Ref:	**Master 45**

Delivered:	**24 May 2007**

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

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN

JAMES KENNEDY

Plaintiff;

and

(1) IGNATIUS GEDDIS
(2) JOHN THOMPSON
(3) ROBERT HENDERSON

Defendants.

MASTER BELL

[1] This case concerns an application on behalf of Ignatius Geddis, the first-named defendant, to extend time for compliance with an Unless Order made by Master Wilson on 14 March 2003 which had ordered that the defendant's defence would be struck out unless, within 6 weeks from the date of service of the order, he gave the plaintiff discovery by list verified by affidavit.

[2] The application was grounded by an affidavit sworn by Keith Cowan, solicitor of Carnson Morrow Graham, Solicitors, exhibited to which was a copy of certain correspondence between the parties. Submissions were made by Mr A.J.S. Maxwell on behalf of the Applicant and by Mr Gillespie on behalf of the respondent. I then reserved judgment, but allowed the submission of a chronology of events on behalf of the respondent.

Chronology of Events

[3] The history of the significant events in this litigation is as follows:

1 February 1995	-	Issue of Writ of Summons against Ignatius Geddis.
16 February 1995	-	Appearance on behalf of Ignatius Geddis.
11 January 1996	-	Issue of Writ of Summons against John Thompson and Robert Henderson.
9 January 1988	-	Order of Master Wilson joining the Motor Insurers' Bureau as a defendant in the action.
26 June 1998	-	Statement of Claim served on Ignatius Geddis.
2 October 1998	-	Statement of Claim served on John Thompson and Robert Henderson.
29 April 1999	-	Amended Statement of Claim served on John Thompson, Robert Henderson and the Motor Insurers' Bureau.
18 May 1999	-	Defence served by Motor Insurers' Bureau.
18 December 2000	-	Defence served by Ignatius Geddis.
20 December 2000	-	Order of Master Wilson that the action against the Motor Insurers' Bureau be dismissed for want of presentation unless it be set down for hearing within 14 days.
20 December 2000	-	Action set down for trial.
14 March 2003	-	Unless Order granted by Master Wilson ordered that Ignatius Geddis's defence be struck out unless he gave the plaintiff discovery by list verified by affidavit.
30 May 2003	-	Order of Master Wilson that Ignatius Geddis serve replies to Plaintiff's interrogatories.

24 September 2004 - Unless Order granted by Master McCorry striking out Ignatius Geddis's defence unless he served replies to the plaintiff's interrogatories.

7 March 2006 - Order granted by Master McCorry consolidating the two actions.

Extending time for compliance with Unless Orders

[4] Counsel for the respondent referred me to the decision of Master McCorry in Hutchinson -v- Chief Construction Limited delivered on 23 February 2006 as being the most recent decision on Unless Orders in this jurisdiction. In that decision Master McCorry extensively reviewed the authorities in respect of Unless Orders in the wider context of the power to strike out proceedings for want of prosecution. Master McCorry recognised that there had been a change in emphasis in the jurisprudence in England and Wales on this subject in recent years and that there had been a shift in emphasis away from the question of whether or not the failure to comply with an Unless Order was intentional and contumelious, a test which had been laid down in Re Jokai Tea Holdings Limited [1993] 1All ER 630. Master McCorry concluded that the leading authority on Unless Orders in England and Wales was now the decision of the Court of Appeal in Hytec Information Systems Limited -v- Coventry City Council [1997] 1 WLR 1666. In that decision Ward LJ set out guidelines in relation to applications to extend time to comply with Unless Orders, summarising the approach 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".

