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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 11/09/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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ON APPEAL FROM THE COUNTY COURT

No. 14/022467/02

BETWEEN:

PENNY PICKERING

Plaintiff/Appellant;

-and-

ABBEY TAXIS

First Defendant;

-and-

SAMUEL BARRON

Second Defendant (Respondents).

BETWEEN:

RODNEY McALISTER

Plaintiff/Appellant;

-and-

ABBEY TAXIS
AND
SAMUEL BARRON

Respondents.

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MAGUIRE J

Introduction

[1] The court has before it two identical appeals which arise from civil bill proceedings in which the appellants were plaintiffs and Abbey Taxis and Samuel Barron were defendants.

[2] The proceedings involve claims for personal injuries, loss and damage, as a result of a road traffic accident in which both of the appellants were passengers in a taxi which was involved in a collision with another taxi. The accident occurred on 23 December 2011 in the vicinity of the junction between Lenamore Park and Jordanstown Road, Belfast.

[3] In the course of the appellants' proceedings, liability was admitted by the defendants and in each, in the usual way, medical evidence was commissioned. A lodgement was made in each case.

[4] The relevant chronology in respect of the proceedings can be summarised shortly:

Date of Accident	23 December 2011
Plaintiffs' medical reports	2 July 2013
Civil Bills issued	27 February 2014
First Defendant's Notice of Intention to Defend	20 July 2015
Second Defendant's Notice of Intention to Defend	10 February 2016
Letter from Second Defendant's to Plaintiffs' Solicitors Indicating that liability had been agreed between the Defendants	10 February 2016
Lodgement made	10 February 2016
Order made by the court requiring the appellants to file Certificates of Readiness within 28 days	19 September 2016
Date of expiry of the time above	17 October 2016
Date of default listing	26 October 2016
Dismissal of the civil bills	26 October 2016
Informal service by e-mail of draft application by appellants to reinstate the proceedings	21 June 2017
Defendants indicate their intention to object to re-instatement	29 June 2017

Matter listed for mention before a judge who indicated that she was not minded to reinstate the cases	24 October 2017
Formal application to reinstate made	7 November 2017
Defendants object to re-instatement	9 November 2017
Hearing of application and dismissal of same	30 November 2017
Notice of Appeal to the High Court served	11 December 2017

[5] From the above, in summary, it can be seen that there had been a failure by the solicitors for the appellants to serve a Certificate of Readiness within the time set by the court's order of 19 September 2016. This resulted in the proceedings being dismissed on 26 October 2016. Attempts to revive the proceedings were long delayed and, while informal notice had been given to the defendants of this proposed step in the litigation, and they had objected to it, no formal application was apparently made to 7 November 2017. This resulted in a hearing on 30 November 2017 in which the appellants' application was dismissed.

The key orders made

[6] The key orders made in respect of the matters at issue in these appeals were as follows:

(a) An order made at a review of the case on 19 September 2016. It states that:

> "Unless the plaintiff complies with the provisions of Order 43 Rule 17(a) by filing a Certificate of Readiness and at the same time causes a copy of it to be served on the defendant within 28 days from the date of this order, the action shall be struck out.
>
> In the event of non-compliance by the plaintiff with the terms of this order the defendant is at liberty to file in the court office an application to have this matter struck out.
>
> This matter has been listed in the default court on 26 October 2016."

(b) An order made on 26 October 2016 to the effect that the civil bills were dismissed. This appears to have occurred without any application

having been made by the defendants or their solicitor in accordance with the terms of the order of 19 September 2016. Moreover, no one from either side appeared at court on 26 October 2016. All this court has been told is that this occurred "by oversight". The actual order dismissing the proceedings is not found in the papers before the court though it looks as if an ordinary dismiss order was made.

(c) The order under appeal is that made by the judge on 30 November 2017. It indicates that the judge was considering an application dated 7 November 2017 under Order 8 Rule 3(2) of the County Court Rules. As a result of this consideration, the court directed that "the application for an order reinstating the above matter and for such directions concerning future conduct [of] these proceedings is hereby refused".

The issues

[7] When the appeal commenced it appeared to be the joint understanding of the parties that the order of the court dismissing the proceedings on 26 October 2016 was to be viewed simply as the by-product of the court having, on 19 September 2016, granted an "unless order".

[8] However, this analysis of the situation, in the court's view, is open to question. This is for two reasons. Firstly, the making of an "unless order" in the technical sense in the circumstances then prevailing seems to this court to be dubious in that such an order takes a sledgehammer to crack a nut. From the chronology of the case, it can readily be seen that this was not a case of extensive delays in the litigation or a case of repeated breaches of court orders by the appellants[1]. On the contrary, the proceedings had been moving along, albeit not at a fast pace; liability had been admitted; medical reports (on both sides) had been prepared; and very little more needed to be done to bring the matter to trial. While it is accepted that a Certificate of Readiness ought to have been served and that the court understandably set a timetable for such service, there appears to have been little need for this timetable to be reinforced by an "unless order" under which the claims would simply be administratively dismissed upon application by or on behalf of the defendants. In the court's view, it would be unwise to use an "unless order" in the circumstances when the penalty arguably was quite disproportionate to the default in question.

[9] But, however one views the last point, it also appears to the court that the actual dismissal of the proceedings did not comply with the procedure envisaged in the case of an "unless order", properly so called. In fact, the defendants, through

[1] For guidance as to when an unless order is appropriate see: Hytec Information Systems Limited v Coventry City Council [1997] 1 WLR 1666 at 1674 H.

their solicitor, did not make any form of certification of default which appears to be a procedural step which applies where an administrative striking out of the proceedings is the consequence of default in the performance of an obligation imposed by an "unless order". In fact, what occurred was that after the 28 days had expired, the cases became listed in what is described in the order as a default list. The matter thus came back to a judge and it appears that the judge then, with neither party appearing, made a dismiss order.

