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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**17/01/2025**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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COMMERCIAL DIVISION

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BETWEEN:

(1) KRW LLP
(2) KEVIN WINTERS, JOSEPH McVEIGH, GERARD McNAMARA, NIALL MURPHY, PAUL PIERCE
(3) KRW LAW ADVOCATES LTD

Plaintiffs

and

PETER CORRIGAN

First Defendant

and

CLAIRE KEEGAN

Second Defendant

and

DARRAGH MACKIN

Third Defendant

and

CIARAN MOYNAGH

Fourth Defendant

and

PHOENIX LAW HUMAN RIGHTS LAWYERS LTD

Fifth Defendant

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Mr O'Donoghue KC with Mr Maxwell (instructed by Carson McDowell Solicitors) for the Plaintiffs
Mr McLaughlin KC with Ms Rowan and Mr Fletcher (instructed by Shein Dickson Merrick Solicitors) for the 2nd to 5th Defendants

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McBRIDE J

Introduction

[1] This is an appeal against the decision of Master Bell dated 29 April 2024 whereby he refused to set aside an order made by the Proper Officer dated 5 September 2023 striking out the plaintiffs' actions against the second to fifth defendants for failure to comply with an unless order dated 5 May 2023. The plaintiffs additionally issued a summons under Order 58 rule 1 appealing the Proper Officer's decision. The plaintiffs advised the court that they do not intend to pursue the appeal against the Proper Officer's decision and intend only to appeal Master Bell's decision dated 29 May 2024.

Representation

[2] The plaintiffs were represented by Mr O'Donoghue KC and Mr AGS Maxwell of counsel. The second to fifth defendants were represented by Mr McLaughlin KC with Ms Rowan and Mr Fletcher of counsel.

Background

[3] KRW LLP was established in 2012. The business was originally established in 2001 as Kevin R Winters & Co, Solicitors. The firm practices predominantly in criminal and public law.

[4] The first defendant became a partner in Kevin R Winters & Co, Solicitors, in 2004 and then a partner in the LLP in 2012. The second defendant was employed as an apprentice solicitor in January 2012 by the plaintiffs and qualified as a solicitor in September 2012. She worked as a solicitor for the plaintiffs, working mainly in historical abuse cases.

[5] The third defendant was employed by the plaintiffs as a trainee solicitor on 17 February 2012 and qualified as a solicitor in September 2014. He was employed as a solicitor by the plaintiffs, working mainly in legacy and inquest cases.

[6] In or around 2016, there were discussions about the second and third defendants being made partners in the plaintiffs' business. The nature of the legal relationship between the plaintiff and the second and third defendants remains in dispute with the plaintiffs alleging that they were made partners and these defendants denying they were appointed partners.

[7] The second defendant resigned from the plaintiffs' business on 17 August 2018. The first defendant and third defendant resigned on 18 August 2018.

[8] The first, second and third defendants then commenced employment with the fourth defendant on 20 August 2018. On 24 August 2018, the fifth defendant was

incorporated. It carries on business as a firm of solicitors. The first, second, third and fourth defendants are directors and shareholders of the fifth defendant.

[9] From in or around 20 August 2018, the plaintiffs received numerous "forms of authority" from its clients, all of whom sought to transfer instructions to the new partnership formed between the first, second, third and fourth defendants.

[10] On 7 September 2018, the plaintiff issued proceedings against the first, second, third and fourth defendants alleging, *inter alia*, a breach of contract, breach of a partnership agreement, breach of fiduciary duty, negligence and conspiracy.

[11] The plaintiffs sought interim injunctive relief against the defendants preventing then from, *inter alia*, breaching the terms of the partnership agreement dated 17 November 2017; acting in competition with the plaintiff; soliciting or acting for clients or former clients of the plaintiff and soliciting employees of the plaintiff to join them.

[12] The plaintiffs' claim for injunctive relief was resolved in the terms of a Tomlin order dated 21 September 2018.

[13] Thereafter, the case was pleaded out and various amendments were made to the pleadings. Ultimately, on 27 April 2023, an amended Statement of Claim was served. In this Statement of Claim the plaintiffs claim loss and damage caused to their business arising from the defendants' actions. For the purpose of this appeal the following extract from the Statement of Claim is relevant:

> "Particulars of Loss and damage
> …
> Paragraph 63(c) - 'The value of WIP (work in progress) and goodwill in respect of the files held by the first and third plaintiffs and unlawfully transferred to the fourth and fifth defendants."