[5] The sixth of Ward LJ's principles emphasised that there was an important role for judicial discretion to be exercised in the light of the particular facts of each case. Nevertheless in the same decision Woolf MR felt the need to add what he described as a "footnote" to the judgments of Ward LJ and Auld LJ in an attempt to indicate the proper context of the Hytec ruling. Lord Woolf explained:

> "There are, however, situations where this court makes remarks in the course of a particular judgment which were intended to be, or are taken to be, the source of general guidance as to how a particular discretion given to the courts by the rules in wide terms should normally be exercised. Such guidance is extremely helpful since it allows courts up and down the country to achieve greater consistency which is an important feature of justice. However remarks are usually either obiter or no more than an indication of the reasons for a decision in a particular case. The comments which are made in such a case are frequently picked up and repeated in judgments by other divisions of this court and that gives them greater authority.
>
> This is all to the good subject to two qualifications. The first is that the guidance may become treated with excessive respect so that they are regarded as exhaustive and enunciating principles of law. If this happens, there can be unfortunate consequences because situations which were not contemplated when the

> guidance was given might arise. If the courts follow the guidance blindly, it can result in decisions which are not in accordance with the requirements of justice where a decision which is in accordance with that requirement could otherwise be given if the general discretion which the rules confer were to be exercised … I therefore draw judges' and practitioners' attention to the principles set out in the judgment of Ward LJ which for the future should be regarded as stating the general guidance which should normally be applied in this area, but subject to the qualifications which he made clear".

[6] The decision in Hytec has been followed in a line of subsequent cases. For example, in Tawfick -v- Al-Saud [1998] EWCA Civ 460 Otton LJ said that Hytec established a significant change in the law, moving away from the approach in Re Jokai Tea Holdings Limited [1993] 1All ER 630 which focused on whether the failure was intentional and contumelious. Otton LJ observed that Hytec had held that the former test was too narrow and that the approach should be broader and much more flexible.

[7] Of these subsequent decisions, there have been a number which have emphasised that the guidelines offered by Ward LJ in Hytec should not be applied in a rigid manner.

[8] In O'Hara and Another v Rye [1999] EWCA Civ 779 the Court of Appeal observed that the Court in Hytec never intended or imagined that they were laying down the law for all factual situations.

[9] In QPS Consultants Ltd -v- Kruger Tissue (Manufacturers) Ltd [1999] All ER (D) 1000 Waller L.J. said:

> "In Hytec Information Systems Ltd -v- Coventry County Council [1977] 1 WLR 1666 further guidance was given by the Court of Appeal as to the appropriate course for the court to take where there has been breach of an "unless" order. That guidance would indicate that the discretion to enforce an Unless Order was not simply to be exercised where the default was intentional and contumelious, but nevertheless it confirmed that enforcement of such an order was a discretionary one, and emphasised if anything the wide divergence of circumstances in which the court may have to consider what action to take".

[10] In Newtown -v- Dorset Travel Services Ltd, [1999] EWCA Civ 1337 the Court of Appeal was critical of a judge who on hearing an application for extending out of time an

Unless Order contended "these are days when the rules have to be obeyed and everybody is going to have to get used to that". The Court of Appeal detected "a mechanistic approach" by the judge and concluded that he had given no real or proper weight to the aspects of prejudice and overall justice which the authorities recognised had to be taken into account.

[11] In Beloit Walmsely Ltd -v- LEP International Ltd and Another [1997] EWCA Civ 2782 Roach LJ observed that, in Hytec, Ward LJ had been careful to preserve the general discretion whilst at the same time giving guidance, concluding:

> "In my judgment the statements of those principles underline that at the end of the day this is still a matter for the exercise of a judge's discretion".

[12] Those decisions therefore raise the issue as to what factors ought to be taken into account in the exercise of a discretion whether or not to extend time to comply with an Unless Order. As Master McCorry noted in Hutchinson -v- Chief Construction Ltd, the introduction of the Civil Procedure Rules in England and Wales, which led to a greater case management role by judges, has resulted in a significant decline in the number of cases where cases have been allowed to go to sleep, and decisions on the subject of dismissal for non-compliance are more infrequent than before.

