

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

APPEAL FROM THE COURT OF APPEAL OF BARBADOS

**CCJ Appeal No. CV 1 of 2005
BB Civil Appeal No. 18 of 2000**

BETWEEN

BARBADOS REDIFFUSION SERVICES LIMITED APPELLANT

AND

**ASHA MIRCHANDANI
RAM MIRCHANDANI
MCDONALD FARMS LTD.**

RESPONDENTS

**Before the Honourables: Mr. Justice M.A. de la Bastide, President
Mr. Justice R. Nelson
Mr. Justice A. Saunders
Madame Justice D. Bernard
Mr. Justice D. Hayton**

Appearances:

Sir Henry de B. Forde Q.C., Mr. Hal Gollop and Mr. C. Anthony Audain for the Appellant

Dr. Richard Cheltenham Q.C., Mr. Clement E. Lashley Q.C., Mr. David J.H. Thompson, Ms. Onika E. Stewart and Ms. Shaunita Jordan for the Respondents.

**Judgment delivered on 16th March, 2006,
by the President of the Court, The Rt. Hon. Mr. Justice M. de la Bastide**

1. On November 7, 2005, we heard this appeal from a decision of the Court of Appeal of Barbados. It was the first appeal heard by this Court. The Court of Appeal had dismissed an appeal against an order made by Husbands J. striking out the Amended Defence of the appellant in an action for defamation, on the ground of the appellant's failure to comply with an order for the discovery of documents. At the conclusion of the hearing we allowed the appeal and made an order substantially restoring the Amended Defence. We promised to give our reasons in writing later, and we proceed to do so now.

2. Although this case has not yet reached trial, it has a long history, commencing with the filing of the writ by the respondents on December 28, 1990, some 15 years ago. In this action the respondents are seeking to recover damages from the appellant for playing on the appellant's radio station 'The Voice of Barbados' three calypsos alleged to be defamatory of them. The first two respondents are husband and wife and they comprise the board of the third respondent which carried on the business of raising, slaughtering, processing and selling chickens. The offending calypsos were entitled respectively "The Madd Chicken Song", "Pluck It" and "Tit for Tat". The common theme in all three is a complaint about the processing and sale to the public of diseased chickens. The Statement of Claim alleges that these calypsos identified the respondents as the persons responsible and were frequently played during the months of June and July 1989, the period of the annual Crop-Over festival. It is also the respondents' case that these calypsos were broadcast live by the appellant when they were sung on the 28th July and 4th August, 1989 at the semi-finals and finals respectively of the calypso competition known as "Pic-o-de-Crop" held in conjunction with Crop-Over. It was alleged that the calypsos continued to be played, though less frequently, on the Voice of Barbados up to the date of the writ.

3. The Defence which was twice amended, was in its final form limited substantially to a plea of justification i.e. truth, although certain allegations contained in the Statement of Claim were either not admitted or denied. Thus the appellant did not admit (a) that the appellant published the calypsos or (b) that the calypsos were defamatory, and denied that the calypsos referred to the respondents. The Defence at one stage included a plea of qualified privilege but this defence was struck out on February 11, 1992, by order of Williams CJ.

Objection to jurisdiction

4. We granted the appellant special leave to appeal to this Court on August 9, 2005. Even after Barbados gained its independence, appeals from its Court of Appeal continued to lie to the Judicial Committee of the Privy Council ("the JCPC") but the JCPC was replaced by the Caribbean Court of Justice as the final court of appeal for Barbados by two Acts passed by the Barbados Parliament, namely the Caribbean Court of Justice Act, 2003, and the Constitution (Amendment) Act, 2003, both of which were brought into force by Proclamation on April 8, 2005. The strike out order which is under challenge in this appeal, was made by Husbands J. on November 24, 1999, and the decision of the Court of Appeal affirming that order, was made on August 20, 2004. A day or two before we heard this appeal the respondents filed and served on the appellant a notice of objection to the jurisdiction of the Court to entertain the appeal. Now, when the application for special leave was being heard by us, we invited counsel for the respondents (who also appeared before us

with a leader on the substantive appeal) to address us on whether this Court had jurisdiction to entertain the proposed appeal. That invitation was not accepted and no argument was advanced by counsel for the respondents on this issue. In delivering the reasons of the Court for granting special leave to appeal, I dealt with the question of jurisdiction and explained why this Court concluded that it had jurisdiction in the matter. One reason which the Court gave, was the clear intention shown in the transitional provisions in both Acts just mentioned that the substitution of a right of appeal to this Court in place of the previous right of appeal to the JCPC, should apply to pending proceedings except in the circumstances spelt out in the transitional provisions themselves. The grounds of objection to the jurisdiction set out in the notice belatedly filed by the respondents, contained nothing to suggest a counter to what appears to be an unavoidable inference from these transitional provisions. In the circumstances, we saw no justification for allowing the respondents to re-open an issue already decided by the Court, and we did not permit counsel to pursue the objection.

The background to the strike out order

5. It is necessary now to recount the events that led to the making of the strike out order. The first step was the making of an order on July 7, 1992, requiring the parties to file lists of documents and verifying affidavits within 42 days. There was no attempt by either side to comply with this order for more than a year. Eventually, the respondents filed their list of documents and verifying affidavit on September 15, 1993, and the appellant (prodded into action no doubt by the filing of an application to strike out the Defence for non-compliance) filed its list of documents and verifying affidavit on November 23, 1993. There followed another period of inaction so far as discovery of documents was concerned, until the respondents applied by summons dated October 12, 1994, for an order inter alia that the appellant file a further and better list of documents. The basis of this application was provided by an affidavit made by the first respondent on October 12, 1994 (“the first respondent’s October 1994 affidavit”). In its list of documents the appellant had listed in Schedule 1 as documents which were then in its possession, custody or power, a record of “The Madd Chicken Song”, a record of “Pluck It”, a tape of “Tit for Tat” and some 13 items of correspondence. In Schedule 2, which was supposed to contain relevant documents which had once been but were no longer in the possession, custody or power of the appellant, all that appeared was the word “None”. In her affidavit the first respondent complained that the appellant had not disclosed a number of relevant documents, firstly, audio tapes of the three calypsos complained of, in particular tapes of the live broadcasts made of the calypso competition; secondly, library, computer or other records showing when the calypsos were played on the Voice of Barbados, and thirdly, what were described as “logger tapes in relation to the calypsos played on its radios” (sic). It was common ground that for purposes of discovery tapes and records are considered documents. Because of the omission of these documents from the appellant’s list, it was contended that the appellant had made insufficient discovery and should be ordered to file a further and better list of documents supported by a verifying affidavit.

6. It should be explained that at about this time there was a hiatus in the legal representation of the appellant. It appears that in September, 1994, senior counsel who had

been acting for the appellant, was appointed Attorney General of Barbados and for reasons which are not clear but for which no one has sought to blame the appellant, there was considerable delay in the engagement of a suitable replacement. This presumably was the reason why when Williams C.J. heard the respondents' application for further and better discovery on November 24, 1994, and ordered that the appellant do within fourteen days file a further and better list of documents and verifying affidavit, there was no appearance by or on behalf of the appellant. It probably also explains why there was no attempt by the appellant either to comply with or to challenge that order. As a result of this lack of response, a further application was filed by the respondents on December 30, 1994, seeking an unless order pursuant to Order 24 Rule 16, that is, an order that the Amended Defence be struck out and judgment entered for the respondents if the appellant did not file a further and better list of documents and verifying affidavit within a specified time.

