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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**31/05/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING S BENCH DIVISION

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Between:

ANDREW MATTHEW McGIVERN

Plaintiff/Appellant

-and-

SOUTH EASTERN HEALTH AND SOCIAL CARE TRUST

Defendant/Respondent

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Ciaran McCollum (instructed by McCoubrey Hinds Solicitors) for the Plaintiff/Appellant
Michael Lavery (instructed by Directorate of Legal Services) for the Defendant/Respondent

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SIMPSON J

Introduction

[1] This is the plaintiff s appeal from an order of Master Harvey, dated 14 December 2023, refusing the plaintiff s application for an order setting aside a judgment entered for the defendant due to the plaintiff s failure to comply with an unless order. The application was brought under the inherent jurisdiction of the court and/or Order 3 rule 5 of the Rules of the Court of Judicature (Northern Ireland) 1980.

[2] Where material, Order 3 rule 5 provides:

> **Extension, etc. of time**
>
> 5.–(1) The court may, on such term as it thinks just, extend or abridge the period within which a person is required or authorised by these Rules, or by any judgment, order or direction. to do any act in any proceedings.

> (2) The court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period."

[3] The plaintiff s claim arises out of alleged clinical negligence on the part of the defendant at the Ulster Hospital, Dundonald from 26 June 2017 to 2 July 2017. The alleged negligence relates to delay in treatment of the plaintiff s appendicitis as a result of which the appendix perforated, and the plaintiff had to undergo open, as opposed to keyhole, surgery.

[4] The Writ of Summons was not issued until 25 June 2020, just before the expiry of the primary limitation period. It is not clear when the Writ was served, but the Memorandum of Appearance is dated 11 June 2021. A letter of claim was not sent to the defendant until 21 September 2021, following the first review referred to below. To date no Statement of Claim has formally been served, although a draft Statement of Claim was provided to the court as a result of a direction from Colton J when the hearing of this appeal was adjourned for a short period to allow for its provision.

[5] The unless order in question was made by Master Harvey on 3 October 2022 in the following terms:

> IT IS ORDERED that unless within 4 weeks of the date of service of this order, the plaintiff serves a Statement of Claim in compliance with the order dated 29 day of June 2022, the plaintiff s action shall be struck out with judgment to the defendant with such costs in the action to be taxed in default of agreement."

[6] It was served on the plaintiff s solicitors. According to the first affidavit of the solicitor with carriage of the case, it was served with an undated letter when she was off work, but she accepts information provided by the defendant that it was served on 10 November 2022.

Some relevant history

[7] The case was first reviewed by a Master on 15 September 2021. In his judgment underlying the decision under appeal in this matter Master Harvey describes such reviews.

> Masters reviews are important milestones in the life of a case and should be treated as such; they ensure the litigation progresses expeditiously and in a manner which is likely to minimise costs, which is in line with the overriding objective set out in Order 1 rule 1(a) of the Rules."

[8] At that first review in September 2021 the Master directed, inter alia, that a Statement of Claim be served within 16 weeks. Importantly, the Master s order provided that any application for an extension of time for compliance with the directions must be sought from the court before the expiry of the prescribed time limit contained within." No Statement of Claim was served within the 16-week period and no extension of time was sought before the time limit expired.

[9] The case was reviewed again on 29 June 2022, some 9 months after the first review. The Master directed that the Statement of Claim was to be served within 12 weeks of the date of the June review, time to run during the Long Vacation. The plaintiff s solicitor was to provide a chronology of all steps taken to obtain an expert s report. Again, the directions provided that any application for an extension of time should be made before the expiry of the time limit in the directions. No such extension was sought, and no Statement of Claim was served within the 12-week period.

[10] A third review took place on 3 October 2022, over 12 months after the first review. No Statement of Claim had been served. Accordingly, the Master made the unless order referred to above.