[13] Nevertheless, the Civil Procedure Rules, while they do not, of course, apply in Northern Ireland, are of assistance in that they indicate a range of factors which a court might properly take into account when exercising the discretion whether or not to extend time to comply with an Unless Order. Rule 3.9(i) provides:

> "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;
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> (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;

(i) the effect which the granting of relief would have on each party".

[14] I therefore propose to use these factors as a framework to consider the circumstances in the instant case.

The interests of the administration of justice

[15] In Jani-King (GB) Ltd -v- Prodger [2007] EWHC 712 (QB), a case dealing with non-compliance with an Unless Order under the Civil Procedure Rules, MacKay J examined the interests of the administration of justice as relevant to the case before him for failure to comply with an Unless Order concerning compliance with an order for specific discovery. MacKay J said that the interests of justice were two-fold, namely that orders of the court should be fully or strictly complied with and that multiple applications to the court, particularly on disclosure, should where possible be avoided. Equally, in his judgment, it was in the interests of justice that the overriding objective in the rules be achieved, namely that the court should deal with cases justly, with parties on an equal footing, saving expense and acting proportionately. Within the spirit of that objective lay also the proposition that a party should not be driven from the seat of judgment and denied the opportunity to bring a claim without strong reason.

[16] Under this heading must also be considered the seventh of Ward L.J.'s Hytec principles that 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.

[17] In the instant case a further issue was raised. In his oral submissions, Mr Maxwell relied heavily on the point in that, following the granting of the Unless Order, the case had on three separate occasions been reviewed before a High Court judge, and on none of those occasions had the respondent made any mention of the Unless Order or informed the Court there had been non-compliance with it. The effect of this was that the applicant had continued defending the proceedings and, in particular, had incurred further costs for which he may ultimately be liable. Indeed, Mr Maxwell submitted that, since the most recent review before Hart J., the defendant had shouldered the principal burden of preparing the case. Mr Maxwell submitted that in these circumstances, which he described as "unique", it would be inequitable now to revisit the matter of the Unless Order. The respondent's conduct, he argued, amounted to a waiver of the failure to comply with the Unless Order. He argued that the Unless Order did not deal primarily with an issue between the court and the party in default, but rather was primarily a remedy sought by one party against the other party. In the circumstances, the respondent should be estopped from seeking to have the applicant's defence struck out.

[18] A similar point, addressed in the affidavit of Mr Cowan, but not in counsel's oral submissions, concerns a summons, served on 27 January 2005, for an order pursuant to Order 37 to have damages assessed for failure to comply with the Unless Order. The applicant's solicitors wrote to the defendant's solicitors on 1 February 2005 stating that they had not received the Unless Order and that they did not possess any discovery documentation. The respondent's solicitors consented to an adjournment of the hearing subject to the filing of an affidavit that the Unless Order had not been received. Such an affidavit was filed and, as a result, the respondent's solicitors agreed not to proceed with their application and the

summons was struck out with no order as to costs. This appears to amount to a clear waiver of the non-compliance with the Unless Order by the respondent since that time.

[19] Subsequent to the hearing of the current application, Counsel for the respondent submitted with his chronology of events a copy of Halsbury, 2003 edition, Volume 16(2) Paragraph 1058, dealing with estoppel by representation. The excerpt states that parties to litigation who have continued with the proceedings with knowledge of an irregularity of which they might have availed themselves are estopped from afterwards setting it up; and, on somewhat different principles, such a party cannot take advantage of an error to which he has himself contributed. While no submissions were made to me in respect of the cases cited in the excerpt, Counsel for the respondent believed the point was against him and that hence it was his duty to refer it to me. Mr Cowan's affidavit on behalf of the applicant notes that, at all times since the expiry of the time for compliance with the Unless Order, the plaintiff engaged with the defendant on the basis that the defence was extant. Although it is not necessary for the purposes of this decision to reach any conclusion as to the law of estoppel, I am satisfied that the circumstances are such that they should be taken into account under the heading of the interests of the administration of justice since the overriding objective provides that dealing with a case justly includes ensuring that it is dealt with fairly.