7. On the hearing of that application before Williams C.J. the appellant was represented by a then newly admitted attorney-at-law. On February 20, 1995, the Chief Justice ordered that unless the appellant filed on or before March 6 1995, a further and better list of documents and a verifying affidavit, the Amended Defence should be struck out and judgment entered for the respondents for damages to be assessed and costs. Again, there was no appeal against this order and on March 1, 1995, the appellant filed and served what was claimed to be a further and better list of documents supported by a verifying affidavit purportedly in compliance with the unless order made by the Chief Justice. The further and better list of documents was a replica of the original list with two variations. One was the addition of four items of correspondence passing between the parties' attorneys which were of absolutely no significance. The other variation was that whereas the original list had included in Schedule I as a document in the possession of the appellant, 'a tape of "Tit for Tat"', the new list replaced this with 'a record of "Tit for Tat" '. The verifying affidavit sworn by Victor Fernandes, the Managing Director of the appellant, stated baldly that the mention in Schedule I of the original list of a "tape of 'Tit for Tat' " was "through error or inadvertence".

8. The respondents' attorneys took the view that this new list did not constitute compliance with the unless order and on March 13, 1995, they filed an application to strike out the Amended Defence and for leave to enter judgment for damages and costs. Shortly thereafter the appellant retained Mr. Henry Forde Q.C., and he has since then represented the appellant in these proceedings. Unfortunately, due to the unavailability of Mr. Forde, at least three dates fixed for the hearing of this application were not kept and the consequent adjournments resulted in a delay of nearly a year before the hearing eventually began before Husbands J. It was completed in September, 1996. Judgment was reserved and was eventually delivered on November 24, 1999, that is, some three years later, when Husbands J. ordered the Amended Defence to be struck out and judgment to be entered for the respondents for damages to be assessed and costs. The appellant applied to the Court of Appeal for leave to appeal. Leave was granted and the appeal was heard on July 17, 2000. The Court of Appeal reserved judgment and did not deliver it until August 20, 2004, when it dismissed the appeal and affirmed the order of Husbands J.

The orders for a further and better list of documents

9. Before examining the respective judgments of Husbands J. and the Court of Appeal, it is necessary to refer to certain criticisms that were made by counsel for the appellant of the two orders made by Williams C.J., that is, the order for a further and better list of documents made on November 24, 1994 and the unless order made on February 20, 1995. One of these criticisms was that these orders were made in breach of a well-established rule that a statement by a party that he has disclosed in his list of documents all relevant documents that are or have ever been in his possession, custody or power, is at an interlocutory stage at least, conclusive and not susceptible of contradiction or challenge. There is good reason for this rule and we must not be understood to be casting any doubt on it. Apart from the undesirability of generating additional costs and delay by embarking upon a full-scale trial of factual issues in advance of the trial proper, injustice may well result from one party or his witnesses having to go to trial with their credibility damaged by an adverse finding made on incomplete evidence. The only exception to this rule in the context of general discovery is where something emanating from the party making discovery points to the existence of some undisclosed but relevant document being, or having at one time been, in that party's possession, custody or power. The pointer may be found in the party's list of documents itself, or in one of the documents disclosed in that list or in an admission made in a pleading or otherwise. It was argued that insofar as the two orders of Williams C.J. were based on affidavits that sought to go behind and to contradict the verifying affidavit sworn by Victor Fernandes in support of the appellant's original list of documents, those affidavits were inadmissible and the orders wrongly made.

10. It was also argued that if the respondents wished to allege that there were specific documents or categories of documents then or previously in the appellant's possession, custody or power, which it ought to have but had not disclosed, then application should have been made for specific discovery under Order 24 rule 7, and not for a further and better list of documents. It was also suggested that the orders of the Chief Justice lacked the specificity which was an essential requirement if non-compliance was to be visited with so extreme a sanction as striking out. The orders contained no indication of the respects in which the original list of documents was defective and therefore they lacked the specificity needed to support the sanction imposed.

11. The trouble with these arguments is that they come too late. They should have been deployed when the first application for a further and better list was heard, but at that hearing there was no appearance by or for the appellant. A further and better list having been ordered, there was (as already indicated) no appeal against that order nor any application to set it aside. The order it appears, was simply ignored. Predictably this prompted the application for the unless order which, it would appear, was made without any significant opposition and was not challenged by an appeal. The judgment of Arden L.J. in **Stolzenberg and others v. CIBC Mellon Trust Co. Ltd and others** [2004] EWCA Civ. 827 contains some passages which demonstrate the need to focus on the strike out order made by Husbands J. (which is the subject of this appeal) and refuse to entertain any challenge of the antecedent orders of the Chief Justice. In **Stolzenberg** the English Court of Appeal was asked inter alia to hold that the refusal of Etherton J. to set aside a judgment obtained for

breach of an unless order was a wrongful exercise of his discretion. The unless order had been made by Rattee J. following non-compliance by the appellants with an earlier order of Lightman J. Arden L.J. said at para.176:

“It was argued before the judge that there was no good reason to require [the Appellants] to produce a statement of assets. The judge was in effect asked to review the order of Lightman J. In my judgment, as the judge was not sitting on an appeal from that order, he should not have been asked to approach the matter in that way. It was relevant to ask what effect non-compliance with it had on the respondents, but it was inappropriate to question whether the order should ever have been made. ... Likewise, it was inappropriate to enquire whether it was proportionate for Rattee J to make an unless order to enforce compliance with the orders of Lightman J If the appellants had wished to argue that, they had the opportunity to appeal against the order of Rattee J but failed to take it”.

12. We hold therefore that the appellant cannot now challenge the validity and binding force of the unless order. Nor can it be disputed that the duty of the appellant was to comply with it.

The Main Issues

13. This takes us to the first of the two main issues in this case which are:
- (1) Was there a failure to comply with the terms of the unless order? and
 - (2) if there was, was the making of the strike out order a proper exercise of the Judge’s discretion?

The First Issue: Was there compliance with the unless order?

14. In relation to the issue of compliance with the unless order, the appellant is entitled to rely on the arguments outlined above with respect to (a) the lack of specificity in the unless order and (b) the conclusiveness of the further and better list and verifying affidavit. It is not clear whether the argument with regard to specificity was made in the courts below but be that as it may, we must consider it. As already stated, this argument cannot now provide a basis for quashing the order on the ground that it should never have been made. The question, however, which remains a live one, is whether the appellant knew what it had to do in order to comply with the order. The order itself made it clear that the appellant was required to remedy some alleged deficiency in its first list of documents. What that alleged deficiency was, was apparent from the first respondent’s October, 1994, affidavit. If the appellant had or had ever had in its possession, custody or power any documents of the kinds described in that affidavit, then it would have been quite clear to the appellant that they should be included in the further and better list of documents which it had been ordered to file. It does not help the appellant that that affidavit might have been held inadmissible had objection to it been taken at the appropriate time. The first respondent’s October 1994 affidavit was on the record and was read by the Chief Justice before making his first order, a

fact which is recorded in the order itself. In that affidavit the first respondent identified the three categories of documents already mentioned which she alleged were or should have been in the appellant's possession and which it had not disclosed. This affidavit was specifically referred to by then counsel for the respondents, Mr. Peter Williams Q.C., in the affidavit which he swore in support of the application for the unless order. If therefore the appellant in fact had, or had at any time had, in its possession, any document of a type described in the first respondent's October 1994 affidavit, then the appellant could not be heard to say that it did not understand that it was required to disclose that document in its further and better list of documents, or excuse its failure to do so on that ground.