[11] In her first affidavit the solicitor with carriage of the case admits that the listing notification of the third review was received in the solicitors office and was scanned to the case file. However, it was not actioned." She says she was off work at this time." Without wishing to make public detailed matters involving the solicitor with carriage of the case and her immediate family, the affidavits filed by her explain that there were a number of serious personal and family matters which resulted in her being off work for periods of time relevant to the proceedings in this case. She says that there were times when I was in work and times when I was off work, and I was trying to manage work as best I could." I accept the reasons behind her difficulties to be entirely genuine. The effect of this was her attendances at the office from September 2021 were sporadic, and she was out of the office altogether from approximately mid-July 2022 to mid/end-October 2022.

[12] Counsel for the plaintiff, Mr McCollum, became aware of the listing on 3 October 2022, as he was involved in other reviews on that date, but by the time he was able to do anything, the order had already been made.

[13] The defendant served the unless order on the plaintiff s solicitors on 10 November 2022. The plaintiff, therefore, had until 8 December 2022 to abide by the terms of the order. The plaintiff did not do so.

[14] Master Harvey, in his judgment, refers to the Master s Practice Note No. 1 of 2012 which provides:

> The sanction specified in an unless order takes effect without the need for any further order of the court if the

> party to whom it is addressed fails to comply with its terms."

[15] In her second affidavit the solicitor with carriage of the case explains that by early November 2022 she had returned to work, but

> "… things were still in upheaval. I was off some days and unfortunately the letter enclosing the order was overlooked. No other solicitor in the firm was managing my work load during this period as the other practitioner within the firm working in the field of litigation was relatively inexperienced and would not have been aware of the significance of such an order. During this time incoming correspondence would have been handled by my secretary."

[16] It is clear, therefore, that the solicitor with carriage of the case was back at work probably before, but certainly at or about the time, when the unless order was served on her firm by the defendant. She says that because the letter was undated she assumed that it had been received by her office shortly after the order was made in early October 2022." Notwithstanding this, and the potential consequential urgency to deal with the matter, the plaintiff did not make any application to set aside the order eg on the basis that no-one for the plaintiff appeared before the Master on 3 October 2022. Nor did the plaintiff seek to appeal the order.

Some relevant authorities

[17] The appropriate starting point for the consideration of unless orders is the case of *Hytec Information Systems Ltd v Coventry City Council* [1996] EWCA Civ 1099; [1997] 1WLR 1666. In this jurisdiction Morgan LCJ said in *Ritchie v McKee and others* [2016] NICA 8 at paragraph [13]: There is no dispute that Master Bell in his careful judgment was correct to follow the approach in *Hytec*…"

[18] In *Hytec* Ward LJ said (WLR page 1674H to 1675C):

> In the light of my observations that each case really should be cited upon its own facts, it may be otiose to try and encapsulate what I understand to be the philosophy underlying this approach.
>
> It seems to me it is:
>
> 1. An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party s last chance to put his case in order;

2. Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed;

3. This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure;

4. It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred), flouts the order then he can expect no mercy;

5. A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order;

6. The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice;

7. The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also weigh very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two."

[19] At 1675h to 1676A he said:

> Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: first, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a charter for the incompetent (as Mr MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. The basis of the rule is that orders of the court must be observed and

> the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant himself."

[20] Auld LJ said (1676 F/G) that an unless order is, by its nature, intended to mark the end of the line for a party who has failed to comply with it and any previous orders of the court." Citing the judgments in the case of *Caribbean General Insurance Ltd v Frizzell Insurance Brokers Ltd* [1994] 2 Lloyd s Rep. 32 he said, I respectfully agree…that the essential notion in play is whether a party s failure to comply with an order is inexcusable, in the sense of being without a reasonable excuse."

[21] At page 1677G/H he said that:

> In my judgment, there is no need to confine the test to that of an intentional disregard of a court's peremptory order, whether or not it is characterised as flouting, contumelious, contumacious, perverse, obstinate or otherwise. Such an intent may be the most usual circumstance giving rise to the exercise of this jurisdiction. But failure to comply with one or a number of orders through negligence, incompetence or sheer indolence could equally qualify for its exercise. It all depends on the individual circumstances and the existence and degree of fault found by the court after hearing representations to the contrary by the party whose pleading it is sought to strike out."

