Neutral Citation No: [2024] NI Master 15 ***Judgment: approved by the Court for handing down (subject to editorial corrections)***	***Ref:* [2024]NIMaster15** ***ICOS No: 18/85224/02*** ***Delivered: 03/05/24***

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION

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BETWEEN:

SAMUEL GOURLEY

Plaintiff

and

BELFAST HEALTH & SOCIAL CARE TRUST

and

UNIVERSITY HOSPITALS OF LEICESTER NHS TRUST

Defendant

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Mr Brady, instructed by McCartan Turkington Breen for the plaintiff.
Mr McGarvey, instructed by Directorate of Legal Services for the first defendant.
Mr McMahon, instructed by Carson McDowell for the second defendant.

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MASTER HARVEY

Introduction

[1] I am grateful to counsel for their helpful written submissions and focused oral submissions.

[2] On consent between the parties, at the outset of the hearing, I granted leave to amend the summons pursuant to Order 20 rule 5 to reflect the correct relief being

sought which was under Order 3 Rule 5 and not Order 2 as set out in the summons of 7 October 2021.

[3] The plaintiff therefore seeks an order pursuant to Order 3 Rule 5 of the Rules of Court of Judicature (Northern Ireland) 1980 ("the Rules") setting aside the judgment for the defendants due to failure by the plaintiff to serve a statement of claim in compliance with two unless orders.

[4] Mr Brady confirmed the plaintiff was no longer seeking that the matter be removed to the Judge as had been sought in the summons. In any event, I observed that the unless orders had been granted by a different Master in June 2021.

Background

[5] This is a clinical negligence case relating to a cardiac ablation procedure, namely pulmonary vein isolation. This was carried out by the second defendant following a referral by the first defendant to the then Health and Social Care Board who accepted the referral of the plaintiff's case as part of the Board's extra contractual Referral process whereby patients can access care from outside NI for procedures not carried out here.

[6] The summons has an unfortunate history, having taken 2 ½ years to get to hearing for various reasons. I note the current solicitor took over carriage of the case filing a notice of change of solicitor in May 2022, and new senior counsel came into the case very recently. I am grateful to the new solicitor for compiling the helpful hearing bundle and to the plaintiff's recently instructed senior counsel for the more focused submissions.

The legal principles

[7] I referred the parties to *PD 1 of 2012* in relation to unless orders as well as a recent decision of this court concerning a similar application to reinstate a claim for failure to comply with an unless order, *McGivern v South Eastern Trust* [2023] NIMaster 13.

[8] The legal principles in such applications are well known and uncontroversial. Of relevance is the oft cited authority in *Davis* v *Northern Ireland Carriers* [1979] NI 19 (Lord Lowry) in which the court stated where a time limited is imposed by rules of court the court must exercise a discretion and should consider:

1. whether the time is already past (a court will look more favourably on an application made before time has elapsed);
2. if time has elapsed, the extent to which the party is in default;
3. the effect on the opposing party (and in particular if he can be compensated in costs);

4. whether a hearing on the merits has taken place or would be denied by the refusal of the application);

5. whether there is a point of substance to be made which could not otherwise be put forward;

6. whether the point is of general not merely particular significance;

7. that the rules of court are there to be observed.

[9] In subsequent authorities, there has been much debate about the application of the *Davis* principles. Gillen J stated in *Benson v Morrow Retail Limited* [2010] NIQB 140 at paragraph 24:

> "I have reminded myself, as did the Deputy Master that a court should not determine an appeal to extend time by a numerical account of the principles set out in Davis."

[10] Moreover at paragraph 19, Gillen J stated:

> "I respectfully add one footnote to the principles set out in Davis. I do not consider that they should be approached artificially as a series of hurdles to be negotiated in succession by an appellant with loss of the right to obtain an extension if he cannot pass any one or more of them. To do so would be to focus too closely on appearance rather than substance. Courts must not fall into the trap of missing the wood for the trees. The central underlying question is always whether in the particular circumstances and in accordance with an overall desire to achieve justice, the discretion ought to be exercised in favour of the appellant. See also Graham, Corry and Cheevers v Quinn and Others (1997) NI 338 at 355A."