15. In an affidavit sworn by the appellant's Managing Director Victor Fernandes, on November 28, 1995, and filed in opposition to the application for the strike out order, it was claimed that the filing of the further and better list of documents and the verifying affidavit on March 1, 1995, constituted compliance with the unless order and objection was taken to those paragraphs of the affidavit of the first respondent made on March 13, 1995, in support of the summons for the strike out order, which repeated the allegations contained in the first respondent's October 1994 affidavit as to the three categories of documents which the appellant had or "should have had" in its possession. The ground of that objection as stated in Mr. Fernandes' affidavit, was that "they seek to show that the statements in the defendant's further and better list of documents are untrue and/or to contradict the same". In the same affidavit Mr. Fernandes went on nevertheless to answer the allegations of undisclosed documents. Before doing so, however, Mr. Fernandes sought to preserve the objection based on the conclusiveness of the further and better list and his verifying affidavit by stating in paragraph 11:

"These statements which are deposed to by me in paragraphs 12.1 to 17 inclusive are being made without waiver of the Defendant's strict rights and the Defendant will seek leave to rely on and use them only in the event that this Court does not accept the contentions hereinbefore advanced, since the defendant has been advised by its Attorneys-at-Law and I verily believe that paragraphs 7 to 26 inclusive of the first plaintiff's first affidavit should be struck out for the reasons hereinbefore set out."

16. The first respondent made an affidavit dated January 10, 1996, in response to the affidavit of Mr. Fernandes and that provoked a further affidavit from Mr. Fernandes dated January 31, 1996. In that second affidavit, which contains no fresh reservation of the appellant's right to stand on its preliminary objection, Mr. Fernandes returned to the factual issues as to what tapes and other records had been made of the appellant's broadcasts of the three calypsos. It does not appear that on the hearing of the summons to strike out any application was made to strike out the paragraphs of the affidavit of the first respondent that were objected to. Certainly none was alluded to in the judgment of Husbands J. In any event it does not seem to us that the appellant having chosen to put before the Court the factual material contained in Mr. Fernandes's affidavits with regard to the existence of tapes and other records, can deny the Court the right to take account of any admissions which that evidence contains on the ground that it was only putting forward that evidence conditionally i.e. if its preliminary contention failed. I agree with the appellant's contention insofar as it

claimed to exclude any evidence from the respondents which contradicted the statement in the verifying affidavit that there were no other relevant documents apart from those in the schedules to the further and better list, which were or had ever been in the appellant's possession, custody or power. But if the appellant chose (as it did) to raise a second line of defence by having Mr. Fernandes deal with the facts, the Judge was entitled (and so are we) to take account of any admission made by him with regard to the existence of undisclosed documents. No privilege can be claimed for such admissions merely because they were introduced by some version of the "without prejudice" formula. In a roughly analogous situation, a defendant who wishes in a civil trial to make a 'no case' submission must elect between doing so and calling evidence. He cannot do both.

17. I turn therefore to the substantive question whether on the material before the learned trial Judge he was entitled to hold that the appellant had failed to comply with the unless order of the Chief Justice. More specifically the question is whether the appellant on its own admission had, or had ever had, in its possession, custody or power any of the documents mentioned in the first respondent's October 1994 affidavit.

18. Remarkably, in the judgment of Husbands J. this question is not addressed. The learned Judge appears simply to have assumed that there was non-compliance without giving any indication of how he reached that conclusion.

19. The Court of Appeal did examine the affidavit evidence in order to determine whether there had been a failure to comply with the unless order. The Court found that there had been non-compliance in two respects. Firstly, the Court held that on Mr. Fernandes' own admission the appellant had at one time in its possession log tapes or master tapes on which were recorded the whole of what was broadcast each day on the "Voice of Barbados". The master tapes for the two months prior to Crop-Over 1989 would have recorded the three calypsos complained of whenever they were played on that station during that period. Even if (as the Court of Appeal appears to have accepted) these master tapes were no longer available because they had been recycled or destroyed, they ought to have been included in Schedule 2 to the appellant's further and better list of documents as documents which had once been but were no longer in the possession of the appellant.

20. This was clearly a correct finding based on Mr. Fernandes' own affidavits. These master tapes or 'logger tapes' as they were called by the first respondent, were identified in the first respondent's October 1994 affidavit as one of the categories of documents which the appellant had failed to disclose in its original list of documents. The way in which Mr. Fernandes dealt with them in his first affidavit was somewhat disingenuous. In paragraph 14 (ix) of that affidavit he disposed of them in this way:

" Such logger tapes as the Defendant had made or does make were or are not relevant to the matters in question in this action because:-

- (a) the only labels on logger tapes were and are the numbers 1-60 which represent day one, two etc.;

- (b) logger tapes were and are kept for two months, after which they were and are recycled;
- (c) logger tapes were and are not re-broadcast and did and will not play on the tape machines used for broadcast purposes in the studios.”

The Court of Appeal in its judgment (which was delivered by King J.A. (Actg.)) described Mr. Fernandes’ affidavit as “carefully and cleverly drawn”. The passage just quoted could be described less charitably. Not only does it avoid making the admission (subsequently made in Mr. Fernandes’ second affidavit) that master tapes were routinely made of the whole of each day’s broadcast, but the reasons given for their alleged lack of relevance are quite specious, having nothing whatever to do with relevance. Mr. Fernandes dealt with the matter more frankly in his second affidavit when he stated at paragraph 4.11(i):

“... log tapes are audio tapes kept on a daily basis which reflect everything that has been played on the station for that day.”

20. The respondent’s case was that these calypsos were frequently played on the Voice of Barbados during the two months or so preceding the 1989 Crop-Over. Admittedly it might have been a time-consuming exercise to identify the parts of those tapes on which the calypsos were recorded, but with the assistance of the logs which according to Mr. Fernandes were kept of the times during which music was played on the station, it would not have been an impossible or impractical task. Clearly, the master tapes covering the pre-Crop-Over period in 1989 would have been relevant, and though recycled, should have been disclosed in Schedule 2 to the original list of documents. The reference to them in the first respondent’s October 1994 affidavit would have alerted Mr. Fernandes to the need to include them in the further and better list of documents. His failure to do so was clearly a breach of the unless order.

