Neutral Citation Number: [2019] EWHC 2078 (TCC)

Case No: HT-2018-000172

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2019

Before:

MR ALEXANDER NISSEN QC
(sitting as a Deputy High Court Judge)

- -

Between:

EVERWARM LIMITED	**Claimant**
- and -	
BN RENDERING LIMITED	**Defendant**

- -
- -

IAIN QUIRK (instructed by **Harper Macleod LLP**) for the **Claimant**
CATHERINE PIERCY (instructed by **Goodman Derrick LLP**) for the **Defendant**

Hearing dates: 19 July 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR ALEXANDER NISSEN QC

MR ALEXANDER NISSEN QC :

Introduction

1. By an application dated 11 July 2019, the Defendant, BN Rendering Limited ("BN") applies for an extension of time within which to comply with an "unless" order made by O'Farrell J on 5 July 2019. It raises an interesting question about the interface between CPR 3.1 and CPR 3.9 in circumstances where, before its expiry, further time is sought for compliance.

2. The Claimant, Everwarm Limited, ("Everwarm") resists the application. The application was heard on 19 July 2019 and, at the time, I stated my decision to allow the extension but indicated that my reasons for doing so would follow. These are those reasons.

3. Everwarm is a company which provides energy efficiency advice and related services including the provision of external building insulation. BN is a company which provides external insulation products and services. From around December 2013, Everwarm engaged BN as a subcontractor to install insulation to a number of residential property projects. In these proceedings, Everwarm contends that, pursuant to contractual provisions, it has provided BN with a binding Assessment of the amount due to BN on each Project and that these Assessments show that BN has been overpaid by £798,468. BN disputes the application of these contractual provisions and contends that, for a variety of reasons, it is owed money from Everwarm in the sum of £1,957,905.

The original Orders

4. The circumstances in which the original Orders came to be made are as follows. On 21 May 2019 Everwarm applied to the Court for an Order that BN be required to provide security for costs in respect of its Counterclaim against Everwarm. The application was contested on various grounds including lateness of the application. In that context, it is relevant to mention that the trial of the action, including most of the Counterclaim, was due to take place from 19 July 2019 for six days. The part of the Counterclaim which was not to be heard concerned the detail of any valuation disputes arising in respect thereof. At the conclusion of the hearing of the application, which took place on 13 June 2019, Cockerill J ordered the Defendant to provide security for costs in the amount of £145,000 by payment into court or by provision of a guarantee. I do not have a transcript of the hearing but it appears to be common ground that immediately after the oral decision of principle was made, BN sought and was given three weeks within which to comply. Accordingly, the Order records that BN was required to provide security for costs by either of the two means within 21 days of 13 June 2019. It is common ground that this would have required compliance by 4 July 2019.

5. In the first instance, it is not usual for an Order for security to have a sanction attached to it were such security not provided and this Order had no sanction attached to it.

6. Very shortly before the time for compliance would have expired, namely on 3 July 2019, BN applied to the Court for an extension of the time within which it was required to comply. The application requested that it be determined without a hearing. It was supported by the fourth witness statement of Ms Boland-Shanahan. It explained why

BN would not be able to comply and asked for a further 8 days within which to do so i.e. until 12 July 2019. The witness statement briefly explained the steps that BN had been taking since the original Order was made. Everwarm's solicitors responded by letter dated 4 July 2019 opposing the application outright but, in the alternative, cross applied seeking the issue of an Unless Order requiring compliance by 11 July 2019, one day earlier than the date sought by BN. Everwarm submitted that there could be no slippage beyond that date because, otherwise, it would have no costs protection going into the trial starting on 19 July 2019.

7. The application was determined on paper by O'Farrell J. She acceded to Everwarm's cross-application and ultimately[1] issued an Order dated 5 July 2019 which stated:

> *"Unless the Defendant makes provision for security for costs in the sum of £145,000 by way of payment into Court or a guarantee from a first class UK bank in accordance [with] Mrs Justice Cockerill's Order dated 13 June 2019 by 4:00pm on Thursday 11 July 2019 its Counterclaim will be stuck out and judgment on the Counterclaim will be entered for the Claimant."*

8. I define this as the "Unless Order". As the matter was determined by O'Farrell J on paper, no reasons for the decision were given. But Mr Quirk, appearing for Everwarm, properly accepted that a factor which would have influenced both the making of the Unless Order and the time provided for compliance with it was the proximity of the trial date. Indeed, that point had been made in the letter opposing the application.

The Present Application

9. At 3:30pm on 11 July 2019, i.e. just before the expiry of the relevant deadline for compliance with the Unless Order, BN applied to the Court for a further extension of time within which to comply with the Unless Order of O'Farrell J, namely a further 7 days, until 4pm on 18 July 2019. On this occasion, the application asked for an oral hearing. The application was supported by the second witness statement of Mr John Gordon dated 11 July 2019. In short, he explained that BN was doing all it could to comply with the Unless Order but required a further 7 days within which to comply.