[11] In the case of *Mahmud v Secretary Of State For The Home Department* [2023] NICA 4, in the context of an asylum application, McCloskey LJ also commented on the *Davis* principles, pointing out it should not be seen as an exhaustive code which is applied mechanistically:

> "[11] Many practitioners in this jurisdiction and, one would add, probably every serving member of the Court of Judicature have had occasion to consider the judgment of Lord Lowry LCJ. To embark upon an analysis of how this judgment has been applied in subsequent cases would be inappropriate. However, it is opportune to make clear the following. First, Lord Lowry did not purport to formulate an exhaustive code of principles. The second observation, related to the first, is that in doctrinal terms this is unsurprising – indeed entirely appropriate – given the breadth of the judicial discretion in play in every case where a possible extension of a time limit prescribed by rules of court falls to be considered. The third observation is that the advent of the overriding objective post-dated the decision in Davis.

The significance of this is that, per Order 1A, rule 3(a) the court "must" seek to give effect to the overriding objective – namely everything contained in paragraphs (1) and (2) of the Rule – when exercise any power contained in the Rules. The overarching imperative in the overriding objective is the application of the Rules "… to enable the court to deal with cases justly." The outworkings of this overarching requirement are set forth inexhaustively in para (2) of the Rule.

[12] As appears from the immediately preceding analysis, extension of time determinations in any of the judicial organs of the Court of Judicature should not be dictated by the mechanistic application of the Davis code. Rather a somewhat broader and more sophisticated judicial exercise may be required, with alertness to the particular context.

…

[15] As the immediately preceding analysis demonstrates the contemporary application of the Davis code must take into account not only the later advent of the overriding objective but also, and more fundamentally in cases such as the present, the advent of the Human Rights Act."

[12] In *Hytec Information Systems Limited -v- Coventry City Council* [1997] 1 WLR 1666, Ward LJ set out guidelines in relation to applications to extend time to comply with unless orders. This was followed in the Northern Ireland Court of Appeal in the case of *Ritchie v McKee and others* [2016] NICA 8 where at paragraph 13, Morgan LCJ stated that at first instance, the Master was correct to follow the approach in *Hytec*. The principles were summarised in the following way:

"1. An Unless Order was an order of last resort, not made unless there was a history of failure to comply with other orders. It was the party's last chance to put its case in order.

2. Because it was the last chance, a failure to comply would ordinarily result in the sanction being imposed.

3. The sanction is a necessary forensic weapon which the broader interests of the administration of justice required to be deployed unless the most compelling arguments were advanced to exonerate the failure.

4. It seemed axiomatic that if a party intentionally flouted the order he could expect no mercy.

5. A sufficient exoneration would almost invariably require that he satisfied the court that something beyond his control had caused the failure.

6. The judge would exercise his judicial discretion whether to excuse the failure in the circumstances of each case on its own merits, at the core of which was service to justice.

7. The interests of justice required that justice should be shown to the injured party for procedural inefficiencies causing the twin scourges of delay and wasted costs. The public administration of justice to contain those blights also weighed heavily. Any injustice to the defaulting party, though never to be ignored, came a long way behind the other two."

[13] In Hytec, Auld LJ observed with regard to intentional flouting of the order that negligence, incompetence or sheer indolence may qualify as flouting of court rules. This depends on the existence and degree of fault found by the court after having heard representations to the contrary by the parties whose pleadings it has sought to strike out.

[14] Moreover, in *Hughes v Hughes* [1990] NI 295, Carswell J stated that in order to seek an extension of time in respect of an unless order, the party must put forward some material to serve as a foundation for the court's exercise of its discretion and that a defendant is always likely to be prejudiced by a plaintiffs dilatoriness.

[15] In *Hutchinson v Chief Construction Limited,* a case also involving a failure to comply with the terms of an unless order, Master McCorry, at page 15 of the judgment stated:

"In exercising its discretion whether or not to excuse this plaintiff's failure to comply with the unless order the court must have regard to the circumstances of the case on its own merits, and in so doing it must have regard to the fact that the interests of justice requires that justice should be shown to the injured party as a victim of procedural inefficiencies causing the twin scourges of delay and wasted costs. No party to litigation can put forward its case in a fair and expeditious manner, having regard in particular to the question of cost and delay, if the other party can simply ignore the rules of court and previous orders of the court, in the way the plaintiff has sought to do in this case. Any injustice to the defaulting party, though not to be ignored, must come a long way behind injustice to the innocent party, in this case the defendant."