21. The other respect in which the Court of Appeal held that the appellant had failed to comply with the unless order, was the omission from the further and better list of documents of ‘audio tapes’ of the live broadcasts of the semi-finals and finals of the Pic-O-de-Crop competition. In the case of these tapes there was no admission by Mr. Fernandes. While he was not in a position to deny categorically of his own knowledge that the appellant had taped these events, he deposed that he had been unable to find any trace of such tapes and that the persons still available who had been involved in the live broadcasts of the semi-finals and finals of the competition, had no recollection of any such tape being made by the appellant. Accordingly, it was Mr. Fernandes’ belief that there had never been any ‘audio tape’ of those live broadcasts made by the appellant. It did emerge from his affidavits that tapes were sometimes made by the appellant of events which they broadcast live, but these tapes would be played on the air only for the purpose of showing crowd reaction and would be recycled within a matter of days at most. There was no hard evidence offered by the respondents to establish that these shows had in fact been taped by the appellant, not that such evidence, if offered, would have been admissible. Nevertheless, the Court of Appeal held that the appellant had taped these live shows and should have disclosed these tapes in its further and better list of documents, even though these tapes had since been “recycled or otherwise

disposed of'. The basis of that finding was that the Court of Appeal considered it "very unusual and stretching credibility to accept that a responsible broadcast organisation such as the applicant/defendant would do a live broadcast of such significant events ... without having made a tape or other record of the broadcast of those events". In our view the perceived improbability of such an occurrence, unsupported as it was by any evidence of the practice followed by the 'Voice of Barbados' or by radio stations generally, is not a satisfactory or sufficient basis for the conclusion reached. Further, Mr. Fernandes swore that he believed that no such tapes had ever existed. There was no evidence whatever to contradict that statement which should in accordance with the general principle already referred to, have been regarded as conclusive. In fact, even though I have examined the affidavit evidence with regard to the audio tapes issue, in the absence of any admission subsequently made by Mr. Fernandes, the verifying affidavit sworn by him in support of the further and better list should be regarded as a conclusive, albeit implicit, denial that any tapes of the live broadcasts ever existed.

22. For all of these reasons we hold that the conclusion of the Court of Appeal that the appellant was also in breach of the unless order by not listing audio tapes of the two live broadcasts of the calypso competition in Schedule 2 of its further and better list of documents, was unjustified and cannot be supported.

23. The argument was advanced by counsel for the respondents that this Court, following the practice of the Judicial Committee, ought not to interfere with concurrent findings of fact made by the lower courts in the jurisdiction from which the appeal comes. We do not consider that that rule has any application to findings made on an interlocutory application on affidavit evidence which has not been subjected to cross-examination. There would seem to be no basis in common sense for applying the rule in such a situation and we are not aware of any instance in which it has been so applied. In any event, we do not consider it necessary or appropriate in the circumstances of this case to commit ourselves to adopting without modification the practice of the Judicial Committee in regard to this matter.

Destruction of tapes

24. The Court of Appeal was critical of the appellant for having destroyed the master tapes "in view of pending litigation". They said that this was "illustrative of the Defendant's attitude towards the Plaintiffs' request for discovery". One must assume in the absence of any evidence to the contrary that the relevant master tapes were in accordance with the usual practice as deposed to by Mr. Fernandes, kept for two months and then recycled. If so, then they would have been recycled before there was any pending litigation against the appellant since the writ in this action was not filed until December 1990. Nevertheless, in July 1989 the appellant's management knew that proceedings against them were imminent as letters before action dated respectively the 11th and 13th July, 1989, in identical terms, were addressed by the respondents' attorneys to the Manager of Voice of Barbados and the Manager of Barbados Redifusion Service Ltd. respectively. As the letters indicated, the respondents had already sued another party for publication of the same calypsos. That was a reference no doubt to the action that had been launched against the Caribbean Broadcasting Corporation. It would have been in accordance with best practice for the appellant to have

taken steps to preserve at least the relevant parts of the master tapes of what was broadcast during the two months or so prior to Crop-Over, 1989. Mr. Fernandes took over as Managing Director and Chief Executive Officer at the beginning of August, 1989, and given the delay in the commencement of these proceedings, we find the Court of Appeal's comments on the recycling of the master tapes, somewhat harsh.

The computer tape

25. The Court of Appeal also found it unusual "that the tape referred to was destroyed and the record kept" and continued: "This begs the question why was the tape destroyed?" While this is not altogether clear, the tape referred to is presumably the tape from which music was selected and played by a computer on the appellant's FM station YESS (see para. 14 (i) and (ii) of Fernandes' first affidavit). This tape came to light when the respondents' attorneys by letter dated 4th July, 1991, to the appellant's General Manager, complained of the playing of the calypso "Pluck It" on the FM station even after these proceedings had been launched. In his reply dated the 18th July, 1991, the appellant's then attorney explained that the calypso had been included in an "old programme" which was being used by the computer, and stated that it had been "forthwith excised" on his advice. We do not know how the excision was done, whether for instance it was by erasure of the song from the tape, or possibly by altering the instructions given to the computer. The "record" on the other hand which the judgment of the Court of Appeal says was kept, is presumably the vinyl record of the same song, which had been disclosed in the appellant's list of documents. Once it is appreciated that the selection and playing of music by the computer from the tape was automated and did not require 'the use of manpower', one can readily understand why the offending calypso was 'excised' (by whatever means), while the vinyl record from which the tape was made, was kept. In the circumstances we do not agree with the Court of Appeal's view that there is something suspicious about the appellant 'destroying' the tape (if that is what excision of the song involved), but retaining the record.

26. It could be argued that the tape on which the song "Pluck It" had been recorded for playing on the FM station, ought also to have been disclosed in the further and better list of documents, even though no complaint was made in the Statement of Claim about broadcasts on that station. But the failure to include it was only a technical breach of the unless order at worst, as the existence of the tape had in fact been disclosed to the respondents by the letter from the appellant's attorney referred to above.

27. To sum up our findings so far, we find that:

- (a) the appellant ought to have included in Schedule 2 of its further and better list of documents the master tapes made during the period of the Crop-Over festival, 1989;
- (b) its failure to do so constituted a breach of the unless order of the 20th February, 1995; and
- (c) there is no evidence that the recycling of the master tapes was done otherwise than innocently i.e. in accordance with the station's normal routine and

without any intention of preventing the respondents from having access to documents that might prove useful to them in the litigation.

The Second Issue: Was the discretion properly exercised?

28. I pass now to the second major issue in this case, that is, whether the order striking out the Amended Defence and giving the respondents leave to enter judgment, was a proper exercise of the Judge's discretion under Order 24 rule 16. It would be as well to set out here the relevant portion of that rule. It reads as follows:

“(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents ... fails to comply ... with that order, ... then, ... the Court may make such order as it thinks just, including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.”

29. The same approach to this issue was adopted by both Husbands J. and the Court of Appeal. They adopted and applied what I would describe as “the principle of contumelious breach”. According to this principle, if failure to comply with an unless order is intentional or “contumelious”, then a strike out order should issue. In order to avoid that consequence the party in default must satisfy the Court that he was prevented by some extraneous circumstances i.e. something beyond his control, from complying with the order. Both the Judge and the Court of Appeal held that the appellant had not satisfied them that it was prevented from complying with the unless order of the Chief Justice by any extraneous circumstance, and accordingly, the Judge made, and the Court of Appeal affirmed, the order striking out the Amended Defence.