[14] The defendants have entered amended defences to the statement of claim. For the purposes of this appeal, the following extract from the second defendant's defence is relevant. It states at para 49:

> "The second defendant does not accept the table appended at Appendix 1 to the statement of claim as an accurate list of previous clients of the plaintiff firm which have since transferred instructions to the fifth defendant…"

[15] The third defendant in his defence at para 46 makes an identical averment to the second defendant.

[16] In the course of preparation for trial the parties sought to finalise discovery. This led to a number of court orders being issued.

Relevant court orders regarding discovery

[17] On 30 January 2024, the court made an order for specific discovery. The order provided as follows:

> "Upon application by counsel for the second to fifth defendants for an order pursuant to Order 24 rule 7 of the Rules of the Court of Judicature,
>
> IT IS ORDERED that the plaintiffs within six weeks make and file an affidavit stating whether any of the documents specified in schedules 1 and 2 of the summons are or have been in their possession, custody or power and to disclose same to the second to fifth defendants, or if not now in their possession, custody or power stating the current whereabouts of the said documents and how they left the plaintiffs' possession."

[18] Schedule 1 set out 28 categories of documents sought. Beside each category sought the defendants provided reasons why the documents sought were relevant to the issues in dispute in a box headed "Relevance."

[19] The sole issue in dispute between the parties relates to documents sought in category 13; more specifically, time sheets in relation to work in progress ("WIP").

[20] The plaintiffs failed to comply with the order for specific discovery dated 30 January 2024 and on 5 May 2023, Master Bell made an unless order, which was not opposed by the plaintiffs, at an administrative review. The unless order provided as follows:

> "Upon application by the solicitors for the second to fifth defendants for an order pursuant to the inherent jurisdiction of the court,
>
> IT IS ORDERED that unless within 21 days of service of this order, the plaintiff complies with the order of the court granted on 30 January 2023, the plaintiffs' action shall be struck out with judgment for the defendants, with costs in the action to be taxed in default of agreement."

[21] In response to the unless order, Mr Kevin Winters filed an affidavit on 25 May 2023. At para 4 he averred as follows:

> "I am confident that we have carried out a thorough and diligent search…I refer to a bundle of documents marked KW3 comprised in two files that accompany this affidavit. They are tabbed to align with the items in Schedule 1. All of the documents meeting the description in Schedule 1 to the summons we have been able to locate are in those files…"

[22] This affidavit was accompanied by two lever arch files of documents which were tabbed to align with the categories of documents set out in Schedule 1 of the order for specific discovery.

Inter partes correspondence following Mr Winters' affidavit

[23] Upon receipt of Mr Winters' affidavit, the defendants' solicitors emailed the plaintiffs' solicitors on 6 June 2023 indicating that the discovery provided was partial and incomplete stating that if the documents were not provided they would seek default judgment against the plaintiffs.

[24] Although the original correspondence indicated the plaintiffs had failed to comply with the unless order in numerous respects, the sole basis of contention between the parties now relates to failure to provide time sheets in respect of WIP in accordance with category 13. In respect of category 13, the plaintiffs' solicitors' email dated 6 June 2023 stated as follows:

> "Ledger cards have been provided."

[25] On 16 June 2023, the plaintiffs' solicitors addressed the various queries raised in the defendants' solicitors' email and in respect of category 13 stated, "no further discussion required."

[26] Further correspondence followed on 27 June and 3 August 2023. This correspondence did not specifically refer to category 13.

[27] The defendants remained dissatisfied with the discovery provided and on 22 August 2023 filed an affidavit with the Proper Officer. On 5 September 2023, the Proper Officer made the order striking out the plaintiff's actions against the second to fifth defendants. This order was registered on 26 September.

[28] On 27 September the plaintiffs appealed the decision of the Proper Officer to the Master by way of an appeal under Order 24 rule 20. The plaintiffs also appealed the Proper Officer's decision pursuant to Order 58 rule 1.