[16] In *McKenna v Quinn* [2012] NIQB 8 at paragraph 15 Weatherup J stated:

"…an unless order is effectively a judgment in the action in favour of the party on whose behalf it is made."

[17] Keene LJ in *Donovan v. Gwentoys Ltd* [1990] 1WLR 72 at 479-480 (Para 31) referred to the prejudice that may be caused to a defendant where time limits are not adhered to:

> "A defendant is always likely to be prejudiced by the dilatoriness of a plaintiff in pursuing his claim. Witnesses' memories may fade, records may be lost or destroyed, opportunities for inspection and report may be lost. The fact that the law permits a plaintiff within prescribed limits to disadvantage a defendant in this way does not mean that the defendant is not prejudiced. It merely means that he is not in a position to complain of whatever prejudice he suffers. Once a plaintiff allows the permitted time to elapse, the defendant is no longer subject to that disability, and in a situation in which the court is directed to consider all the circumstances of the case and to balance the prejudice to the parties, the fact that the claim has, as a result of the plaintiff's failure to use the time allowed to him, become a thoroughly stale claim, cannot, in my judgment, be irrelevant."

[18] The key questions to determine can be summarised in the following way.

Was the order complied with?

[19] The court directed that the plaintiff was to serve a statement of claim within 8 weeks of service of the unless orders. The order obtained by the second defendant was dated 18 June 2021, the first defendant obtained their order on 21 June 2021. Time started to run from the date of service of the orders. The orders were served by the second defendant on 18 June and by the first defendant on 27 July 2021. The deadline for compliance came and went with no service of the statement of claim. No extension was sought. A court review on 16 September was erroneously vacated as the court was under the impression the entire action was struck out when in fact at that stage it was still "live" against the first defendant at least, albeit the unless order was due to expire a few days later.

[20] The plaintiff appears to have taken no proactive steps, other than indicate in a QBCI3 form (which was in use at the time for administrative reviews) in advance, that they were going to seek an extension of time to comply with the order against the first defendant and seek reinstatement of the claim against the second defendant. Nothing was done after it became apparent the review was not proceeding although I note a draft summons was apparently dated 17 September but not issued until 7 October 2021. In the interim, the unless order obtained by the second defendant was served on junior counsel twice as well as by email and post to the plaintiff solicitor's firm. It is conceded that both the former plaintiff senior and junior counsel at the time were aware of the unless order obtained by the first defendant, and it had also been served on the principal of the solicitor's firm. The orders were not complied with despite being brought to the attention of the plaintiff's lawyers at the time and subsequently, by various means. The plaintiff was clearly in breach of the order.

Was the order regular and properly obtained?

[21] The unless orders were in line with the practice direction of 2012 and were in clear terms. They were issued administratively by the court, as is often the practice in this jurisdiction and I observe that assertions to the contrary by the plaintiff's former legal team regrettably further demonstrates a startling lack of knowledge of the basics of civil procedure in this jurisdiction. The orders were then properly served on the plaintiff. No extension had ever been sought to comply with the previous Master's directions of 23 July 2020 or January 2021. The directions of January 2021 expressly stated that any extension of time for compliance with the directions could be sought in writing. This is a standard and well-known practice in the Master's review system, but no attempt was made by the plaintiffs to take up this opportunity and alert the court to their supposed difficulties.

[22] The plaintiff's former solicitor questioned the purportedly unusual and unlawful manner in which the unless order was sought and granted. This lacks any credibility. The orders were sought and granted lawfully and in keeping with civil procedure in this jurisdiction, the various authorities in this area and the practice direction of 2012, which all serve to ensure the cost effective, fair, expeditious and just progress of the large number of active clinical negligence cases.

[23] Failure to comply with the rules resulted in the sanction being imposed by the court which is a necessary forensic weapon. It was the plaintiff's last chance to get their house in order and deployed absent any compelling argument having been advanced by the plaintiff to exonerate the failure to comply with previous directions.

[24] The initial email from the second defendant seeking an unless order on 3 June and the subsequent email of 18 June were both copied to the plaintiff. They had the opportunity to make email submissions in advance of the orders ever having been made. The fact the first defendant then proceeded to obtain their own order is something they were perfectly entitled to do given the default by the plaintiff.