30. The learned Judge referred to the case of *Caribbean General Insurance Ltd. v. Frizzell Insurance Brokers Ltd.* [1994] 2 Lloyd's Law Reports 32 and quoted a passage from the judgment of Roskill L.J. in that case. He also referred to *Grand Metropolitan Nominee Company (No.2) v. Evans* [1992] 1 WLR 1191. The Judge stated his conclusion in these words:-

“On review of all the authorities cited and the submissions made, the Court came to the conclusion that the Defendant has not convinced it that its failure to comply with the unless order of the 20th February, 1955, was other than intentional and contumelious. Therefore, the Defendant's defence is struck out”

31. The reasoning of the Court of Appeal was summed up in the following sentence:

“Since no satisfactory explanation or excuse was given by the Applicant/Defendant for a failure to comply with the order, such failure is therefore intentional and contumelious”.

The Court of Appeal also referred to the *Caribbean General Insurance Ltd.* case (supra) and cited three other cases which together with those cited by the Judge, provide firm support for the principle of contumelious breach. These are *Tolley v. Morris* [1979] 1 WLR 592, *Re Jokai Tea Holdings Ltd.* [1993] 1 All E.R. 630 and *Hytec Information Systems v. Coventry City Council* [1997] 1 WLR 1666. The judgments in these cases are replete with passages which emphasise the importance of securing obedience to the peremptory orders of the Court and hold out little hope of reprieve for those defaulters who cannot demonstrate to the satisfaction of the court that their failure to comply was due to extraneous circumstances, and not to an intention to ignore or flout the order of the court. It is sufficient to quote one of those passages. It is from the judgment of Sir Nicholas Browne-Wilkinson V-C in *Re: Jokai Tea Holdings Ltd.* (supra) at page 637C and reads as follows:

“In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an “unless order”, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed”.

32. But these cases do not stand alone. There is another line of cases in which a totally different approach is taken to the making of strike out orders pursuant to Order 24 rule 16 (1). According to those cases the primary, if not the only, purpose for which the weapon of the strike out order may properly be used, is to ensure the fairness of the trial and, therefore, the test which a Judge should apply in determining whether to make such an order, is whether as a result of the breach of the rule or order which has been committed, a fair trial is no longer possible, or to put the matter more exactly, there is a real risk that a fair trial will not be possible. A corollary of this approach which conflicts sharply with the principle of contumelious breach, is that punishment is not a legitimate purpose to be served by the use of the strike out order. An early and powerful proponent of this school of thought was Millett J. (as he then was) in the case of *Logicrose Ltd. v. Southend United Football Club Ltd.* The Times, March 5, 1988. In that case there was no unless order involved, but an application was made at the trial for an order that the action be dismissed and the Defence to Counterclaim struck out and judgment on the Counterclaim entered for the defendants, on the ground of what was alleged to have been a deliberate suppression of a crucial document by the principal director and shareholder of the plaintiff. The application was refused by Millett J. who found that the suppression of the document was not deliberate, but held that even if it had been, he would not have made the order sought once the missing document had been produced. He explained why in this passage:

“The object of Order 24, Rule 16 is not to punish the offender for his conduct but to secure the fair trial of the action in accordance with the due process of the Court (see *Husband’s of Marchwood Ltd. v. Drummond Walker Development Ltd.* [1975] 2 All ER 30, [1975] 1 WLR 603). The deliberate

and successful suppression of a material document is a serious abuse of the process of the Court and may well merit the exclusion of the offender from all other participation in the trial. The reason is that it makes the fair trial of the action impossible to achieve and any judgment in favour of the offender unsafe”.

Earlier in his judgment the learned Judge dealt with disobedience of an order of the Court in this way:

“Deliberate disobedience of a peremptory order for discovery is no doubt a contempt and, if proved in accordance with the criminal standard of proof, may, in theory at least, be visited with a fine or imprisonment. But to debar the offender from all further part in the proceedings and to give judgment against him accordingly is not an appropriate response by the Court to contempt”.

A little later on he said:

“In my view a litigant is not to be deprived of his right to a proper trial as a penalty for his contempt or his defiance of the Court, but only if his conduct has amounted to an abuse of a process of the Court which would render any further proceedings unsatisfactory and prevent the Court from doing justice. Before the Court takes that serious step, it needs to be satisfied that there is a real risk of this happening.”

33. The case of *Husband's of Marchwood Ltd.* referred to by Millett J. in fact does not provide authority for the proposition that a strike out order may never be used as punishment for disobedience of an order for discovery but only for the more limited proposition that it is not appropriate to punish late compliance with an order for discovery by making an order for payment of money into Court backed by the sanction of dismissal of a party's claim. In that case the defendant had twice failed to comply with orders for the provision of a list of documents but did provide the list albeit out of time, before the hearing of an application for an order that he pay into Court an amount equivalent to the balance of the sum claimed by the plaintiff or in default be debarred from defending the action. The Court of Appeal quashed the order made in terms of that application. In his judgment Russell L.J. said:

“It seems to me that the condition of requiring payment of the balance into court is something which is quite inappropriate, in the sense that it is a punishment which does not fit the crime. The object of the plaintiffs has in fact been achieved, because their summons has produced what they wanted, namely, that the due processes of the action should go forward.”

Stamp L.J. said:

“I think that RSC Ord 24, r 16(1), is designed to secure compliance with the rules and orders of the court relating to discovery, and not to punish a party for not having complied with them within the time limited for the purpose. I think

normally – there may be exceptional circumstances – that an order which is not aimed to achieve that result is prima facie wrong” (emphasis added).

34. The judgment of Millett J. in *Logicrose* was considered by the Court of Appeal in *Landauer Ltd. v. Comins & Co.* The Times, August 7, 1991. In that case the Court of Appeal upheld the striking out of a plaintiff’s claim on the ground that as a result of the destruction of certain relevant documents, a fair trial was no longer possible. It was assumed that the destruction was inadvertent, but Lloyd L.J. expressed some difficulty in understanding why it should matter whether the destruction was deliberate or inadvertent if the test was whether a fair trial could be held without the documents. The learned Lord Justice then referred to the statement of Millett J. that it was no part of the Courts’ function in exercising its discretion under Order 24 rule 16 to punish the party in default and said:

“In all ordinary cases that must be so. But I can imagine cases of contumacious conduct, such as the deliberate suppression of a document, which might justify the striking out on the analogy of striking out for want of prosecution under Order 25, rule 1(4) even if a fair trial was still possible. I use the word “contumacious” with the encouragement of my Lord Sir John Megaw, since it expresses the required meaning more accurately than “contumelious”, the word more commonly used and originally, I believe, used by Diplock L.J. in this connection. But cases of contumacious conduct in relation to discovery must necessarily be extremely rare”.

The term “contumelious” or “contumacious” is commonly used in the authorities as applicable to conduct involving defiant disobedience of an order of the Court. The example, however, which Lloyd L.J. gave of contumacious conduct which might justify a strike out order, was the deliberate suppression of a document, an act which might not involve, and was not expressly linked by him to, disobedience of an order of the Court. His judgment therefore, like many others which have followed it, does not confront head-on the conflict between those cases in which the making of a strike out order under Order 24 rule 16 has been justified as a response to defiant disobedience (be it described as contumelious or contumacious) of an order of the Court, and the principle enunciated by Millett J. that a strike out order may never be used to punish disobedience of an order of the Court.

