Neutral Citation No.: [2009] NIQB 32 | *Ref:* **GIL7455**

Judgment: approved by the Court for handing down | *Delivered:* **25/3/09**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

JOHN AND FRANK WALSH T/AS J & F GROUP

Plaintiffs/Respondents;

-and-

BRENDAN McCLINTON

Defendant/Appellant.

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GILLEN J

The appeal

[1] This is a civil bill appeal from the decision of Her Honour Judge Kennedy made on 3 October 2008 when she entered judgment for the plaintiffs for the sum of £8,344 for monies due and owing to them by the defendant together with the sum of £4,421.83 for costs.

[2] On 19 January 2009 I ordered that this appeal be conducted by way of a preliminary determination on the issue which underscored the decision of the learned judge namely the failure of the defendant/appellant to comply with an "unless order" made by the learned County Court Judge on 3 September 2008. The terms of that order read:

> "It is ordered that, unless the defendant complies with the provisions of Order 43, Rule 17(a) (*of the County Court Rules*) within 14 days from the date hereof, the defendant's defence shall be struck out." ("the unless order")

On 3 October 2008 when the application to enforce the unless order was heard by the learned County Court Judge, in the absence of the defendant or his representative, the judge proceeded to grant a decree against the defendant.

[3] An appeal against this order was lodged on 16 October 2008.

Background

[4] The plaintiffs are motor traders who sold a Mercedes CLS 500 to the defendant for the sum of £40,000 plus VAT in November 2005. It is the plaintiffs' case that by way of payment the defendant entered into a finance agreement which provided £40,000 leaving a balance of £7,000 to be paid. The plaintiffs, on receipt of the £40,000, released the vehicle to the defendant on the understanding that the balance would be paid without delay. It is the plaintiffs' case that the defendant has refused to pay the outstanding £7,000.

[5] It is the defendant's case that he was given a £7,000 discount in the purchase of this car and in any event the car in question is not subject to VAT. He contends that in paying £40,000 he has paid the total due.

[6] It is the understanding of the defendant from the VAT Regulations that VAT is not automatically due on a second-hand car. The defendant had written to the plaintiffs asking them to clarify why they assert that VAT is due and contended there has been no satisfactory response.

[7] The defendant further asserts that if the plaintiffs are correct in their assertion that VAT was to be paid on this car, the plaintiff has refused to provide the discount agreed which should have been applied to the £40,000 net. This would have created a new total of £33,000. VAT on that figure is £5,775 which, when added to the new total of £33,000 would have given a gross total of £38,775. This would in fact mean that the plaintiffs owed the defendant the sum of £1,225 out of the £40,000 already paid.

[8] The plaintiffs responded to these contentions by asserting that the car was purchased as a VAT qualifying vehicle and retained that status until it was sold to the defendant. The defendant, being VAT registered, was therefore liable to pay VAT which he could then reclaim. Further, the plaintiffs assert that when the defendant sold the vehicle to a third party, namely Mr Rodney Williamson, he charged VAT therefore confirming the VAT qualifying status.

[9] Insofar as the defendant had earlier contended that a discount was given because the vehicle had been damaged in an accident, the plaintiff asserts that the vehicle had been involved in a flooding incident and was

subsequently repaired. The defendant had been aware of this prior to the purchase and no discount was agreed on or contemplated.

Chronology

[10] Mr Spence, who appeared on behalf of the plaintiff/respondent and Mr Jones, who appeared on behalf of the defendant/appellant, both supplied comprehensive and informative skeleton arguments. In the course of Mr Spence's skeleton argument, he set out a helpful chronology in the action to date with the following salient references.

- The civil bill was issued on 10 January 2008.
- The plaintiffs issued a notice requiring discovery dated 29 February 2008.
- The plaintiffs obtained an order for discovery against the defendant dated 11 June 2008 and served it on 13 June 2008.
- The plaintiffs applied for an order striking out the defendant's defence for his failure to comply with the order for discovery dated 11 July 2008.
- The unless order was made on 3 September 2008.
- Between 7 March 2008 and 3 October 2008, the parties' solicitors have engaged in correspondence regarding discovery. The plaintiffs provided documentation on 13 May 2008 and the defendant provided some documentation only on 20 November 2008.