Are there grounds for extending time for compliance with the unless order?

[25] The authorities make it clear that such a power should be exercised cautiously. In summary form and addressing the reasons advanced by the plaintiff as grounds to extend time, I consider these in turn.

Delays in legal aid

[26] I consider there were delays but only for the period from March 2020 and April 2021. It does not exonerate the plaintiff from serving a statement of claim. There was significant delay prior to issuing the writ from 2014 to 2018. Thereafter there was further delay, to which I have given careful scrutiny.

The need to seek senior counsel's input

[27] This was not a complex case, as evidenced by the factual background and draft statement of claim belatedly produced six years post issue of the writ which I

will turn to shortly. Awaiting input from senior counsel to draft a statement of claim in a case of this nature is not sufficient reason for the delay. In any event, authority for senior counsel was granted by the Legal Services Agency two months before the unless order expired against the second defendant and three months before it expired against the first defendant.

Breach of the plaintiffs Art 6 and art 8 rights

[28] The court itself would be in breach of article 6 of the convention if it did not seek to enforce the rules and ensure that the public administration of justice curtails procedural inefficiency, delay and incompetence in the conduct of litigation. Rules are there to be observed, as was stated in *Hytec.* Remedies are available to the plaintiff who was sufficiently frustrated by the delays to seek a new solicitor, who is now on board along with new senior counsel and who are seeking to rectify the actions and inaction of their predecessors. The plaintiff is therefore not left without a remedy, and his rights under the convention are thus protected by the safety net of a professional negligence claim.

The defendants can be compensated in costs and have suffered no prejudice

[29] I do not consider this grounds to accede to the application nor do I consider it an adequate remedy which addresses the default in the case, the failure to adhere to court directions, the wasted costs and delay as a result, the ineptitude demonstrated by the former legal advisors or prejudice caused to the defendants not least as they would be denied the benefit of a default judgment. The court can infer prejudice from the delay as it can have an impact on the cogency of the evidence adduced to the court given the cause of action was now 10 years ago. I also observe that the case against the first defendant appears at best weak albeit that is not determinative of this application.

A case of wider or general importance

[30] I consider this is not such a case as one might find in a judicial review matter involving public law issues. This is a clinical negligence case which is understandably very significant to the plaintiff but not a novel case on an emerging issue of law nor one which has an impact on wider society given that claims arising from waiting list initiatives have been before the courts for several years.

The need to obtain quantum reports

[31] This assertion that such reports were required to serve a statement of claim lacks credibility. Order 18 Rule 7 provides that the statement of claim contains a summary of the material facts. These were known from early 2020 when the plaintiff's expert report from Mr Glover was available. The statement of claim could easily be amended once the quantum reports became available. It is common practice in this jurisdiction to initially plead particulars of personal injuries in brief summary form and then subsequently seek to further particularise this aspect of the

claim through replies to particulars or by amending the statement of claim when the reports become available.

The changes in personnel in the plaintiff solicitor's firm

[32] I note the tragic death of the plaintiff's initial solicitor in 2017, the fact the next solicitor left the firm and thereafter a junior solicitor took over conduct. Based on the papers and the exchanges during the hearing, what in fact appears to have occurred is that a litigation secretary was entrusted with a clinical negligence case, which on the plaintiff's case was so difficult it necessitated senior counsel to even draft a statement of claim but did not merit careful handling by a qualified solicitor.

The lack of discovery

[33] I note the statement of claim as provided to the court during the hearing contains nothing which would suggest that drafting of the document could not have been done some time after March 2020 when the plaintiff had an expert report and counsel's opinion, or in the weeks after April 2021 when legal aid was granted to serve a statement of claim. This was not a complex case, the document produced is relatively brief and the allegations contained therein are short, based on the expert report and identical as against each defendant.

[34] Communications between the second defendant's solicitor and plaintiff's counsel clearly indicated she was working on the document but for whatever reason it did not appear. In fact, it was never produced even in draft form in the two and a half years since this application was issued, nor was it exhibited to the application which one would have expected, to assist the court.

[35] The provision of the type of discovery that was being sought and directed by the court was ultimately not a barrier to drafting of the statement of claim. I note the plaintiff solicitor in the agreed proposed directions from the parties prior to the court review in January 2021 did not indicate that drafting of the statement of claim was contingent upon receiving such discovery. They already had the various medical records, the only matter outstanding was contractual documents from the defendants, which were finally made available in March 2024.