35. The conflict, however, was recognised (though not resolved) by the Court of Appeal in *Artisan Scaffolding Co. v. Antique Hypermarket Ltd.* (unreported February 10, 1993). In response to counsel’s submission based on the judgment of Millett J. that a judge asked to make a strike out order should focus on the issue of whether a fair trial was still possible, Rose L.J. in his judgment said:

“For my part, without analysing the report in truncated form which appears in The Times of Mr. Justice Millett’s judgment in any detail, it does seem to me that there is an expression of view there which is perhaps not wholly in accordance with the practice of the court as I have understood it to be”.

The learned Judge then quoted the passage (already quoted above) in which Millett J. suggests that the proper way of dealing with deliberate disobedience of an order for discovery is by contempt proceedings, and not by an order to strike out. Rose L.J. continued:

“I, for my part, would wish to reserve consideration as to whether that is in fact an accurate statement of the court’s approach”.

Rose L.J. went on to hold that the material before the trial judge was not sufficient to establish that there had been a failure to comply with the peremptory order and that in any event, even if there had been non-compliance, it had not been contumelious. In a short judgment Waite L.J. gave some useful guidance as to how a Court which is called upon to make a strike out order, should approach its task. He said:

“There is in every case an inquiry to be made as to the degree of contumely involved in the default, the scale of the breach, what excuse there may or may not be for it, whether it can be remedied, how far the opposing party has been prejudiced by it, and any other matter relevant to the very wide discretion conferred on the court by Order 24 rule 16 to make whatever order the justice of the case may in its particular circumstances require”.

36. This emphasis on the flexibility of the discretion to be exercised by a court in responding to a failure to comply with a peremptory order of the Court, is found also in the judgment of Robert Walker J. in *Pereira v. Beanlands* [1996] 3 All E.R. 528. The Judge in the particular circumstances of the case felt able to depart from the normal rule that the consequences of a default by a litigant’s solicitor should be visited on the litigant. In setting aside the summary judgment which had been entered as a result of non-compliance with an unless order for discovery, the learned Judge took into account the fact that the party against whom judgment had been entered, was not personally at fault, had replaced his delinquent solicitor, and wished to defend the action in a fiduciary capacity. Given that the other side did not allege any actual prejudice as a result of non-compliance with the discovery order, the Judge held that justice required that the judgment be set aside. In discussing what epithet was most appropriate to describe the type of disobedience which justified the making of a strike out order, the learned Judge suggested that “deliberate” or “defiant” was preferable to either “contumelious” or “contumacious”, as it was part of “more everyday language”. He made the important point that in responding to a failure to comply with an unless order, a Judge should be allowed a good deal of flexibility in the exercise of his discretion and not be expected to apply rigidly a set of rules or follow some mechanical process. As the Judge put it, adopting the language of counsel: “The Court must not tick boxes on a form”.

37. The same Judge after his elevation to the Court of Appeal, returned to the same theme in *Beeforth v. Beeforth* (unreported July 3, 1998). In that case there was non-compliance with two successive orders made for specific discovery, the second order being an unless order made by consent. No excuse was offered for non-compliance with these orders and as a result the pleading of the defendants who were the parties in default, was struck out and judgment entered against them. The Court of Appeal quashed the strike out order. Having listed some of the factors which weighed with him, Robert Walker L.J. said:

“To put it quite simply, justice requires that this case should be tried, if it cannot be settled. In my judgment the judge, in spite of the care with which he evidently dealt with the matter, failed to address his mind sufficiently to the balancing exercise that was required and to the need for proportionality in any order which he made. That, it seems to me, entitles this court to exercise its own discretion afresh. For my part, I consider that the course which the Judge took, although I find it wholly understandable, was rather too severe”.

38. In considering the more recent English cases on the use of the power to strike out, one must bear in mind that the new Civil Procedure Rules came into force on April 26, 1999. As a result Order 24 rule 16 no longer exists in England. Its counterpart is CPR 3.4(2)(c), which gives the Court power to strike out a statement of case for failure to comply with a rule, practice direction or court order. Where an unless order is made under that rule, the party in whose favour it is made, may if it is not complied with, obtain judgment with costs under CPR 3.5 simply by filing a request for judgment. The party in default who wishes to set aside such a judgment, must apply for relief from the sanction imposed. A non-exhaustive list of the matters to be considered by the Court in deciding whether to grant relief, is set out in CPR 3.9. It does not appear, however, that these procedural changes have resulted in any change in the principles governing the making or refusal of orders the ultimate effect of which is to strike out a party’s case and cause judgment to be entered against him because of his failure to comply with a peremptory order of the court.

39. There are a number of other cases (to which I need not refer) in which the English courts have applied the principle that a strike out order may, and indeed should be made, whenever a party’s failure to comply either with the rules or with an order of the court, has rendered a fair trial no longer possible. It is necessary, however, to make clear what is meant by a ‘fair trial’ and for this purpose it is convenient to cite the following passage from the judgment of Chadwick L.J. in *Arrow Nominees Inc. v. Blackledge & Ors.* [2000] 2 BCLC 167 (at paragraph 55):

“Further, in this context, a fair trial is a trial which is conducted without an undue expenditure of time and money; and with a proper regard to the demands of other litigants upon the finite resources of the court. The court does not do justice to the other parties to the proceedings in question if it allows its process to be abused so that the real point in issue becomes subordinated to an investigation into the effect which the admittedly fraudulent conduct of one party in connection with the process of litigation has had on the fairness of the trial itself”.

Later in his judgment the same Judge again made it clear that the question whether in that case the trial should have been allowed to run its course, had to be determined by reference to whether that was fair to the innocent party as well as in the interest of the administration of justice generally.

40. I think I have quoted enough of the English authorities to demonstrate that notwithstanding the dicta of Millett J. in the *Logicrose* case, it remains good law that a

striking out order may in appropriate circumstances be made in response to, and in a sense, as a punishment for, the contumelious or contumacious or defiant breach of a peremptory order of the court. This, however, is subject to the proviso that a court which is called upon to make such an order on this ground, must approach the matter holistically and undertake the balancing exercise needed to ensure that proportionality is maintained and that the punishment fits the crime.

41. I refer as support for this proposition to the judgment of Arden L.J. (with whom the other two members of the Court of Appeal agreed) in the case of ***Stolzenberg v. CIBC Mellon Trust Co. Ltd.*** (supra). In that case there was an appeal against the refusal by a Judge to grant the defendants relief from an order which debarred them from defending the action unless they complied with various orders including one relating to discovery, which they had previously disobeyed. Arden L.J. in her judgment referred to a number of the cases decided under Order 24 rule 16. She obviously considered them still relevant despite the change of rules. She quoted with approval passages from some of the authorities to which I have already referred e.g. the ***Hytec*** case, in support of the following propositions:

- (i) That non-compliance with an unless order particularly if intentional, was a factor to be taken into account in determining whether a Judge should make an order striking out a party's case; and
- (ii) That the fact that the party in default could show that a fair trial was still possible notwithstanding his default, did not necessarily mean that a strike out order should not be made.

