

Neutral Citation No: [2018] NIQB 37

Ref: MAG10575

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 22/2/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

2011 No. 80159

BETWEEN:

ALAN McNEELY

Plaintiff

-and-

**PIERSE CONTRACTING LIMITED (IN RECEIVERSHIP AND IN
LIQUIDATION)**

First Defendant

-and-

BELFAST HARBOUR COMMISSIONERS

Second Defendant

-and-

HEYSHAM BOAT CHARTERS

Third Defendant

MAGUIRE J

Introduction

[1] This is an appeal to the High Court from a decision of Master McCorry ("the Master") made on 17 January 2018.

[2] The Master dismissed an application by the plaintiff, the now appellant, to set aside a default judgment which had been obtained by the second and third named defendants and to extend the time for complying with an “unless” order granted by Stephens J (as he then was) on 17 November 2016. The first named defendant has not played any part in these proceedings.

[3] The “unless” order had required that the plaintiff set down the proceedings for trial by 6 March 2017.

[4] In fact the plaintiff failed to comply with this order with the result that the second- and third-named defendants, following the normal procedure, certified non-compliance and obtained a default judgment. In this appeal, Mr John Coyle BL appeared for the appellant; Mr Gary Potter BL for the second named defendant; and Mr McHugh BL for the third named defendant. The court is grateful to counsel for their helpful oral and written submissions.

The proceedings

[5] These proceedings arose from an accident which allegedly befell the plaintiff on a date in July 2008. As a result of this accident, the plaintiff claims to have sustained personal injuries, loss and damage for which he claimed damages against the defendants.

[6] The court has before it exhibited materials which run to some length and which appear to amount to almost every document which the case has generated. It has, of course, considered these. However, what it has found of particular value is a chronology of key events since the time of the accident which has helpfully been distilled in the skeleton argument filed on behalf of the second-named defendant. All parties agreed that this chronology accurately records the main events with which this application is concerned.

[7] It is as follows:

“Writ of summons issued on 30 June 2011, seven days prior to the expiration of the limitation date.

Writ served on 8 May 2012, one month prior to expiry.

10 June 2013, the first unless order was made, requiring service of the statement of claim as a consequence of the plaintiff’s failure to comply with previous court directions regarding the service of the statement of claim. The plaintiff’s solicitor sought an

extension of time for compliance with that unless order.

Statement of claim served on 19 August 2013 without any medical evidence, in breach of the Rules of the [Court of Judicature].

After requesting supporting medical evidence, a medical report from Mr McCormack, consultant orthopaedic surgeon, bearing the date of 6 May 2011, was served on 2 September 2013.

The plaintiff's medical notes and records and loss of earnings information were requested on 2 December 2013.

On 10 December 2013 the plaintiff's solicitor advised that they were arranging for an appointment with the plaintiff to discuss outstanding issues.

1 October 2015, the second unless order was made directing the plaintiff's solicitor to serve the plaintiff's GP notes and records. The plaintiff's solicitor complied with the terms of this order on the last day for compliance.

26 April 2016 the second named defendant's solicitor wrote to the plaintiff's solicitor enclosing ELTO search details concerning the first named defendant, as the plaintiff's solicitor had advised the Master previously that they were unable to identify the administrators or insurers for the first named defendant...

30 June 2016, the third unless order was made requiring the plaintiff to serve an affidavit verifying discovery, the plaintiff having failed to comply with the court order of 18 April 2016 in respect of an application by the second named defendant pursuant to Order 24 Rule 7 of the Rules of the [Court of Judicature].

The time for compliance with this unless order was extended to 31 August 2016 by order of 4 August 2016. In breach of that unless order, as extended to

31 August 2016, the verifying affidavit was not served until 6 September 2016.

17 November 2016 the plaintiff's case was reviewed by ... Mr Justice Stephens who made the fourth unless order requiring the plaintiff's action to be set down for trial by 6 March 2017 and the plaintiff's accountant's report and evidence served on or before 12 January 2017. The claim was listed for trial for 24 April 2017.

The plaintiff sought a six week extension of time for service of accountancy evidence to 23 February 2017. No accountancy evidence was served within this timeframe and none has been served to date.

The plaintiff failed to set down the action for trial on or before 6 March 2017.

On 15 March 2017 judgment was formally entered on behalf of the second named defendant against the plaintiff.

