

**Neutral Citation No. [2015] NIMaster 7**

Ref:

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

Delivered: **5/6/15**

**IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION**

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**BETWEEN:**

**Paul Bradley**

**Plaintiff;**

**And**

**Chief Constable of the Police Service of Northern Ireland**

**Defendant.**

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**Master Bell**

**Introduction**

[1] In this application the plaintiff, having breached an Unless Order made by Master McCorry on 16 October 2014, applies for an extension of time belatedly to comply with it. At the hearing of the application I heard oral submissions from Mr Kearney for the plaintiff and Mr McEvoy for the defendant.

**Factual Background**

[2] On 7 April 2003 the plaintiff was present at a rave party in Brooke Park. The police decided to enter and clear the park. As a result of the police action the plaintiff alleges *inter alia* that he climbed a wall in order to exit the park but fell off it. He sues in relation to his injuries. A writ was issued on 4 April 2006 although this was only served on 23 February 2007. A memorandum of appearance was filed by the defendant the following month. It was not until 25 November 2009 that the plaintiff served a Statement of

Claim. The grounding affidavit by the plaintiff's solicitor states that she does not know why this delay was allowed to occur and cannot see any real reason for it. A defence and Notice for Further and Better Particulars were served on 14 September 2010. The plaintiff's solicitor frankly concedes that no further steps were then taken to progress the plaintiff's action for just over four years though she states that she was on maternity leave for an extensive period in 2011 - 2012 and 2012 - 2013. It appears that the inference I am being invited to draw from this aspect of her affidavit is that her caseload was not effectively managed in her absence on maternity leave. In 2014 the solicitor was notified that the action was shortly to be listed before Master McCorry for review. At this point there was a flurry of activity. The papers were sent to counsel. Replies were drafted and counsel advised that, since no steps had been taken for over one year, a Notice of Intention to Proceed should be served. Accordingly such a Notice was served on 13 October 2014.

[3] On 16 October 2014 the action was reviewed by Master McCorry in the presence of both parties, with the plaintiff being represented by counsel. Master McCorry made an Unless Order that required three steps to be taken, failing which the plaintiff's action would be struck out. It stated:

"IT IS ORDERED that unless within six weeks from the date hereof the plaintiff serves replies to the defendant's Notice for Further and Better Particulars and discloses to the defendant the plaintiff's GP notes and records and within 12 weeks of the date hereof sets the action down for trial, the plaintiff's action shall be struck out with judgment for the defendant, with costs of the action to be taxed in default of agreement.

In the event of non-compliance with the terms of this order the party with the benefit of the order shall file in the court office either an affidavit sworn by the party or a certificate completed by the party's solicitor confirming service of the order and non-compliance with the terms thereof. Upon receiving such an affidavit or certificate the court office shall issue a default judgment in the action in terms of the order, in which judgment date shall be stated as the date of default.

Any extension of time for compliance with these directions must be sought from the court before the expiry of the prescribed time limit contained therein.”

The plaintiff did not appeal against the making of the Unless Order

[4] In respect of the first element of Master McCorry’s Unless Order, the plaintiff’s solicitor served replies to the defendant’s Notice for Further and Better Particulars on 3 November 2014. That element of Master McCorry’s Unless Order was therefore complied with.

[5] In respect of the second element of Master McCorry’s Unless Order, the plaintiff’s solicitor was required to serve the plaintiff’s GP notes and records on or before 28 November 2014. She did not do so. Rather than serving the GP notes and records (which she already had in her possession), she wrote to the plaintiff’s GP on 28 October 2014 requesting full updated GP notes and records. Her affidavit states that she took no further steps in relation to disclosing the relevant GP notes and records until counsel advised her (on a date which she does not specify) that this was something that had to be addressed in order to comply fully with the terms of the Unless Order. Following her receipt of this advice, she served copies of all GP notes and records in her possession on the defendant on 16 January 2015. Counsel conceded to me that this was seven weeks later than required by the Unless Order (and, as matters turned out, also one full week after the defendant had entered judgment against the plaintiff for non-compliance with the Unless Order).

[6] In respect of the third element of Master McCorry’s Unless Order, the plaintiff’s solicitor was required to set down the action for trial on or before 9 January 2015. She did not do so. Rather she drafted a Notice of Setting Down and sent it to the court office under cover of a letter dated 13 January 2015. Her affidavit does not provide any evidence as to the date on which it was received but even if it was received the day after it was posted it was then five days outside the time limit set by Master McCorry (and, as matters turned out also five days after the defendant had entered judgment against the plaintiff for non-compliance with the Unless Order). The explanation offered by the plaintiff’s solicitor for this non-compliance was that, while she was aware that she had 12 weeks to set the action down for trial, she mistakenly believed that time would not run against the plaintiff during the Christmas holiday period. Rather she believed that there would be one week over the Christmas period when the court office would be closed and that period would not be counted towards the twelve week period. However, the day after she had posted the Notice of Setting Down, she received from the Crown

Solicitor a copy of the Court order of 9 January 2015 striking out the plaintiff's action for failure to comply with the Unless Order.

### **Law and Practice on Unless Orders**

[7] Masters' Practice Note No. 1/2012 was issued on 12 March 2012 to clarify the way in which unless orders take effect and provides:-

"[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 is 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 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.”

[8] In *Smyth v Nixon* [2013] NIMaster 4 Master McCorry has reviewed the authorities on the subject of Unless Orders. I respectfully agree with, and adopt, his analysis of the legal framework.