[29] On 29 April 2024, the Master refused to set aside the order made by the Proper Officer. The Master gave an *ex tempore* ruling. After the ruling on 29 April, a clerk in the Master's office emailed the parties on 30 April 2024 on behalf of the

Master advising that upon a careful re-reading of the decision in *Chantry Martin v Martin* [1953] 2 QB 286, the Master was now satisfied that he was incorrect in finding that the working papers of the accountants were the property of the plaintiff. The Master further advised that his decision remained but for slightly different reasons than those stated. The email then stated as follows:

> "He remains satisfied that all the original material handed over by the plaintiffs to the accountants remain the property of the plaintiffs and that those documents are not the property of the accountants. The Master also remains satisfied that the full range of material in respect of WIP which was ordered to be discovered by McFarland J in the decision of *Winters and others v News Group Newspapers Ltd* [2023] NIKB 45, has not yet been discovered by the plaintiffs in *KRW v Corrigan and others*. For that and the other reasons he stated the defendants were correct in their assertion that the plaintiffs were in breach of the unless order and the plaintiffs did not show cause for relief from the sanction imposed under the unless order."

[30] The decision of McFarland J in *Winters v News Group Newspapers Ltd* [2023] NIKB 45, ("the Sun case") related to an order for discovery of documentation in respect of a defamation claim. McFarland J ordered the plaintiff to provide discovery of 19 categories of documents which included the following:

> "(i) WIP ledgers for the LLP at each year ended 31 March 2013, 2014, 2015, 2016 and 2017;
>
> (ii) Any document setting out the detailed breakdown/analysis of any adjustments to the WIP balances recorded per the ledgers and the amount recorded in the statutory accounts;
>
> (iii) Any document detailing how WIP is valued/recorded in the WIP ledger..."

[31] In the fifth affidavit filed by Mr Winters, he confirms that he swore and filed an affidavit dated 1 June 2023 in response to the Order 24 rule 7 Schedule of Documents ordered by McFarland J. A copy of the Sun case affidavit was exhibited to his fifth affidavit. In the Sun case affidavit, Mr Winters confirmed that the plaintiffs did not maintain a WIP ledger and in those circumstances, he treated the request as being for documents which recorded WIP on files across the LLP. He then provided handwritten time sheets which were described as forming "the contemporaneous record of a fee earner's time."

[32] Following the Master's decision, the plaintiffs filed this appeal which was supported by a fourth affidavit sworn by Mr Winters. In his fourth affidavit Mr Winters avers that he complied fully with the unless order and asserts that the defendants have been provided with all documents which are in the possession, custody or power of the plaintiffs relating to WIP.

[33] After this appeal was listed the plaintiffs applied for leave to adduce fresh evidence, namely the fifth affidavit sworn by Mr Winters. In his fifth affidavit he also exhibits the affidavit filed in the Sun case. He asserts that the discovery order in the Sun case was different from the specific discovery ordered in this case and again avers that he has complied with the unless order in the present case. He avers however that he has no objection to inspection of the documents exhibited in the Sun case. Mr Winters then specifically states that the only documents which are no longer in his possession custody and control are the client files transferred to the defendants. He avers that the time records for these transferred files are contained within those files and therefore these time sheets are no longer within the plaintiffs' power custody or control. The affidavit also exhibited a report from the plaintiffs' accountant Harbinson Mulholland.

[34] The parties agreed that the application for the admission of fresh evidence would be dealt alongside the appeal hearing.

[35] At the end of the appeal hearing, Mr O'Donoghue applied to file further fresh evidence in support of the plaintiffs' claim for relief in the event that the court found there was non-compliance with the unless order. I reserved determination of this application.

Issues for consideration

[36] There are three issues for determination by the court, namely:

(i) Should the court admit fresh evidence?

(ii) Did the plaintiff comply with the unless order?

(iii) If there was non-compliance, should the court grant relief?

Admission of fresh evidence

[37] It is accepted by all parties that an appeal from the Master is a *de novo* hearing. It is also accepted that on appeal from the Master the High Court has a discretion to admit fresh evidence. As was set out by Girvan J in *Lough Neagh Exploration v Morrice* [1999] NIJB 43, the onus is on the party seeking to admit the evidence to demonstrate that the interests of justice are better served by admitting the evidence than by refusing and that there was a sound reason for failing to file the evidence below.

[38] I am satisfied that since the hearing before the Master, the issues in dispute in this case have evolved and crystalised. In the absence of any evidence in respect of these matters, the Master wrongly believed that the plaintiff had failed to file an affidavit in response to the order for discovery made by McFarland J in the Sun case. The fresh evidence addresses this incorrect belief. Further, the fresh evidence addresses a submission made by the defendant before the Master that Mr Winters' original affidavit was defective in form as it failed to state, in accordance with the order for specific discovery, details of the documents which were no longer in the plaintiffs' possession. The fresh evidence addresses this submission which the plaintiffs were not alive to until submissions were made before the Master. I am satisfied that it is in the interests of justice for these points to be addressed by the plaintiffs in fresh affidavit evidence. These points only became apparent at or after the hearing before Master Bell. They are matters of substance which impact upon the appropriate order to be made. I therefore consider that it is in the interests of justice for the fresh evidence to be admitted. I further consider the plaintiffs had a sound reason for not filing this evidence at the original appeal as he did not and could not have anticipated that they would become relevant issues in dispute. Accordingly, I admit the fresh evidence.