[36] Such delay by the first defendant (the second defendant already having indicated in November 2020 they did not have the documentation) in the provision of the documents which was first directed in July 2020 was unhelpful and in breach of a court direction and no good reason was offered as to why this was ignored. Nevertheless, the statement of claim could have been produced absent the discovery that was finally provided or input from senior counsel.

The impact of the pandemic

[37] It is clear that email communications continued during the pandemic between the parties. During this time, the plaintiff successfully obtained a medical report and

instructed two counsel. There were two administrative reviews by the court. This did not prevent service of the statement of claim.

The court review on 16 September 2021

[38] I have dealt with this above and consider this does not exonerate failure to serve the statement of claim in compliance with the orders.

Is a fair trial still possible?

[39] I do consider, among a range of factors, that a fair trial is still possible and by not acceding to the application, the plaintiff would be denied a hearing on the merits against the current defendants. The notes and records are available, and the defendants do not assert evidential prejudice should the case proceed. While they have not obtained expert evidence to date, it is something that could be relatively easily organised.

Were matters outside the control of the plaintiff

[40] There is insufficient material before me as to serve as sufficient exoneration for the failures in this case or suggest the aforementioned purported obstacles preventing service of the statement of claim were genuine, insurmountable or outside the control of the plaintiff's lawyers at the time. The orders may not have been intentionally or contumaciously flouted but the authorities are clear that negligence or incompetence or sheer indolence may of themselves satisfy such a threshold and this case bears such hallmarks.

Conclusion

[41] The plaintiff asserts the court should exercise its wide discretion to accede to the application. In the exercise of judicial discretion as to whether to excuse the failure I have had regard to all the circumstances of the case with service to justice at its core.

[42] I have considered the overriding objective, the authorities, the factual matrix, affidavits, written and oral submissions and conclude this is not a case in which to exercise such discretion as to allow the relief sought. The interests of justice are such that any injustice to the defaulting party, though not to be ignored, must come a long way behind injustice to the innocent party, in this case the defendants.

Costs

[43] The usual order in the circumstances would be costs to the defendants, such costs to be taxed in default of agreement albeit as the plaintiff appears to be legally aided, such order not to be enforced without further order of the court, however, I will hear submissions as to the appropriate order in this case and whether costs have been wasted by failure to conduct proceedings with reasonable competence and expedition, pursuant to Order 62, Rule 11 of the Rules which provides:

"11. – (1) Subject to the following provisions of this rule, where it appears to the Court that costs have been incurred unreasonably or improperly in any proceedings or have been wasted by failure to conduct proceedings with reasonable competence and expedition, the Court may-

(a) order-

(i) the solicitor whom it considers to be responsible (whether personally or through a servant or agent) to repay to his client costs which the client has been ordered to pay to any other party to the proceedings; or

(ii) the solicitor personally to indemnify such other parties against costs payable by them; and

(iii) the costs as between the solicitor and his client to be disallowed; or

(b) direct the Taxing Master to enquire into the matter and report to the Court, and upon receiving such a report the Court may make such order under sub-paragraph (a) as it thinks fit…

(4) Subject to paragraph (5), before an order may be made under paragraph (1)(a) of this rule the Court shall give the solicitor a reasonable opportunity to appear and show cause why an order should not be made.

(5) The Court shall not be obliged to give the solicitor a reasonable opportunity to appear and show cause where proceedings fail, cannot conveniently proceed or are adjourned without useful progress being made because the solicitor-

(a) fails to attend in person or by a proper representative;

(b) fails to deliver any document for the use of the Court which ought to have been delivered or to be prepared with any proper evidence or account; or

(c) otherwise fails to proceed."

[44] The governing principles for such orders are contained in *Gupta v Comer* [1991]1QB 629. The purpose of making a wasted costs order against a solicitor in pursuance of this rule is compensatory and not punitive. Furthermore, the making of such an order is not dependent upon the demonstration of serious dereliction of duty, gross misconduct or gross negligence or neglect. The kind of default engaging the application of this rule is illustrated in *O'Neill v Nicholson* [1995] NIJB 11.

[45] An oral hearing in relation to the costs issue has been requested on a date to be fixed.