In connection with the first of these propositions Arden L.J. said (at paragraph 167):

“The fact that an unless order has been made inevitably means that there is an additional factor to consider. ... It is only a factor to be weighed in the balance. Moreover, compliance with orders of the court is not a question of judicial amour propre. It goes to the essence of the rule of law that parties subject to the court's jurisdiction ... should comply with the court's orders. The gravity of the matter of non-compliance is plainly increased where the non-compliance results from a conscious decision as in this case. It follows, as Ward L.J. said in ***Hytec Information Systems Ltd. v. Coventry City Council*** (1997) 1WLR 1666 at 1674 to 1675, that “If a party intentionally or deliberately ... flouts the order, he can expect no mercy”. He has to persuade the court that in all the circumstances the injustice to him outweighs the interest of the administration of justice and the injury to the other party.”

In relation to the second proposition she said (at paragraph 171):

“The fact that a fair trial is possible does not mean that relief from sanctions should follow”.

She then preceded to quote a passage from the judgment of Mance L.J. in *Hansom v. Makin* [2003] EWCA Civ 1801, a case decided with reference to the application of CPR 3.9. Part of the passage she quoted reads:

“But it does not follow that, where a fair trial is still possible, relief will necessarily be granted. CPR 3.9 deals generally with relief from sanctions imposed for failure to comply with a rule, practice direction or court order. It could not be the case that, whenever such a sanction had been imposed, and however flagrant or persistent the failure, the defaulting party could have it set aside by showing that a fair trial was still possible ...”.

We regard this statement as equally valid if applied *mutatis mutandis* to the exercise of the discretion to strike out under Order 24 rule 16. On the other hand, it is equally good law that if a fair trial (in the broad sense explained above) is not possible as a result of the breach of an unless order, ‘*cadit quaestio*’ – the strike out order must issue.

42. The last but by no means least of the authorities to which I will refer, is the decision of the Barbados Court of Appeal in *Caribbean Broadcasting Corporation v. Mirchandani and Ors* (2000) 59 WIR 57. That action had many affinities with these proceedings. It was a claim in libel brought by the same plaintiffs against the corporation which carried a live telecast of the ‘Pic-O-de-Crop’ finals from the National Stadium on the 4th August, 1989. I refer to the judgment delivered by Williams C.J. when the matter came before the Court of Appeal for the second time. This was on an application by the defendant/appellant for a review of the order previously made by the Court of Appeal striking out certain paragraphs of the Defence for failure to comply with an order to produce a videotape which the defendant had disclosed in its list of documents as one of those in its possession, power or custody. The ground of the application for review was simple. The inclusion of the videotape in the affidavit of documents was the result of a misunderstanding by the defendant’s attorney-at-law of his instructions. There was sworn and incontestable evidence that in fact no such videotape had ever existed. The Court of Appeal, not surprisingly, concluded that the application should succeed and quashed the earlier order to strike out. In giving the judgment of the court, Williams C.J. quoted passages from the judgments of Stamp L.J. in the *Husband’s of Marchwood* case, Millett J. in the *Logicrose* case and Lloyd L.J. in *Landauer Ltd. v. Comins & Co.* All three passages quoted made the point that Order 24 rule 16 is not intended to be used as a punishment for disobedience to the orders of the Court. Notwithstanding this, the learned Chief Justice thought it necessary to make the point that:

“It was not a case of contumacious conduct by CBC in not producing the tape. It never had the tape.”

The judgment thus reflects the ambivalence created by the two separate streams of English authorities.

43. The common sense reasoning which underlay the decision was explained by the Chief Justice in the following passage:

“Had it been known in the initial stages of the proceedings that CBC had no tape of the televised broadcast, the respondent would have had to use the home recorded tape in the presentation of their case. That is what they will now have to do if CBC is granted relief and nothing has been put forward to suggest that the respondents will be in a worse position.”

We find it strange that neither this judgment of Williams CJ nor any of the authorities cited in it, was referred to by the courts below in the instant case.

Guidelines

44. Having reviewed a number of authorities it would be useful for us now to identify some of the factors which a Judge who is asked to make a strike out order should take into account in conducting the balancing exercise to which reference has already been made. I should start by making it clear that what follows is not intended to be a comprehensive list of the factors to be considered. The discretion is a wide and flexible one, to be exercised “as justice requires”, and it is quite 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. A judge dealing with an application to strike out, should start off by reminding himself that to strike out a party’s case and so deny him a hearing on the merits, is an extreme step not to be lightly taken. In fact, this is a consideration which should be taken into account by the judge who is asked to make an unless order. He should not use the threat to strike out contained in such an order unless there is a real prospect that non-compliance with the order might warrant the imposition of such an extreme penalty.

45. Broadly speaking, 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. 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, then that is a situation which calls for an order striking out that party’s case and giving judgment against him. One way in which such a situation may come about, is if crucial documents which are not disclosed within the time prescribed by an order for discovery, are subsequently lost or destroyed, albeit without fault on the part of the non-disclosing party. Another is where a party has been so fraudulent in relation to the discovery process, for example, by forging or deliberately suppressing documents and lying about it, that it is impossible to place any reliance on what he has disclosed as being either authentic or complete, without a long and expensive inquiry.

46. With regard to the use of strike out orders as a response to disobedience of court orders, we respectfully disagree (as other courts have done) with the view of Millett J. expressed in the *Logicrose* case, that such disobedience can never justify the making of a strike out order. We prefer the view expressed by Arden L.J. in the *Stolzenberg* case that the fact that a fair trial is still possible, does not preclude a court from making a strike out order. We accept with some qualifications the principle expounded and applied in cases such as *Tolley v. Morris* (supra), *Hytec Information Systems Ltd. v. Coventry City Council* (supra)

and *Re: Jokai Tea Holdings Ltd.* (supra), that 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 symbolic response to a challenge of 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 the type of disobedience that may properly be categorised as contumelious or contumacious.

47. We do not, however, endorse the approach which was adopted by the courts below in this case. This involved a two-step inquiry. The first step was to enquire whether there was non-compliance with an unless order of the Court. Non-compliance having been found, the second step was to consider whether the offending party had demonstrated that its non-compliance was due to some extraneous circumstance. The offending party having failed to do so, the issue of the strike out order was regarded as automatic. Such an approach approximates to the ticking of boxes on a form, an approach which we join with Robert Walker J. in deprecating. What is required is a balancing exercise in which account is taken of all the relevant facts and circumstances of the case. For one thing, 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. No doubt the fact that what has been breached is an unless order has a special significance, as such an order is framed in peremptory terms which make it clear to the party to whom it is directed, that he is being given a last chance. The previous conduct of the defaulting party will obviously be relevant, especially if it discloses a pattern of defiance. It is also relevant whether the non-compliance with the order was total or partial. Normally it will not assist the party in default to show that the non-compliance was due to the fault of his lawyer since as already stated, 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. Other factors which depending on the context, have been held to be relevant include such matters as whether the party at fault is suing or being sued in a representative capacity and 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. Regard may have to be paid to the impact of the judgment not only on the party in default, but on other persons who may be affected by it.

48. We would like to emphasise again that what has been offered above is not intended to be a complete catalogue of the matters to be considered but represents a general guide to the approach to be adopted and a sample of the factors which have been held in decided cases to be relevant to the balancing exercise.

The exercise of discretion by Husbands J.

49. I turn finally to consider whether the exercise of his discretion by Husbands J. in favour of making a strike out order, can be impugned. As already pointed out, the learned Judge did not explain the nature or extent of the non-compliance with which he was dealing.