[10] In the court's view, the correct interpretation of these events is that the order granted by the judge on 26 October 2016 was pursuant to the plaintiffs having defaulted and was not the product of an "unless order" properly so called.

[11] The question which then arises for the appellants in these proceedings is what they needed to do to obtain reinstatement of the proceedings. While it is correct that there are procedures which can be gone through to seek reinstatement, whether the order made is simply the follow through of an "unless order" procedure or, alternatively, the order is in the nature of a simple default order involving dismissal of the proceedings, it should not be thought that the correct legal approach to reinstatement is exactly the same in both situations. To put the matter very shortly, reinstating the proceedings in the face of an "unless order" is a more difficult process than reinstatement in an ordinary default situation. In the former case, it seems to the court that, as the making of an unless order properly so called should only occur in circumstances where there has been a history of non-compliance and should be deployed only as a last resort, reinstatement should properly be more difficult to achieve than in the case of a default *simpliciter*. But a less strict approach can be taken in an ordinary default situation, as is the case here.

[12] Certainly the legal authorities appear to recognise that the law to be applied is less liberal from the point of view of the party seeking relief in the "unless order" situation as compared with an ordinary default order situation[2].

The court's assessment on the basis of the analysis above

[13] It is evident from the chronology above that the appellants failed to apply to reinstate the proceedings or to extend the time for compliance with the court's order for a not insubstantial time (probably a period of just over a year).

[14] This plainly is a factor which the court ought to give considerable weight to but, as in all cases of this sort, the court should view the factual picture as a whole. It appears to be well established that in an ordinary default case delay in making such an application for reinstatement is not to be viewed as necessarily fatal to the application.

[2] See the Hytec case *supra* and such authorities as Smith v Nixon [2013] NI Master 14.

[15] The more important issue in such a case relates to whether the proceedings have any merit.

[16] The White Book (1999) may usefully be referred to at this point. Under the heading "Delay in Making an Application" it states:

> "There is no rigid rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising discretion (*Evans v Bartlam* [1937] AC 473 at 480).
>
> The application should be made promptly and within a reasonable time … but the court will in a fit case disregard lapse of time.
>
> (See 13/9/10)."

[17] The White Book goes on to discuss the discretionary powers of the court in a default situation. The relevant text reads:

> "The discretionary power to set aside a default judgment which has been entered regularly is unconditional, and the court should not lay down rigid rules which deprive it of jurisdiction. The purpose of the discretionary power is to avoid the injustice which may be caused if judgment follows automatically on default. The primary consideration in exercising the discretion is whether the defendant [here the plaintiff] has merits to which the court should pay heed not as a rule of law but as a matter of common sense, since there is no point in setting aside a judgment if the defendant has no defence …"

[18] The court has considered a substantial number of authorities both in this jurisdiction and in England and Wales which broadly endorse the above approach, though there remain some particular points which may arise in individual cases (which the court in this case need not deal with). In Northern Ireland the matter has been the subject of discussion in such cases as *McCullough v BBC* [1996] NI 580 (Girvan J); *Tracy v O'Dowd* [2002] NIJB 124 (Higgins J); *Bank of Ireland v Colson* [2009] NIQB 96; and *Irish Bank Resolution Corporation Limited v Dolan* [2014] NI Master 12. In England and Wales the main authorities in this area include *Evans v Bartlam* (supra);

Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc [1986] 2 Lloyds Reports 221; and *Day v RAC Motoring Services Ltd* [1999] 1 AER 1007.

[19] In the present case, as liability has been admitted in each of the appellants' cases, it is not difficult to conclude that the proceedings in each case have merit. The above authorities invite the court to seek to do justice and, in general, not to prevent proceedings being adjudicated upon, if they appear to have merit, without good reason. Such a position, moreover, appears to the court, in the human rights era, to dovetail with the requirement of a proportional response implicit in Article 6 of the ECHR. However, in some cases there will be strong and compelling reasons for allowing a default judgment to stand and to bar a litigant from proceeding further. The object, it should not be forgotten, is not to punish the party in default by destroying his or her right to a full and fair hearing but to impose the court's disciplinary framework in order to advance the goal of timeous conduct of litigation.

[20] Despite the delay in the appellants making their application to reinstate these proceedings, this court, exercising its discretion, considers that it should grant reinstatement and will so order. Its principal reasons for doing so are:

(i) Each appellant's case clearly has merit.

(ii) This is not a case of default upon default by the appellants.

(iii) It would be in the interests of justice to enable the proceedings to be adjudicated on in the circumstances of this case.

(iv) To do otherwise would in these cases confer a windfall benefit on the defendants.

(v) It is difficult to see how, in view of the already made admissions of liability in each case, there is any real prejudice caused by the course the court proposes to take, other than that it frustrates the receipt by the defendants of their windfall benefit.

Conclusion

[21] The outcome may be summarised as follows:

(i) The court does not view the order made on 19 September 2016 as an "unless order", in the technical sense.

(ii) In the court's opinion, its correct classification is as a default order.

(iii) Applying the authorities in respect of the granting of relief to a party subject to a default order the court considers this is a clear case for relief to be granted. Accordingly the court will grant such relief

(iv) In all the circumstances of this case the court will allow the appeal of the appellant in each case and re-instate the civil bill proceedings with a requirement that the Certificate of Readiness be filed within four weeks of this judgment being given.