Did the plaintiffs comply with the unless order?

[39] The plaintiffs assert that they have complied fully with the unless order by filing the affidavit sworn by Mr Winters on 25 May 2023 which exhibited two lever arch files of documents which were tabbed to align with the 28 categories of documents set out in the specific discovery order.

[40] The defendants submit that there was non-compliance with the unless order in two respects. Firstly, the plaintiffs failed to provide, and continue to fail to provide, the time sheets which show WIP. These documents, the defendants submit, are within the custody, power and control of the plaintiffs as they were disclosed by Mr Winters in the Sun case. Accordingly, the defendants submit that there has been a failure to comply with the unless order as the plaintiffs have not provided the documents requested under category 13, namely "…time records for each such client."

[41] Secondly, the defendants submit that Mr Winters' affidavit is defective in form because it fails to set out the documents which are no longer in the plaintiffs' possession, custody, power or control, as required by the terms of the specific discovery order.

Relevant legal principles regarding test for compliance

[42] In *Realkredit Danmark A/S v York Montague Ltd* [1998] WLR 10471 71, the Court of Appeal in England & Wales heard an appeal against the dismissal of the plaintiff's claims for failure to comply with an unless order for discovery. The court addressed

the issue of principle "what is the test for establishing whether or not there has been compliance with an unless order?" In answering this question Tuckey LJ reviewed the authorities, and I consider the following principles emerge from his judgment:

(i) The court must be sure that there has been a failure to comply with the order in question.

(ii) The burden of establishing non-compliance lies on the party who alleges failure to comply.

(iii) Usually the discharge of this burden is easy as in most cases there has been a total failure to comply.

(iv) In cases where there has not been a total failure to comply, Tuckey LJ opined that the order must be in clear and precise language and relied upon the following passage by Greene LJ at page 834 in *Abalian v Innous* [1936] 2 All ER 834:

> "The dismissal of an action at interlocutory stage is a very serious matter and may well work serious injustice. If an order is to be made in the form that, unless one party or another, does something, the action will be dismissed, it is imperative that the thing to be done in order to avoid dismissal of the action should be specified in the clearest and most precise language, so that it may be possible for the party on whom the necessity of doing the act lies … to be in no doubt whatsoever as to the step which he is to take if he is to avoid his action being dismissed. Looking at it in another way: where the defendant, in reliance on such order, goes to the court and asks it to say that, as a result of the order, the action stands dismissed and is no longer existent, he must be able to show first of all, that the language of the order is sufficiently precise, and, secondly, that which the order contemplates has occurred."

Determining whether an order has been complied with or not is a question of interpretation of the order and the rules and their application to the facts – see *Smails v McNally* [2014] EWCA Civ 1299 at para [40].

[43] There is a large body of jurisprudence in respect of how orders are to be interpreted. I consider the following principles of interpretation emerge from this jurisprudence.

(i) In construing an unless order, as with any other order, the court applies the ordinary meaning of the words used. The legal and procedural context will always be relevant and in some circumstances the context may make clear that the ordinary meaning cannot be the meaning of the order.

(ii) As the party who has to comply with an order, must be able to see from its terms what he is required to comply with, an order cannot be read expansively against the party who has to comply – see para [44] *Wentworth-Wood v Maritime Transport Ltd* (unreported) 3 October 2016.

(iii) Any ambiguity in an order should be resolved in favour of the party who was required to comply." See *Uwhubetine v NHS Commissioning Board England* (unreported) 8 August 2018 at para [45].

[44] Once a breach of the order is established the offending party has the onus of persuading the court to exercise its discretion to grant relief.

[45] Once a deponent says that there are no documents in the class specified that is conclusive, however incredible that might be – see *Lonrho v Fayed (No.3)* [1993] *The Times,* 24 June.

Finding of the court in respect of compliance

[46] In determining whether there has been compliance, it is necessary to consider the language used in the discovery order. Categories 12 and 13 in Schedule 1 of the specific discovery order need to be read together. Category 12 seeks discovery of documents "in relation to the figures for work contained within the accounts of the LLP and KAL to 31 March 2017, 2018, 2019 and the WIP figure produced in August 2018, to provide all documents vouching the breakdown of the totals."