He did not indicate what were the documents which the appellant ought to have disclosed, but did not disclose in its further and better list of documents, or whether those documents were still in existence or had been destroyed. We have held that on the evidence the only material respect in which the appellant failed to comply with the unless order was by failing to list in Schedule 2 the master tapes for the relevant period. We have held that the finding of the Court of Appeal that the appellant also had in its possession audio tapes which it should have disclosed, is without foundation on the evidence and in any event was not one which could properly be made having regard to the conclusive nature of the verifying affidavit sworn by Mr. Fernandes in support of the appellant's further and better list of documents.

50. Can the strike out order be justified on the basis of the failure to disclose the master tapes? We have no hesitation in holding that it cannot. In the first place, we have already expressed our disagreement with the approach adopted both by Husbands J. and the Court of Appeal. This was confined to looking for some extraneous cause to explain the appellant's non-compliance with the unless order. Not having found any, they held that the order must issue. There was no attempt to examine what element or degree of defiance was inherent in the appellant's failure to include the master tapes in its further and better list, or what prejudice the respondents suffered as a result of that failure. On the question of defiance, one cannot ignore the fact that the appellant's failure to comply with the first order made for a further and better list of documents, must have been attributable in part at least, to the appellant's lack of legal representation at the time. Even when the further and better list was filed, the appellant still did not have the services of experienced counsel. Even if one accepts (as we do) the finding of the lower courts that the omission of the master tapes from that list was deliberate, the fact is that when faced with the application to strike out, the appellant through Mr. Fernandes did eventually acknowledge, albeit grudgingly, the existence of the master tapes. So that, even though these tapes were never formally included in a list of documents, the object of the order for discovery was ultimately achieved.

51. We have also held that there was no evidence to support the suggestion that the master tapes were deliberately destroyed or recycled in order to deny the respondents access to them. The recycling would have taken place before the original order for exchange of documents was made in July 1992, so that as in the *Caribbean Broadcasting Corporation* case (supra), the respondents would have been no better off if these master tapes had been disclosed, as they should have been, in the original list of documents, since by then they were no longer in existence.

52. Even though there is some element of fault in the appellant's failure to preserve these master tapes, this could hardly justify a strike out order given that the original order for discovery was made long after the tapes had been recycled. Further, even if the tapes had been preserved, they would have been of only limited value to the respondents. They possibly would have provided conclusive evidence that the calypsos had been played on the Voice of Barbados and established the frequency with which they were so played during the festival period. They might also, because of the comments allegedly made by the radio announcers both before and during the playing of these calypsos on the station, have established that the calypsos were intended and understood to refer to the respondents. But publication and reference to the respondents were peripheral issues which have been

removed from the case by our refusal to re-instate certain paragraphs of the Amended Defence (as I explain below). It was also claimed that the tapes would have assisted in proving the additional verses which were added by the calypsonians to the calypsos as originally recorded, but it appears from one of the first respondent's affidavits that she has her own home-made recordings of the calypsos including the additional verses and the respondents are therefore in a position to reproduce them in their pleading, as they have already done in part and propose to do more completely by way of amendment. The master tapes would have been of no use to the respondents in countering the defence of justification which is the only substantive defence left. The upshot of all this is that no prejudice of any significance has been suffered by the respondents as a result of the omission of these master tapes from the further and better list of documents (or for that matter from the original list of documents). The real prejudice suffered by the respondents has been the long delay in the disposition of this case which regrettably has occurred while the issue of discovery was being contested before the courts.

53. There was no attempt by Husbands J., or for that matter the Court of Appeal, to carry out any sort of balancing exercise and they failed to take into account any of the relevant factors referred to above. Had they done so, they would inevitably have come to the conclusion that to strike out the whole of the Amended Defence and order judgment to be entered for the respondents for damages and costs, was wholly disproportionate in the circumstances of this case and was not required either by considerations of fairness to the respondents or other litigants, or as a response to defiance of an order of the Court that was so egregious that it demanded nothing less. For these reasons, the exercise of the Judge's discretion was fatally flawed and plainly wrong.

Parts of defence not reinstated

54. We did not, however, order the reinstatement of the whole of the Amended Defence. We ordered that certain parts of it should remain struck out. These were paragraphs 2, 3, 5, 10 and part of paragraph 6. In paragraph 2 the appellant did not admit *inter alia* publication of the calypsos. In paragraph 3 the appellant did not admit the paragraphs in the Statement of Claim in which the respondents pleaded the facts on which they relied in support of the allegation that the calypsos were understood to refer to them. In paragraph 5 of the Amended Defence, the appellant denied that the calypsos referred to or were understood to refer to or were capable of referring to the respondents. Paragraph 10 was simply a blanket denial of what was not expressly admitted. The words in paragraph 6 that were struck out, merely served to preserve the appellant's denial that the calypsos referred to the respondents. By striking out these portions of the Amended Defence, therefore, we made it unnecessary for the respondents at the trial to prove:

- (a) that the calypsos were played frequently on the Voice of Barbados during the period of the 1989 Crop Over and less frequently, up to the date of the writ, and
- (b) that the calypsos referred to the respondents.

55. It was obvious to us that there was no real prospect of the appellant resisting the respondents' allegations with regard to these two elements of the respondents' cause of

action i.e. publication and reference to the respondents, and the portions of the Amended Defence that we struck out were really only of nuisance value to the appellant. We considered that having regard to the delay which had occurred, the trial should not be encumbered with unnecessary issues and that the parties should focus on the one substantive issue in the case (apart from the quantum of damages) i.e. whether the appellant can establish the truth of what was conveyed to listeners by the three calypsos. The delay in the disposition of this case has been enormous. Most of it is attributable to the unfortunate tardiness of the Courts below in giving their reserved judgments. This is a matter on which we have already commented adversely in our judgment on the application for leave to appeal, and to which we do not need to return. The appellant, however, is by no means completely blameless in relation to delay. There are two significant periods of delay for which the appellant must share or take responsibility. The first is the time elapsed between the expiration in August 1992 of the period fixed by the original order for the exchange of lists of documents, and the filing of the appellant's list on the 23rd November, 1993. The second is the delay of about a year in the hearing of the respondents' application to strike out, which came about as a result of the inability of the appellant's counsel to keep the dates which had been fixed by consent for the hearing of the matter. (I should mention that we do not accept the respondents' contention that there was a deliberate policy of delay adopted by the appellant or its counsel).

56. One also cannot ignore the fact that the respondents' complaint of inadequate discovery by the appellant, has ultimately been made good, though only to a very limited extent, and this complaint has in fact occupied the court from October 1994, until we gave judgment in this matter on the 7th November, 2005, that is, for more than eleven years. While the appellant cannot be blamed for the great majority of this delay, the fact nevertheless is that had it made a prompt and proper response to the applications for the orders made by the Chief Justice and to those orders themselves, this matter may well have been tried many years ago. In those circumstances, it did not seem unfair to trim the Amended Defence in the way in which we did, with a view to expediting even in some small way, the final disposition of this case.

57. With regard to costs, we made an order which we considered fair and reasonable in the circumstances.

M.A. de la Bastide (President)

Justice Rolston Nelson

Justice Adrian Saunders

Justice Désirée Bernard

Justice David Hayton