[11] On 3 October 2008 when the application to enforce the unless order was heard by the learned County Court Judge, there was no appearance before the court by the defendant or his solicitors.

[12] It is the plaintiff's case that the defendant has still not complied with the discovery order or the unless order. Other than some documents, which are not comprehensive, served on 28 November 2008, no discovery has been forthcoming.

[13] My attention was drawn to what I consider to be significant correspondence in this case.

- On 7 March 2008 Culbert and Martin ("C&M"), having served a notice for discovery on the 28 February 2008, sought from Jones and Company ("J&Co") specific discovery of any documentation that the defendant had in relation to the sale of the car to Rodney Williamson.
- By letter of 20 March 2008 J&Co replied saying that they had requested their client to provide them with copies of any documentation. No argument was raised that this request for disclosure was unjustified. The fact that J&Co had sought this documentation from their client was repeated by J&Co in correspondence of 14 April 2008.

- On 8 May 2008 C&M reminded J&Co of the need for discovery indicating that the onward sale to Mr Williamson had only occurred 18 months ago and that the defendant must have the VAT and tax returns.
- On 13 May 2008 C&M specified the precise documentation that was required relating to the purchase of the vehicle including purchase finance documentation, the relevant VAT return, the defendant's sale of the vehicle to Rodney Williamson including the defendant's VAT return covering that period and the purchase of any other vehicles which were allegedly relevant to the issues in the case.
- On 16 May 2008 J&Co wrote to C&M again repeating that they had written to their client in respect of those matters adding that they "appreciated the relevance thereof".
- On 9 June 2008 C&M wrote to J&Co indicating that since they have not received any documentation whatsoever by way of discovery they had no alternative but to apply for an order.
- On 13 June 2008 C&M wrote to J&Co enclosing a copy order for discovery.
- On 25 June 2008 C&M again wrote to J&Co requesting compliance with the order for discovery within five days failing which an application to strike out would be lodged.
- On 11 July 2008 C&M wrote to J&Co indicating that as a result of the defendant's failure to provide any documentation by way of discovery, a summons and affidavit were now being served on them for hearing on 3 September 2008.
- Thereafter the unless order was obtained on 3 September 2008. I understand that this was not opposed by the defendant.
- On 2 September 2008 J&Co wrote to C&M indicating, inter alia, that the defendant was now seeking information from his bank, his accountants and the person to whom he had sold the vehicle to see if any information could be obtained, that he could not find any reference to materials regarding the sale of the vehicle or VAT being charged, that in event that he "could not do a list of documents" a verifying affidavit would be supplied and that if J&Co could not obtain information by way of return cheques, recovered charges, invoices of registration from the defendant himself or the person whom the vehicle was sold J&Co would return to the plaintiffs. It is significant that this letter was sent the day before the unless order was obtained. No attempt was made to seek an extension of time.
- By letter of the same date, J&Co sent a further letter to C&M advising that the defendant had made extensive enquiries concerning the Lexus vehicle and the documents relating to the issue in question but had not located any such documentation. In the penultimate paragraph it records "in the event the court does not accept this and the strikeout is upheld we will need to consider an application to appeal that and to reinstate the defence". The defendant was therefore well aware that

this application was on going, and was simply awaiting the outcome. No attempt whatsoever was made to engage the issues that were informing the unless application.