On 16 June 2017 the summons in respect of the Order 3 Rule 5 application was lodged with the court, with a supporting affidavit from Suzanne Moran, sworn on 4 May 2017."

The relevant legal principles

[8] These have not been in dispute between the parties to this appeal.

[9] As regards the operation of unless orders attention was drawn to the Master's Practice Note No. 1/2012, which was issued on 12 March 2012.

[10] In its material part this states:

"[1] An "unless order" is an order of the court by which a conditional sanction is attached to an order requiring performance of a specified act by a particular date or within a particular period.

[2] Every unless order made by a Master should state in clear terms:

- (a) The step in the action which the party against whom the order was directed, is required to perform;
- (b) The time within which that step is to be performed;
- (c) The rule or previous order of the court which has not been complied with;
- (d) The sanction which is to occur in the event of default; and
- (e) Where that sanction is striking out of the action, or as the case may be, the defence, the precise terms of the judgment to be obtained, including any order for costs in the action.

[3] An order made in the above terms shall constitute a default judgment in the action, which shall be final for the purposes of enforcement of costs.

[4] 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. The party entitled to judgment in the event of non-compliance with such an unless order is not required to apply to the court for judgment. Rather that party should file in the office either an affidavit sworn by the party or a certificate completed by the party's solicitor confirming service of the unless order and non-compliance with the terms thereof. The office shall issue a default judgment in the action in terms of the order, in which the judgment date shall be stated as the date of default.

[5] A party against whom an unless order is made may in appropriate circumstances request the court for an extension of time in which to comply with the terms of the order. Granting an extension of time is a matter for the discretion of the court. Where a request for extension of time is made before expiry of the time for compliance stated in the unless order, the request

may be made by letter, a copy of which should be sent to the party which has the benefit of the order, explaining why extension of time is sought. Any application for extension of time made after the expiry of the time for compliance stated in the order must be made by summons pursuant to Order 3, Rule 5 and supported by an affidavit setting out, inter alia, the reason for non-compliance.”

[11] The court’s attention was drawn to the decision of Master McCorry in Smith v Nixon [2013] NI Master 14. At paragraph [12] Master McCorry drew attention to Rule 3.9 of the Civil Procedure Rules in England and Wales. He noted this rule stated as follows:

“(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including –

- (a) The interests of the administration of justice;
- (b) Whether the application for relief has been made promptly;
- (c) Whether the failure to comply was intentional;
- (d) Whether there is a good explanation for the failure;
- (e) The extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
- (f) Whether the failure to comply was caused by the party or his legal representative;
- (g) Whether the trial date or the likely trial date can still be met if relief is granted;
- (h) The effect which the failure to comply had on each party; and

- (i) The effect which the granting of relief would have on each party.”

[12] In the same judgment, Master McCorry referred to the decision of the England and Wales Court of Appeal in Hytec Information Systems Limited v Coventry City Council [1997] 1 WLR 1666. At paragraph [16] of the Smith v Nixon judgment Master McCorry stated:

“The plaintiff in the present case has sought to argue that for the court to refuse to extend time for compliance with an unless order, thereby disentitling the party in default from prosecuting or defending the action, as the case may be, there had to be demonstrated a contumelious or deliberate flouting of the rules or orders. However, it appears to me that this argument is not supported by the Court of Appeal in Hytec. Specifically dealing with this point at page 1677 of his judgment Auld LJ said:

‘In my judgment, there is no need to confine the test to that of an intentional disregard of a court’s per-emptory 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.

This seems to me to be entirely consistent with the guidelines at Rule 3.9 of the Civil Procedure Rules in England and Wales, and in particular guideline (c) whether the failure to comply was intentional, and where whether or not the failure to comply is

one of a number of considerations for the court to have regard to, and not the overriding test’.”

[13] In the plaintiff/appellant’s skeleton argument for these proceedings emphasis was placed on the discretion which the court enjoys in relation to the issue of the grant of the relief as sought. Mr Coyle BL, on behalf of the appellant, quoted paragraph [13] of the Hytec case as encapsulating the key principles governing this jurisdiction. The matter was put in the following way, quoting from Hytec:

“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 was 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 seems 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.”