[47] Category 13 seeks documentation "in respect of each client matter included within the breakdowns at No.12, furnished copies of the ledger card and time records for each such client."

[48] I am satisfied applying the ordinary and natural meaning to the words used in category 12 that category 12 applies to documentation in respect of WIP for files ***transferred*** from the plaintiffs to the defendants. No reference is made to files ***retained*** by the plaintiffs. Category 13 refers back to the client matters included within the breakdown at category 12. Accordingly, I find that category 13 also only refers to ***transferred*** files and the order therefore only required the plaintiffs to provide time sheets in respect of the ***transferred files***.

[49] This interpretation of the order is supported by the "relevance" boxes which set out the rationale for the provision of the documents in categories 12 and 13.

[50] The relevance box for category 12 documents states as follows:

> "At paragraph 63(c) of the Statement of Claim the plaintiffs specifically pleads that its loss concerns 'the value of WIP and goodwill in respect of files held by the plaintiffs and unlawfully transferred to the fourth or fifth defendants.' In order to fully assess the WIP this documentation is necessary.

The relevance box for category 13 states as follows:

> "The second and Third defendants have pleaded that the clients were in fact those of KAL not the Plaintiff (2nd defendant's defence at [1A] and [49] …hence these documents go to the question of loss in respect of assessing what fees were actually received by the Plaintiff and what therefore it could have expected to receive had the clients not transferred."

[51] I consider the relevance boxes for categories 12 and 13 only refer to transferred files and accordingly the documents sought in categories 12 and 13 similarly relate only to transferred files and not retained files.

[52] In his fifth affidavit Mr Winters swears that he parted with possession of the time sheets in respect of the transferred files when those files were transferred to the defendants. Accordingly, in accordance with the *Lonrho* principles *(supra)* that constitutes conclusive proof. I am therefore satisfied that the plaintiffs have complied with the specific discovery order.

[53] I consider there is no ambiguity in the language used and that applying the ordinary meaning of the words used and having regard to the context namely the relevance boxes category 13 refers only WIP time sheets in respect of transferred files. If I am wrong in my interpretation and category 13 is open to an alternative interpretation, namely one that refers to retained files, I am satisfied that before imposing a default judgment in relation to a breach of an unless order the court would apply the *contra proferentem* rule in respect of the interpretation of the order. Accordingly, I am satisfied that applying this rule of construction the order refers only to retained files. For the reasons set out I am satisfied that the plaintiffs complied with the order.

[54] In these circumstances, it is unnecessary to go on to consider the issue of relief and, therefore, it is unnecessary for Mr Winters to file any further affidavit in this regard.

[55] Mr McLaughlin submitted that Mr Winters had not stated in any affidavit filed by him that the order should be interpreted as referring only to transferred files. I am satisfied that failure to do so does not prevent the plaintiffs making this

argument. The burden is on the defendants to show non-compliance with the order. The authorities demonstrate that a party is only obliged to comply with the terms of the order. It is therefore the task of the court to interpret the order to consider its meaning. As this is a question of construction the subjective views of the parties would be irrelevant in any event and therefore failure to do so in an affidavit is not conclusive of the matter.

[56] In accordance with Order 24, the parties have a continuing obligation to provide relevant discovery. I am satisfied that the time sheets in respect of the retained files are relevant as the plaintiffs make a claim not only for fees lost due to files being transferred but also make a claim for loss of goodwill and damage to their business. WIP in respect of all files including retained files is an important part of the calculation of goodwill/value of the business. As appears from the Sun case affidavit, time sheets which deal with WIP for the retained files are within the possession, custody, power and control of the plaintiffs. Accordingly, I consider that the plaintiffs' list of documents requires to be amended to include these documents.

[57] I note that there was some correspondence in which the defendants sought to inspect the Sun case discovery based on an apparent offer made in Mr Winters' affidavit to do so. The correspondence demonstrates, for reasons which are unclear, that the plaintiffs refused to provide these documents until after adjudication by this court of this appeal. In light of the decision of this court the time sheets provided in the Sun case should now be made available for inspection.

Conclusion

[58] I grant the appeal and confirm that the defendants' application to strike-out the plaintiffs' action is duly dismissed and the default judgment issued by the Proper Officer is discharged.

[59] I will hear the parties in respect of costs.