- The unless order having been obtained on 3 September 2008, a copy of the order was served by way of letter of 5 September 2008 by C&M.
- No response whatsoever was made to the unless order.
- On 3 October 2008 C&M wrote to J&Co indicating that in the absence of any appearance at the court on 3 October 2008, Her Honour Judge Kennedy had made the decree.
- 12 days later, in correspondence of 15 October 2008, J&Co wrote to C&M indicating that "Judge Kennedy may have misdirected herself in the granting of judgment. While the defendant was barred from defending the action the plaintiff was still required to prove their entitlement to charge VAT. In the circumstances we are instructed to lodge an appeal and this will be done tomorrow". It is noteworthy that this letter made no reference whatsoever to any excuse as to why there had been a non-appearance before the court or that any effort was being made to comply with the order for discovery. Other than to indicate that they were instructed to lodge an appeal, no further information was supplied.
- In correspondence of 22 October 2008 J&Co again asserted that the judgment had been incorrectly obtained together with the following reference in the third paragraph:

> "It would have been our intention to have been in attendance on the day of the case's listing to require the plaintiff to prove their case and, in the event that we did not believe that he had done so, we would then have been entitled to raise an appeal at that point."

  No explanation whatsoever was given as to why they had not been in attendance on that day and certainly no hint of the explanation that was given to this court had surfaced at that stage.
- On 10 November 2008 J&Co wrote to C&M referring to the appeal but again failing to provide any reason for failing to attend at the hearing.

[14] Even as late 20 November 2008, when the defendant did provide some documents – eight months after first being requested – it was still far short of the documentation required as evidenced by the letter of 3 December 2008 from C&M where they set out again the documentation that was still required in order to comply with the orders. No attempt has been made to comply with that request to date.

[15] At the hearing before me, apparently for the first time, J&Co, through counsel, asserted that the non-attendance at the hearing before Judge

Kennedy on 3 October 2008 had been because the defendant and the solicitor had missed the date as a result of failing to diary it. This excuse had never surfaced in correspondence at any stage since the date of the order until the present hearing. It was not contained in any sworn documentary evidence before me and no attempt was made to give sworn or first hand evidence about the matter. Mr Spence informed the court that he was hearing it for the first time on the day of the hearing. This is far too casual an approach to such a solemn and serious court order as had been made in this case.

Principles governing orders to dismiss applications where one party has failed to do a specified act within a stated time

[16] The court has power to extend the time where an "unless order" has been made but not complied with. However this is a power which is to be exercised cautiously and with due regard to the principle that orders are made to be complied with and not to be ignored (See Hughes v Hughes 1990 NILR 295 ("Hughes")).

[17] It is a matter of discretion for the court to decide whether to extend the time. Various factors are to be taken into account in determining how it is to be exercised, and, while it is not necessary for an explanation for the delay to be given, the parties seeking the extension must put before the court some material to serve as a foundation for the court's exercise of its discretion. I consider that in most instances the ipse dixit of counsel will be insufficient.

[18] In considering other factors which the court should take into account and balancing the prejudice to the respective parties, issues such as compensation by way of costs if the action is reinstated, difficulties in the plaintiff preparing his case, the whole period of delay, the date of hearing, the prejudice to the plaintiff in not having a hearing on the merits of his claim can be taken into account (see Carswell J in Hughes' case at p. 299F et seq).

[19] I am particularly conscious of the comments of Carswell J in Hughes' case at p. 300D where he said:

> "Constant reminders have been given by the courts in the cases which I have cited of the importance of the observance of the times laid down by the rules of court. The plaintiff's solicitors completely disregarded them in the present case and took no step to redress their fault when the summons to dismiss for want of prosecution was served or even when Master Wilson made the 'unless' order against the plaintiff. They have in my opinion let the matter run on much too long, whether the lapse of time is viewed as a question of the overall delay since the date of the

accident or as one of the delay since the making of the 'unless' order."