The reasons for non-compliance with the unless order

[14] With the assistance of counsel, the court has carefully considered the two affidavits filed on behalf of the appellant in respect of the reasons for the failure of the appellant to comply with what was the fourth unless order made in respect of the plaintiff's conduct of the proceedings.

[15] While a number of matters were floated as explanations for what occurred, particularly in the plaintiff's own affidavit which was filed following an initial hearing before the Master, these matters have not impressed the court as providing any real or substantial excuse for the failure to comply with Stephens J's order.

[16] In particular, the reference made in the plaintiff's own affidavit to him sustaining an injury following a fall from a horse in 2012 cannot, in the court's assessment, be viewed as causative of the failure to comply with the unless order made in 2016.

[17] Likewise, the mention in the same affidavit of the plaintiff's accountant having a heart attack in 2016 seems to the court to be remote to the matter which has to be explained. That this is so is exemplified by a letter from the applicant's solicitor found in the papers dated 28 July 2016. The letter sought to explain another failure in the case on the plaintiff's side in connection with providing information about the plaintiff's financial loss claim. The letter provided an update in relation to why the relevant information had not been provided but, interestingly, it made no reference whatever to the plaintiff's accountant's heart attack as being a factor in relation to this. Instead the letter provided the information that the plaintiff's accountant had recently opened a new business in the preceding year. The court also notes that the health difficulties of the accountant were not referred to at all in a letter to the court dated 6 January 2017 in which the issue of extension of time to serve accountancy evidence was being addressed.

[18] If the heart attack had been a factor of significance in the context of preparing the litigation, the court considers it would have been mentioned in the above correspondence.

[19] The court also indicates that during the course of argument it was proactive in seeking to prompt the provision to it of any possible explanation for the default in respect of compliance with the unless order of Stephens J. However, it is clear that no ready explanation could be offered.

The court's assessment

[20] The court will always be reluctant to take the step of bringing a party's case to an end in circumstances where an unless order has not been complied with. Such a step, however, is unavoidable in some cases.

[21] The Master, who will have brought to his consideration of this case a wide depth of experience, felt he had no option but to dismiss the plaintiff's application to him. The court was told that he indicated that he felt himself bound to apply the legal rules (as set out above) and that in this case there was no escape from the propriety of making the order which in fact he made.

[22] This court has, of course, approached the matter on the basis that the hearing before it is a *de novo* hearing. Nonetheless, regrettably, the result the court arrives at is the same as that arrived at by the Master.

[23] This result, which involves dismissing this appeal, has been arrived at for the following main reasons:

- (i) This case plainly has been dogged by a history of poor husbandry characterised by delay upon delay. It is now nearly 10 years since the plaintiff's accident and, it seems to the court that, in a case which is relatively simple on the facts, such a period in gestation is unacceptable.
- (ii) On the materials before the court, it is difficult for it to conclude otherwise than that the bulk, if not all, of the delay is attributable to the plaintiff's side.
- (iii) The fact that prior to the unless order made by Stephens J in this case there had been three other unless orders made in the course of the proceedings, all against the plaintiff, demonstrates a failure to approach the case in a professional and efficient manner.
- (iv) The cumulative effect of the various delays exemplified by the chronology above points strongly in favour of no relief being given against the default which has occurred in this case.
- (v) The absence of any convincing or compelling explanation for the latest default in respect of Stephens J's unless order places the case, from the plaintiff's perspective, in a negative light. While it has not been suggested that the plaintiff has intentionally acted to create default, the case has all the hallmarks of an unacceptably casual approach to the litigation.
- (vi) The defendants in this case, on the facts as disclosed, are entitled to expect that the court will not shirk its duty to ensure that the litigation is carried out in accordance with the rules in a reasonably efficient manner. This has not occurred in this case. It is right to take into account that litigation spread over a long period of years is an expensive activity and, in a case where the plaintiff is legally assisted,

as this one, the defendants have no real hope of recovery of costs, even if they are successful in defending the case.

- (vii) The passage of time also affects the ability of the defendants to defend the case. In this regard, there is unanswered evidence in this case of prejudice to the defendants in the form of the loss of witnesses who have died since the proceedings began. It is also inevitably the case that the recollection of witnesses will have dimmed over time as a result of the delays in this case.

Conclusion

[24] In all the circumstances of this case the court dismisses the appellant's appeal and affirms the decision of the Master.