Neutral Citation No. [2012] NIQB 8

Ref:	**WEA8422**

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

Delivered:	**13/02/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

BETWEEN:

ROISIN McKENNA

Plaintiff;

-and-

AIDAN QUINN

Defendant.

WEATHERUP J

[1] The plaintiff applied for an extension of time to comply with an Order of 27 October 2011 that unless the plaintiff made discovery of documents within 14 days judgment would be entered for the defendant against the plaintiff. Mr R Lavery QC appeared for the plaintiff and Mr McMahon appeared for the defendant.

[2] The plaintiff's Writ of Summons was issued on 13 October 2010 claiming damages for loss and damage arising from the negligence and breach of contract of the defendant as solicitor for the plaintiff in the purchase of property in Castlecaulfield. The plaintiff claims that instructions were given to the defendant in January 2004 and upon transfer of the property the title proved to be defective as no easement had been provided for a soakaway from a septic tank, as a result of which the plaintiff claims for loss of value to the property and added expenses.

[3] The proceedings were admitted to the Commercial List on 24 January 2011. On that date Directions were given by the Court requiring the service of a Statement of Claim by 11 February 2011. No Statement of Claim having been served, the Court, on 17 June 2011, made an Order dismissing the action unless the plaintiff

served a Statement of Claim before 24 June 2011, a form of Order commonly known as an "unless order". On the same date directions were given that included the plaintiff providing discovery of documents by 30 September 2011.

[4] The Statement of Claim was served and on 8 September 2011 a Defence was delivered pleading that the plaintiff's claim was statute barred. At a Review on 13 October 2011 there was no appearance on behalf of the plaintiff. The plaintiff had failed to comply with the direction to provide discovery to the defendant by 30 September 2011. An Order was made striking out the action unless the plaintiff provided discovery within 14 days. On 24 October 2011 the plaintiff's solicitors wrote to the Commercial Court seeking an extension of time in respect of the unless order for discovery.

The unless order for discovery by the plaintiff

[5] The plaintiff was granted an extension of time and on 27 October 2011 an Order was made first of all requiring the plaintiff to reply to particulars by 10 November 2011 and secondly striking out the action unless the plaintiff provided discovery by 10 November 2011. This is the relevant unless order for the purposes of this application.

[6] A copy of the Order of 27 October 2011 was served on the plaintiff. The plaintiff provided replies to particulars but did not comply with the requirement to provide discovery by 10 November 2011. No further step was taken by the plaintiff or by the defendant.

[7] The proceedings were listed by the Court on 1 February 2012. On behalf of the plaintiff it was stated that it was only on that date that the plaintiff's legal representatives became aware that the unless order of 27 October 2011 required discovery of documents by 10 November 2011. On behalf of the defendant it was contended that the default of the plaintiff in complying with the unless order of 27 October 2011 had the effect that the defendant had judgment against the plaintiff from 10 November 2011.

[8] Being dissatisfied with the position outlined on behalf of the plaintiff it was directed that the plaintiff's solicitors should provide a written explanation as to the steps that had been taken or not taken in relation to compliance with Orders of the Court. The plaintiff's solicitor provided a letter to the Court dated 3 February 2012 outlining the history of the case. The letter states that the plaintiff's solicitors did not appreciate that the Order of 27 October 2011 included the requirement to make discovery. Reference is made to the first part of the Order which required replies to particulars, which were served, and to the second part of the Order which contained the unless order requiring compliance with Order 24 Rule 2. The plaintiff's solicitor's state that their focus was on compliance with the replies to particulars without

appreciating that the unless order referred to discovery rather than particulars. The plaintiff's solicitors point out that the word discovery was not used in the Order but recognise that had they read the Order correctly they should have appreciated that the unless order required them to make discovery.

[9] The position in relation to unless orders was considered by the Court of Appeal in England and Wales in Hytec Information Systems v. Coventry City Council [1997] 1 WLR 1666. The Court directed that unless particulars were served by a specified date the defendant's claim should be struck out. The defendant served some particulars but it was decided that the defendant had deliberately flouted the unless order and its pleadings would be struck out. On appeal the striking out of the defendant's claim was upheld and Ward LJ set out the approach to unless orders as follows –

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 the sanction being imposed;

3. This sanction is a necessary forensic weapon which the broader interests of the administration of justice require 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 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, comes a long way behind the other two.

[10] In Northern Ireland unless orders were considered by Carswell J in Hughes v Hughes [1990] NI 295 where the following was stated -

> The Court has power to extend the time where an unless order had been made. It is a power that should be exercised cautiously with due regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored (298A).
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> It is matter of discretion for the court to decide whether to extend the time, applying the ordinary principles which it should follow in the case of applications for extension of time, as in Davis v Northern Ireland Carriers [1979] NI 19 and Coyle and the Secretary of State [1987] NIJB 59 (298B-C).
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> The party seeking the extension of time must put before the court some material to serve as a foundation for the courts exercise of discretion (298D).

