be relevant, especially if it discloses a pattern of defiance.

(vi) It is also relevant whether the non-compliance with the order was partial or total.

(vii) Normally, it will not assist the party in default to show that non-compliance was due to the fault of the lawyer since the consequences of the lawyer's acts or omissions are, as a rule, visited on his client. There may be an exception made, however, when the other party has suffered no prejudice as a result of the non-compliance.

(viii) Other factors, which have been held to be relevant, include such matters as (a) whether the party at fault is suing or being sued in a representative capacity; and (b) whether having regard to the nature of the relief sought or to the issues raised on the pleadings, a default judgment can be regarded as a satisfactory and final resolution of the matters in dispute.

(ix) Regard may be had to the impact of the judgment not only on the party in default, but on other persons who may be affected by it."

[46] "The previous conduct of the defaulting party should be relevant especially if it discloses a pattern of defiance", it is clear that a holistic approach is counselled. It is also relevant whether the non-compliance with the order was total or partial.

[47] The guiding principles regarding an order for striking out are that of justice and fairness. Further to this, an order for striking out must only be utilized as a last resort and this court is aware that it is encouraged in the authorities to first use alternative powers to an order for striking out.

The Overriding Objective

[48] Although the court's discretion under the Rule seems unfettered, it must be exercised subject to the overriding objective set out in Rule 1.1 of the CPR which, in essence, is the duty of the court to deal with the case justly. This means that the most draconian sanctions ought to yield to lesser alternatives.

Conclusion

[49] In my view, the second defendant has not complied with the orders of the learned Master. An extract of the minutes is not the same as the minutes of the meetings themselves. The second defendant has not provided a reasonable explanation for breaching the said orders and occasioned delay and expense by taking the position it has. In all the circumstances, the court orders as follows:

Orders:

1. The orders sought in this application will be granted in the alternative. The second defendant's statement of case stands struck out unless it complies with the orders of this court made on August 12, 2022 within one day of the orders made herein.
2. Costs of the application to the claimants against the second defendant to be agreed or taxed.