Whether the application for relief has been made promptly

[20] The Unless Order was made on 14 March 2003. The list of documents is dated 13 October 2006. The Summons seeking an extension of time for compliance with the Unless Order issued on 19 October 2006. It cannot be said that the application for relief has been made promptly.

Whether the failure to comply was intentional

[21] In the grounding affidavit Mr Cowan deposes that the non-compliance was due to an oversight on his part. This was due, firstly, to the fact that he was of the opinion that his client's position with regard to discovery documentation had been made clear by his letter of 1 February 2005 that his client did not have any discovery documentation, and secondly, to the fact that no further reference was made to the Unless Order or requests made for discovery documentation by Russells, the solicitors for the respondent, until their letter dated 1 August 2006. Mr Cowan deposes that in the course of taking other steps in the action he "was distracted from the fact that there had not been formal compliance with the Unless Order".

[22] In Knoll & Oak Farms -v- Hortichem [1998] EWCA Civ 1628 the Court of Appeal considered whether there was a distinction to be drawn between a deliberate act and a contumacious act. Clarke LJ held that there was, stating:

> "In my judgment there is distinction drawn in the cases between a deliberate act and a contumacious or contumelious act …. I agree that contumacy does indeed mean perverse and obstinate resistance of authority and is something different from a deliberate act".

However Auld LJ in Hytec said:

> "In my judgment, there is a need to confine the test to that of an identical disregard of a court's peremptory order, whether or not it is characterised as floating, contumelious, perverse, obstinate or otherwise. Such a 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 of sheer insolence 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 pleadings it is sought to strike out".

[23] I am satisfied that the failure to comply in this instance was not the result of a conscious decision and hence a contumacious act. Mr Cowan in his affidavit specifically deposes that he meant no disrespect to the court.

Whether there is a good explanation for the failure

[24] In connection with this factor, I must take into account Ward LJ's guidance in Hytec that a sufficient exoneration will almost invariably require that he satisfy the court that something beyond his control had caused the failure to comply. It is difficult to conclude that there is a good explanation for the failure to comply. A solicitor offering a High Court litigation service to clients should be aware of the steps which require to be taken in such proceedings and should ensure that his client's position is protected by regular review of the file. Solicitors should be aware that discovery is automatic upon the close of pleadings. It is not a step which can be forgotten and is a continuing duty. While Mr Cowan wrote on 1 February 2005 that his client had "no discovery documents", this cannot have been an accurate statement. A correct discovery list would inevitably by this stage have contained, in Schedule 1, a reference to the pleadings and the correspondence between the parties and, in Schedule 2, a reference to some privileged material (as in fact the list ultimately served did refer to). While it may be true therefore that the list would have not contained any potentially useful material accessible to the plaintiff, there remained an obligation to serve a list. Even if the solicitor misunderstood the practicalities of the discovery obligation, once the Unless Order had been made the matter should have been in the forefront of his mind. As Ward LJ said in Hytec an Unless Order is "an order of last resort" and a "party's last chance to put its case in order". Given that such an order will, in the description of Robert Walker LJ in Dowles Manor Properties Limited -v- Bank of Namibia and Another, [1999] C.P.L.R. 259, often mark "the culmination of repeated procedural failure", it therefore represents one of the most serious warning signs that a court can give to a party. It is difficult therefore to conclude that an admission of an "oversight" represents a good explanation for the failure to comply.

The extent to which the party in default has complied with other rules, practice directions and court orders

[25] No oral submissions were made to me that the applicant has been otherwise in default of rules, court orders or practice directions. Nevertheless it does not appear that it can be argued that this was the applicant's first default. The chronology submitted by the respondent included a copy of an Unless Order granted by Master McCorry on 24 September 2004. Master McCorry ordered that unless the defendant served replies to interrogatories in compliance with the order of the court dated 30 May 2003, the defence would be struck out and judgment entered for the plaintiff. It is clear therefore that the defendant had in September 2004 been in default of the order of 30 May 2003.