### **Consideration**

[9] It is, of course, vital to calculate time periods correctly. The first question any legal practitioner must ask is how long have they got to comply with a court order. Order 3 Rule 2 provides for how periods of time are to be reckoned. It states :

“(1) Any period of time fixed by these Rules or by any judgment, order or direction for doing any act shall be reckoned in accordance with the following provisions of this rule.

(2) Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.”

Hence the replies and the GP Notes and Records had to be served by close of business on Friday 28 November 2014 and the action had to be set down for hearing by close of business on Friday 9 January 2015.

[10] The plaintiff’s solicitor was correct in thinking that there was provision in the Rules for certain vacation days, or certain days on which the court office is closed, not to count in the reckoning of time. But she was incorrect in her understanding of what the Rules actually provided for. Order 3 provides:

“(3) Unless the Court otherwise directs, the period of the Long Vacation shall be excluded in reckoning any period prescribed by these Rules or by any order or direction for serving, filing or amending any pleading.

(4) Where the time prescribed by these Rules, or by any judgment, order or direction, for doing any act at an office of the Court of Judicature *expires* on a day on which that office is closed, and by reason thereof that act cannot be done on that day, the act shall be in time if done on the next day on which that office is open.”

The plaintiff’s solicitor was incorrect in believing that the court office was closed for a week and that any Christmas closing was not counted. A perusal of the Rules or a phone call to the office would have easily discovered that.

[11] On 9 January 2015 an order striking out the action issued from the Central Office. It was in response to a Certificate of Non-Compliance dated 9 January 2015 signed by the solicitor who had carriage of the case in the Crown Solicitor’s Office. The Certificate said:

“I can confirm that to date I have not received any relevant GP Notes and Records and am informed by the Court Office that the Plaintiff has to date failed to set the action down for trial.”

The ICOS system does not record the *time* at which a court order issues, only the *day*. However I consider that, since it is dated 9 January 2015, it is reasonable to assume that the order issued before the end of the formal business day. Given that the plaintiff had until the close of business on 9 January 2015, the solicitor for the defendant was not entitled on 9 January 2015 to seek for the action to be struck out for failure to set down. The reference to the plaintiff’s failure to set down in the Certificate of Non-Compliance indicates that the defendant’s solicitor had also failed to properly calculate the time period under the Rules. On 9 January 2015 he was only entitled to seek to have it struck out for being 7 weeks late in complying with Master McCorry’s Unless Order in respect of serving the GP Notes and records. The error by the defendant’s solicitor in respect of the setting down date does not of course excuse the seven week overstepping of the time limit in relation to the GP Notes and Records by the plaintiff’s solicitor.

[12] As Master McCorry states in *Smyth* the most helpful approach to cases of non-compliance with Unless Orders is that set out in the guidelines provided by the Court of Appeal for England and Wales in *Hytec Information Systems Limited v Coventry City Council* [1997] 1 WLR 1666. Dismissing the defendant's appeal the Court (per Ward LJ, Lord Woolf MR and Auld LJ assenting) held that each case had to be considered on its own facts but that the underlying approach might be encapsulated by the following:

- “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 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 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 came a long way behind the other two.”

(The first guideline does not however represent the exact position in Northern Ireland. While it is true that Unless Orders are regarded as an order of last resort in this jurisdiction, it is not always the case that there will have been a history of failure to comply with other orders. It is not unusual for there to have been a prolonged failure to serve a Statement of Claim within the time limit provided for in the Rules and for the court to grant an Unless Order without there having been a previous “bare” order for a Statement of Claim which has not been

complied with. It is therefore perhaps more accurate to say in this jurisdiction that an Unless Order will be an order of last resort in the face either of prolonged delay to carry out a necessary procedural step or failure to comply with previous court orders.)

[13] The *Hytex* Guidelines indicate that a sufficient exoneration will almost invariably require that the party in default satisfies the court that something beyond his control had caused the failure. In the case before me the plaintiff has not satisfied me that something beyond his control has caused the failure to comply with the Unless Order. The non-compliance is as a result of his solicitor's failure to understand what had to be done in order to comply with the terms of the order and as a result of her failure to understand what the Rules provide in terms of how to calculate periods of time.

[14] *Hytex* does recognise that there is a judicial discretion to excuse the failure to comply after a court has considered the particular circumstances of the case. However the interests of justice require that I take into account that the purpose of Unless Orders is as part of the judicial toolkit to deal with 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. As the Court of Appeal in *Hytex* observed, any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two. In this particular case there has been insufficient material placed before me which would justify the exercise of a judicial discretion to extend time after the plaintiff breached the Unless Order by being seven weeks late with the GP Notes and Records.

[15] Solicitors who practise in the field of High Court litigation should understand that there are, in particular, four time limits which must be treated extremely seriously. The first is a limitation period under the Limitation (Northern Ireland) Order 1989. The second is the period of validity for a Writ. The third is any compliance period set in an Unless Order. The fourth is any period set within which an appeal must be filed. It cannot be emphasised strongly enough that failure to observe any of these time limits can have fatal consequences to a party's litigation. Although it should not be necessary to say this, it is also crucial for solicitors to understand how time is calculated in respect of court orders under Order 3 of the Rules of the Court of Judicature, and in respect of periods provided for in legislation under section 39 of the Interpretation Act (Northern Ireland) 1954.

[16] Solicitors who practice in the field of High Court litigation must be aware of the significance of an Unless Order. They must be



aware of the relevant Practice Note and have an understanding of the relevant caselaw. They must understand that applying for an extension of time to comply with an Unless Order after the period set for compliance is not a relief that can easily be granted by any court.

[17] Having regard to all the circumstances of this case I decline to exercise my discretion to extend time for the plaintiff to comply with Master McCorry's order of 16 October 2014. The action therefore remains struck out.