[22] Lord Woolf MR, at page 1678G said:

> I therefore draw judges and practitioners attention to the principles set out in the judgment of Ward L.J. which for the future should be regarded as stating the general guidance which should normally be applied in this area."

The parties submissions

[23] There is no submission by the plaintiff that there is any procedural defect or that there is any want of regularity in the unless order. The thrust of Mr McCollum s submissions is that there would be no evidential prejudice to the defendant if the court was to exercise its discretion to extend time. As in most, if not all, clinical negligence cases the hospital notes and records are available to all parties, so that the contemporaneous diagnosis and treatment of the plaintiff do not depend on the vagaries of memory. He points to correspondence from the defendant s solicitor setting out what he describes as a full response to the allegations" made by the plaintiff, as evidence that the defendant will not suffer prejudice.

[24] The affidavits sworn by the plaintiff s solicitor, he submits, provide explanations to the court which amount to a reasonable excuse in the circumstances of this case. The firm of solicitors acting for the plaintiff is a small practice and there was no other solicitor with suitable experience of litigation. The lockdowns caused by the Coronavirus Regulations intervened. The plaintiff was not eligible for legal aid and until a suitable medical expert could be identified and a report made available, it was not possible to draft or serve a Statement of Claim. The chronology provided by the solicitor explains the problems obtaining an expert s report. After the case was struck out on foot of the unless order, no Statement of Claim could be served. There was no intention on the part of the plaintiff s solicitor to flout the orders of the court.

[25] Mr McCollum identified cases in which the discretion had been exercised in the favour of the defaulting party, but such cases are not helpful being entirely fact specific. He also, in reliance on the judgment of Weatherup J in *McKenna v Quinn* [2012] NIQB 8 (citing *Hughes v Hughes* [1990] NI 295], submits that in approaching the exercise of its discretion the court can read across to other types of case eg cases involving application for extensions of time such as *Davis v Northern Ireland Carriers* [1979] NI 19 and *Coyle v Secretary of State* [1987] NIJB 59. He particularly drew the court s attention to para [11] in *McKenna v Quinn* and to the judgment of Gillen J in *McArdle v Marmion* [2013] NIQB 123, both dealing with the exercise of discretion.

[26] He reminded the court that the exercise of discretion was for me, irrespective of how Master Harvey exercised it at first instance. Since Master Harvey s decision was made there is further material before the court, namely the solicitor s second affidavit (and exhibits thereto), the medical expert s report and the draft Statement of Claim.

[27] He says that the plaintiff has a case in negligence. The medical report from the expert shows that if there had not been delay, the appendix would not have perforated, and the plaintiff would not have required the more invasive surgery. In all the circumstances the prejudice to the plaintiff — that his case will not be heard, and he will be denied a judicial assessment of his allegations — outweighs any potential prejudice to the defendant.

[28] On behalf of the defendant Mr Lavery points to the risks which practitioners should be aware of when an unless order has been made. He relies on the reasoning in the judgment of Master Harvey; the principles enunciated in *Hytec*; and on what was said by McFarland J in *Foster v Police Ombudsman for NI and another* [2021] NIQB 10, at para [21], viz:

> An unless order is an order of last resort, and should be enforced strictly to ensure that litigants, and their representatives understand that the terms of such orders must be complied with. If courts do not enforce unless orders then a practice will soon develop of them being

> ignored. It will only be in exceptional circumstances that a court will not enforce."

[29] Mr Lavery also criticises the solicitor s second affidavit as still not fully addressing issues of delay. He describes the plaintiff s claim as involving very short delay and being, therefore, a very small claim.

Consideration

[30] In the present case I do not consider that the explanations offered satisfy me that something beyond the plaintiff s control caused the failure to comply with the order. I make no attempt to identify any failure by the plaintiff as opposed to the failures on the part of his solicitor (see para [19] above; and see also *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, at 254 and 256. What matters to the court is that there has been a failure on the plaintiff s side to obey the unless order.