[20] In Hytec Ltd v Coventry City Council 1997 1 WLR 1666 the Court of Appeal in England and Wales considered a party's failure to comply with an unless order in the circumstances that obtained before the civil procedure reforms in England. At p. 1674h et seq Ward LJ outlined the philosophy underlying the court's approach in the following terms:

> "(1) An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order.
>
> (2) Because that was his last chance, a failure to comply will ordinarily result in this 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 reason is advanced to exempt his failure.
>
> (4) It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred) flouts the order then he can expect no mercy.
>
> (5) A sufficient exoneration will almost inevitably require that he satisfies the court that something beyond his control has caused his failure to comply with the order.
>
> (6) The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice.
>
> (7) The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also weighs very heavily. Any injustice to the

> defaulting party, though never to be ignored, comes a long way behind the other two."

[21] I pause to observe that in England Part 3.9 of the Civil Procedure Rules 1998, SI 1998/3132 still adopts that general test towards unless orders, namely that in considering such an application the Master's duty is to ask himself has there been complete compliance and if there has not then the order must be made subject only to the relief under 3.9. There are nine considerations under CPR 3.9 which, since those orders do not apply to Northern Ireland, I do not need to recite. They are well set out and discussed in Jani-King (GB) Ltd v Prodger (2007) EWHC 712 (QB). The comments of MacKay J in relation to the first consideration bear a resonance for the present hearing:

> "The interests of the administration of justice are twofold, as relevant to this case, namely that orders of the court shall be fully or strictly complied with and that multiple applications to the court particularly on disclosure should where possible be avoided. Equally it is in my judgment 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 lies 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."

Conclusion

[22] I have come to the conclusion that there is strong reason in this case to uphold the decision of Her Honour Judge Kennedy. My reasons for so concluding are as follows.

[23] First, even now, the defendant has not complied with the order for discovery or the unless order by serving the appropriate list and verifying affidavit. It is important to observe times laid down by the rules of court. Where even now, several months after the unless order has been made, the defendant has still not complied with the order, despite this appeal pending, I conclude that this is such a flagrant and contumelious breach of the rules that this court could not ignore such a breach without damaging the principle that orders were made to be complied with.

[23] Whilst it is right to say that it is not necessary for an explanation for the delay to be given, I must have some material before me to serve as a foundation for the exercise of my discretion. The reason given – namely that the matter had not been put in the diary – has emerged far too late in this case

and without any documentary or oral evidence for it to carry any material weight. It did not appear in the correspondence which succeeded the unless order being made and, I am informed, was not raised until the hearing before me.

[24] It is clear from the correspondence that this defendant had been asked for this documentation, without suggestion by J&Co that it was improper to do so, for several months prior to the unless order. The explanation in the skeleton argument that 'he was simply unable to locate the documents' is risible given the months that have past. No attempt was made to resist the order for discovery or for that matter the unless order. The unless order did not inject the slightest urgency into the approach of this defendant. Correspondence of 2 September 2008, the day before the unless order was made, manifested an all too casual and dismissive approach for the forthcoming unless order application indicating merely that if the strike out was upheld it would be appealed. No attempt was made to obtain an extension of time, to make representations to the court or make further efforts to comply with the earlier order.

[25] Similarly, although the unless order was served with the letter of 3 October 2008, it was a further 12 days before any response emanated from J&Co and the defendant. No explanation whatsoever was even attempted as to why there had been no appearance. Other than some vague and wholly unsubstantiated suggestion that the judge may have misdirected herself, no effort was made to comply with the order. I have concluded that there has been a history of failure to comply with court orders, that the costs incurred and time wasted in so doing were ignored and that no compelling reason has been advanced to exempt the failure. I find nothing to satisfy me that the circumstances of this case have caused the defendant to fail to comply with the unless order other than his own casual indolence. Public interest in the administration of justice weighs heavily on this court. I borrow the reminder of Carswell J in Hughes' case of the importance of the observance of times laid down by rules of court. In this case the defendant's solicitors and the defendant have completely disregarded them and taken no step to redress their default. They have in my opinion let this matter run on too long. In the exercise of my discretion I consider that time should not be extended in favour of the defendant and I therefore confirm the decision of the learned County Court Judge.

[26] I shall invite the parties to address me on the issue of costs.