

Neutral Citation No. [2010] NIQB 76

Ref: WEA7894

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

Delivered: 11/06/2010

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (COMMERCIAL)**

(1) SHANGHAI TYCOON CO LIMITED and

**(2) ORIENT INTERNATIONAL HOLDINGS (HK)
MARKETING CO LIMITED**

Plaintiffs;

v.

GERARD DYNES

trading as CLONMORE PLANT SALES

Defendant.

WEATHERUP J

[1] By an Order made on 15 April 2010, in a form commonly known as an 'unless order', Deeny J ordered that, unless the defendant served on the plaintiffs a Defence and Counterclaim and an Accountant's Report within 7 days, the defence would be struck out and judgment would be entered in the action for the plaintiff with costs. The defendant was in default of the requirements of the 'unless order'. The plaintiff applies for a further Order setting out the terms of the judgment obtained by the plaintiff against the defendant on the default date, 22 April 2010.

[2] By Writ of Summons dated 21 December 2009 the plaintiffs claimed against the defendant under a number of heads for goods supplied and expenses incurred in the total sum of £251,500.76.

[3] By Practice Direction No 1 of 2003 issued by the Master on 27 March 2003 it was intended that an 'unless order' would be a final order and no further Order would issue from the General Office.

The Practice Direction provided that –

an 'unless order' [stating (i) that unless the plaintiff complies with an earlier order of the court or a particular provision in the Rules, his Writ of Summons will be struck out for want to prosecution with the defendant having costs of the action or (ii) that unless the defendant complies with an earlier order of the Court or a particular provision of the Rules, his defence will be struck out with costs to the plaintiff] is effectively a judgment in the action in favour of the party on whose benefit it is made. The Practice Direction makes reference to the discussion in Hughes v. Hughes [1990] NI 295.

as from 28 April 2003 an 'unless order' will include a clause, as set out in the Schedule to the Practice Direction, the purpose of which would be (i) to underline that it constitutes, if not discharged by the respondent, a final order of the Court and (ii) to facilitate any subsequent claim for costs.

[4] The clause set out in the Schedule was included in the Order of 15 April 2010 and stated that if the defendant failed to comply with the terms of the Order, an affidavit by the plaintiff or a certificate completed by the plaintiff's solicitor confirming service of the Order and non compliance with its terms would be accepted by the Taxing Master as evidence that judgment has been entered for the plaintiff and that the moving party was entitled to tax his costs for payment by the respondent.

[5] The Order of 15 April 2010 does not specify the terms of the judgment that was to be entered if the defendant failed to comply with the 'unless order' within 7 days after the date of the order, that is on 22 April 2010 when the defence was struck out and judgment entered in the action for the plaintiff with costs. Despite the provisions of the Practice Direction it became necessary for the plaintiffs to seek a further order both to identify the terms of the judgment against the defendant and to confirm the date of the judgment, the defendant having been adjudicated bankrupt.

[6] Thus it is necessary to revert to the Writ of Summons which claims the sum of £251,500.76. On 22 April 2010 the plaintiffs' judgment would have been in that sum, together with interest of £6,669.52 from the date of the Writ to the date of the Order, being a total sum of £258,170.28.

[7] The defendant was adjudicated bankrupt on 21 May 2010 and the Official Receiver objects to the judgment against the defendant and seeks a

stay of the proceedings and submits that the plaintiffs should prove the debt in the bankruptcy. It is submitted that a debt provable in the bankruptcy ought to be assessed by the Official Receiver in the bankruptcy and not be determined in separate proceedings. Once a bankruptcy occurs the object is to resolve disputes about the extent of the debts within the bankruptcy scheme and not within the litigation scheme.

[8] However, in the present case the liability for the debt had already been determined in the litigation prior to the date of the bankruptcy and therefore it ceased to be a matter that was provable in the bankruptcy. Liability for the debt had been proved in the action and judgment had been obtained. The Official Receiver will not be required to assess the liability for the debt but will address the impact of the judgment obtained prior to the bankruptcy.

[9] Accordingly I refuse to grant a stay of the proceedings. A confirmatory Order will be issued dated 22 April 2010 providing for judgment for the plaintiffs against the defendant in the sum of £258,170.28. For the avoidance of doubt the judgment will state that the amount of the judgment has been calculated as the £251,500.76 claimed by the plaintiff in the Writ of Summons together with interest from the date of the Writ to the date of 'unless order' which is the sum of £6,669.52.

[10] In the course of the proceedings there was a sale of certain of the defendant's goods and the realisation of £7,055 out of that sale. By Order of the Court that sum was placed in the joint account of the respective solicitors for the plaintiffs and the defendant where, with interest, it remains. This sum represents an asset which now falls into the bankruptcy. It is ordered that the payment of the £7,055 together with the accrued interest held in the joint account of the plaintiffs and the defendants solicitors to be paid to the Official Receiver for the estate of the bankrupt.

[11] This case illustrates that if an 'unless order' is made against a defendant the 'unless order' should state the terms of the judgment that are to be entered for the plaintiff on the default date (whether on a claim or a counterclaim). Otherwise the 'unless order' will not be a final order of the Court, as was intended by the Practice Direction, as it will remain necessary to identify the terms of the judgment.