[11] The factors to be taken into account in relation to the discretion to extend time were set out by Lowry LCJ In Davis v Northern Ireland Carriers [1979] at 20A-D as follows -

> "Where a time limit is imposed by statue it cannot be extended unless that or another statute contains a dispensing power. Where the time is imposed by rules of court which embody a dispensing power such as is that found in Order 64 rule 7 the court must exercise its discretion in each case and for that purpose the relevant principles are –
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> (1) whether the time is sped: a court will, where the reason is a good one, look more favourably on an application made before the time is up;
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> (2) when the time-limit has expired, the extent to which the party applying is in default;
>
> (3) the effect on the opposite party of granting the application and, in particular, whether he can be compensated by costs;
>
> (4) whether a hearing of the merits has taken place or would be denied by refusing an extension;
>
> (5) whether there is a point of substance (which in effect means a legal point of substance when dealing with cases stated) which could not otherwise be put forward; and

(6) whether the point is of general and not merely particular, significance.

To these I add the important principle;

(7) that the rules of court are there to be observed."

[12] The plaintiff's solicitors forwarded the replies to particulars to the defendant's solicitors on 9 November 2011, being within time, with a letter stating that discovery would follow. There was no correspondence from the defendant's solicitors to indicate that the plaintiff was in default of the requirement in relation to discovery. The defendant took no step in relation to judgment against the plaintiff. Counsel for the defendant contends that it was not necessary for the defendant to take any further action as the defendant had judgment against the plaintiff on 10 November 2011 by virtue of the plaintiff being in default of the unless order.

[13] I am satisfied that the plaintiff's solicitor's conduct was not intentional or deliberate. When the plaintiff's solicitors responded with the replies to particulars I accept that they believed the Order had been satisfied. Nothing further occurred until 1 February 2012 when the plaintiff's solicitors became aware of the correct position. I accept that explanation although it was clearly involved a careless reading of the Order.

[14] The time for compliance with the Order had sped; non-compliance with the unless order arose by the default of the plaintiff; the effect of granting the application to extend time would be to deprive the defendant of judgment and that cannot be compensated in costs; the plaintiff would be denied a hearing on the merits if the application were refused; there does not appear to be any point of general importance raised by the claim. The prejudice to the plaintiff would be limited if the application were refused as the plaintiff could sue the solicitors as responsible for the action being struck out. The main point in favour of the plaintiff concerns the denial of a hearing on the merits. It is recognised that the default arose from a misreading of the unless order. On the other hand there has been considerable delay on the part of the plaintiff in progressing this matter and the plaintiff has been in default of other Orders of the Court. In balancing the prejudice to the plaintiff and to the defendant and taking account of the plaintiff's solicitors belief that they had complied with the unless order upon serving replies to particulars on 9 November 2011 and they being unaware that the position was otherwise until the matter was listed by the Court on 1 February 2012, I exercise my discretion to extend the time for the plaintiff to make discovery.

Unless orders generally

[15] The Queens Bench Master issued Practice Notice No 1 of 2003 on "Unless Orders" on 27 March 2003. The Practice Note refers to Hughes v Hughes and states

that an unless order is effectively a judgment in the action in favour of the party on whose behalf it is made. The Practice Note therefore stated that the practice that the party seeking to enforce the unless order should return to Court on an ex parte application for a final order would be discontinued. Accordingly it was provided that from 28 April 2003 an unless order would include a clause, set out in the Schedule to the Practice Note, providing for an affidavit or certificate confirming service of the unless order and non-compliance with its terms. Thus there was to be an administrative step to secure final judgment from the Office and to satisfy the Taxation Master on any subsequent claim for costs.

[16] There appears to be some uncertainty on the part of practitioners as to the obtaining of judgment against a party in default of an unless order as was evident in the present case and in Shanghai Tycoon Co Ltd and Another v Dynes [2010] NIQB 76. The defendant was in default of an unless order requiring service of a defence and counterclaim and an accountants report within 7 days, in which event there was to be judgment for the plaintiff with costs. The unless order did not specify the terms of the judgment to be entered for the plaintiff and upon the default of the defendant the plaintiff applied to the Court for judgment, In the meantime, between the date of default and the date of the hearing of the application for judgment, the defendant was made bankrupt. Judgment was entered for the plaintiff for a specified amount, the judgment being dated the date of the defendant's default. The effect was that the amount due was a liability established by a judgment before the date of bankruptcy and was not a debt falling to be proved in the bankruptcy.

[17] Upon the expiry of the period for compliance with an unless order the party entitled to judgment is not required to make any further application to the Court and a copy of the judgment may be obtained by filing in the Office 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 its terms, which judgment will be dated on the day of default.

[18] To maintain the administrative approach to a judgment obtained in default of an unless order, the unless order made against a defendant to a claim or a counterclaim should specify the terms of the judgment in the event of default, thus avoiding the need to return to the Court to establish the terms of the judgment. If the unless order is for the benefit of a party making a claim the order should state the amount of the judgment or that damages are to be assessed and if the unless order is for the benefit of a party resisting a claim the order will provide for judgment against the party in default.

[19] In summary the position is as follows -

(i) An unless order made against a defendant to a claim or counterclaim should state the terms of the judgment to be obtained in the event of non-compliance.

(ii) The party entitled to judgment in the event of non-compliance is not required to apply to the Court for judgment. Rather that party should file in the Office 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.

(iii) Judgment will be dated on the day of default.

[20] I accede to the plaintiffs application for extension of time for the plaintiff to comply with the unless order requiring discovery of documents. The plaintiff having now made discovery the time will be extended until today. The defendant was entitled to judgment against the plaintiff on 10 November 2011 and the judgment will be set aside.