[31] I consider that it is relevant to the consideration of the main issue in this case that there had been two earlier failures to abide by the order of the court. If those failures were caused, or contributed to, by delays in identifying an expert, then this should have been the subject of an application — within either the 16-week period provided for in the first order, or within the 12-week period provided for in the second order — for an extension of time in which to serve a Statement of Claim. No such application was made. It was not appropriate for the firm of solicitors simply to allow matters to drift and to do nothing. The failure to serve the Statement of Claim effectively meant that no pleading was provided to the defendant from in or about January 2022 (the end of the 16-week period) to April 2024 when, at the direction of Colton J, a draft Statement of Claim was provided — a period in excess of two years.

[32] It should not have to be articulated in a judgment of the court that a firm of solicitors, holding itself out as competent to carry out clinical negligence work, must make provision for absences — even extended absences — from work of a solicitor with carriage of a case. There must be appropriate systems in place within the practice so that time limits are not missed and so that court orders are complied with. It is not a sufficient attempt at exoneration to assert that there was no-one else in the office who had the necessary experience to be able to oversee the plaintiff s case. In passing, I do not accept that a qualified solicitor, however junior, involved in litigation would have been unaware of the significance of an unless order made by a court. However, if this really was the position, then it was all the more important within the firm to have in place some appropriate arrangements to ensure that orders of the court were complied with. Far from this being the case, it is clear beyond peradventure, from the content of the solicitor s affidavits, that no system was put in place to deal with such potential issues while the solicitor with carriage of the case was out of the office, for whatever reason.

[33] In the passages prior to his enunciation of the principles in *Hytec*, Ward LJ cited a number of earlier authorities. Referring to *Frizzell* (op cit) he said (1673G):

> The leading judgment was given by Leggatt L.J. who said, at p. 37, having recited the passage from the *Jokai* case [1992] 1 W.L.R. 1196, 1202-1203, as I have done:
>
> > It is to be noted that the Vice-Chancellor was specifically expecting that a defaulter would only escape the consequences of judgment given against him if he could demonstrate both that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances.'"

[34] In relation to extraneous circumstances he quoted from the Court of Appeal judgment of Beldam LJ in *R.G. Carter (West Norfolk) Ltd v Ham Grey Associates Ltd* (unreported), 21 June 1996, who said:

> As I previously indicated, the only criticism which I would have of the judge s approach is of the meaning which he attributed to the phrase extraneous circumstances as used by this court in the cases of *Jokai* … and *Frizzell* … In my view, it is intended to convey something which happens beyond the control of the party to prevent him from complying with the order."

[35] In my view there was nothing in this case which was beyond the control of the party (being, for these purposes, the plaintiff and the firm of solicitors who represented him) to prevent him from complying with the unless order made by the Master. I find that the explanations provided by the plaintiff s solicitor in her two affidavits do not amount to extraneous circumstances such as would be required to allow the court to exercise its discretion in favour of the plaintiff. The plaintiff has failed to cross the threshold showing that the most compelling reason is advanced to exempt his failure" — see para [18] above, sub-para 3.

[36] I appreciate, of course, that if the court does not exercise its discretion in his favour, it will deprive the plaintiff of his action against the Trust for its alleged negligent treatment of him. However, he will not be without potential remedy.

[37] Directions and orders made by the court are made for a reason. The court intends that they be complied with. The proper administration of justice requires that they be complied with. If a party (being the client and the firm of solicitors instructed) disagrees with the order, it has the right of appeal. If a party feels that it cannot comply with the order for some reason, it is incumbent on the party to apply for an extension of time, setting out appropriate reasons to allow the court to extend time before the expiration of the time set by the court. It is not for the party to sit on its

hands and do nothing, whether deliberately or through negligence, incompetence or sheer indolence", to echo Auld LJ.

Disposition

[38] Having taken into consideration all the circumstances in this case as set out in the papers before me and urged on me by Mr McCollum, I refuse to exercise my discretion, either pursuant to the provisions of Order 3 rule 5 or under the inherent jurisdiction of the court, to extend time for compliance with the unless order dated 3 October 2022.

[39] Accordingly, the plaintiff s appeal against the decision of Master Harvey is dismissed.