Whether the failure to comply was caused by the party or his legal representative

[26] The failure to comply with the Unless Order in this is clearly that of the solicitor rather than the client. This was a factor which Mr Maxwell relied upon in his submissions. However, the court in Hytec was asked to exonerate the litigant because the failure was not personally his but rather that of his legal representative. Ward LJ stated:

> "Ordinarily this court shall not distinguish between the litigant himself and his advisors. There are good reasons why the court shall not: first, if anyone is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation, secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs; thirdly, it seems to me that it would become a chapter for the incompetent (as Mr MacGregor eloquently put it) were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other. The basis of the rule is that orders of the court must be observed and the court is entitled to expect that its officers and counsel who appear before it are more observant of that duty even than the litigant itself".

I have not therefore given any weight to the fact that the failure to comply was that of the solicitor rather than that of his client.

Whether the trial date on the likely trial date can still be met if relief is granted

[27] This litigation has been long-running. The grounding affidavit states, however, that more work has been carried out in respect of the action in the last ten months than in the preceding ten years. No evidence was submitted that the dispute over the list of documents had contributed to the obvious delays experienced in this case. I therefore conclude that the granting of relief would have no effect in terms of delaying any trial date.

The effect which the failure to comply had on each party

[28] No evidence was submitted during the application to support a conclusion that the failure to comply with the Unless Order had had a particular prejudicial or deleterious effect on the plaintiff's case. Nor did counsel for the respondent make any submission that the eventual list of documents was inadequate. Most importantly, there is no indication that the failure to comply has put in jeopardy the possibility of a fair trial.

The effect which the granting of relief would have on each party

[29] The effect of granting the relief would be to allow the applicant to continue to defend the litigation and to deprive the respondent, in the sporting analogy used by the Court of Appeal in O'Hara and Another -v- Rye, of the opportunity to gain a "technical knockout" in these proceedings.

Conclusion

[30] This litigation shows signs of having been poorly managed by both parties and there has been a failure to achieve the standards of professionalism which clients have a right to expect from their lawyers. In respect of the applicant, insufficient attention was paid to an important order made by the court. It is difficult to understand how this can come about in a

well managed practice. LEXCEL is the quality mark used by the Law Society of Northern Ireland in respect of solicitors in Northern Ireland. The LEXCEL Office Procedures Manual emphasises that missed time limits are one of the principal causes of claims against solicitors and that key dates should therefore be noted on the solicitor's file. It requires that the status of a matter and the action taken should be capable of being checked and recommends a practical method of ensuring this. Legal representatives must, firstly, be clear that an Unless Order is, to use a sporting analogy, a warning that a party may be in imminent danger of being shown a "red card", which may result in his case being dismissed from the field of play and, secondly, ensure that they have efficient systems to ensure that such orders have been fully complied with.

[31] In respect of the respondent, it almost beggars belief that there was a failure to recognise that an opposing party was in default of an Unless Order and the matter allowed to come before a High Court judge for review on no less than three occasions without the non-compliance being drawn to the judge's attention. Again, this is a clear failure to manage the litigation properly. Despite that failure, the respondent opposes the application.

[32] Balancing each of the factors considered earlier, I have concluded that the application to extend time for compliance with the Unless Order should be granted. In exercising this discretion, which in the light of the authorities is one likely to be exercised only rarely, I have given particular weight to the matters discussed under the heading of the administration of justice. In the highly unusual circumstances of this case, with the clear failures properly to manage the litigation on both sides, declining to extend time, with the consequent striking out of the defendant's defence, would in my view be an unfair and disproportionate outcome. I therefore extend time with the effect that the list of documents dated 13 October 2006 has been served in compliance with the Unless Order of Master Wilson.