10. As it happened, there was an oral hearing already taking place between the parties on 12 July 2019 in respect of Everwarm's application to amend its Particulars of Claim. There was insufficient time (and, had it been relevant, insufficient notice) for the application for an extension to be heard on that day so it was adjourned to be heard at 2pm on 19 July 2019. This had already been notionally fixed as the first day of trial but was, in practice, set aside as a reading day.

11. In the intervening period each of the following occurred:

    (a) As directed, both parties provided written submissions in respect of the application with or as part of their skeleton openings for the trial. These were received on 16 July 2019 in respect of Everwarm and 17 July 2019 in respect of BN;

[1] It is right to record that the original draft Order submitted by Everwarm with its letter of 4 July 2019 had proposed that, in default of provision of security for costs, the sanction would be that both BN's defence of the Claim and its Counterclaim would be struck out and this form of Order was originally issued by the Court in that form. BN objected to this on the grounds that the sanction could only ever extend to the Counterclaim and O'Farrell J agreed, issuing a corrected order in the terms set out.

(b) Everwarm provided the sixth witness statement of Carolyn Morgan dated 18 July 2019 in opposition to the application;

(c) At 3.25pm on 18 July 2019, BN paid the sum of £145,000 into Court.

12. Arising out of (c), it therefore followed that if the application for more time was wholly successful, BN would, in the event, have complied with the Unless Order, as varied.

13. Once the payment into court had been made, BN's solicitors wrote to Everwarm's solicitors asking them to abandon their opposition to the application. However, Everwarm's solicitors refused to do so. The application was therefore fully contested. At the hearing, Ms Piercy represented BN. As I have said, Mr Quirk represented Everwarm. I am grateful to them both for their submissions.

The Effect of the Unless Order

14. Mr Quirk pointed out that in *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463 at [34] Moore-Bick LJ said this:

> "[34] *In my view it should now be clearly recognised that the sanction embodied in an "unless" order in traditional form takes effect without the need for any further order if the party to whom it is addressed fails to comply with it in any material respect. This has a number of consequences, to three of which I think it is worth drawing particular attention. The first is that it is unnecessary, and indeed inappropriate, for a party who seeks to rely on non-compliance with an order of that kind to make an application to the court for the sanction to be imposed or, as the judge put it, "activated". The sanction prescribed by the order takes effect automatically as a result of the failure to comply with its terms."*

15. What impact does BN's prior application for an extension of time have on this automatic consequence, given that it was made before the expiry of the time limit? Mr Quirk submitted that, as at the date of the hearing, the Counterclaim stood automatically struck out but that, if the Court was to accede to the application for more time, it would in retrospect treat the Counterclaim as if it had never been struck out. I agree that is a sensible approach.

The Test – the Submissions and the Authorities

16. It was apparent that a key point which separated the parties was whether the application for more time should properly be treated as one made pursuant to CPR 3.9 (relief from sanctions) as contended by Everwarm or whether it should properly be regarded as one made pursuant to CPR 3.1 as contended by BN. No point was taken as to the form of wording used in BN's application. Rather, it was Everwarm's case that, however the application itself was worded, as an "unless" order had been made, the appropriate test to be applied in determining it was to ask whether BN should be granted relief from sanctions applying the principles in CPR 3.9. By contrast, BN relied on the application of the overriding objective in CPR 1.1. The alternative tests proposed by the parties were, doubtless, influenced by a perception on both sides that the outcome of the application might be different if one or other test was applied.

17. BN's submission was that this Court is bound by appellate authority that an in-time application for an extension of time for compliance with an Order falls to be decided pursuant to CPR 3.1(2) and, therefore, in accordance with the overriding objective in CPR 1.1. It made no difference that the order in question was an "unless" order. Everwarm's submission was that an application for an extension of time in respect of an "unless" order was to be treated as an application for relief from sanctions pursuant to CPR 3.9.

18. CPR Rule 3.1(2) materially provides as follows:

> *"(2) Except where these Rules provide otherwise, the court may –*
>
> > *(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);"*

19. CPR 3.9 provides:

> *"(1) 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 of the case, so as to enable it to deal justly with the application, including the need –*
>
> *(a) for litigation to be conducted efficiently and at proportionate cost; and*
>
> *(b) to enforce compliance with rules, practice directions and orders."*

20. CPR 1 contains the overriding objective to which, by virtue of Rule 1.2, the Court must seek to give effect when exercising any power given to it by the Rules. Rule 1.2 provides:

> *"(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.*
>
> *(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –*
>
> > *(a) ensuring that the parties are on an equal footing;*
> >
> > *(b) saving expense;*
> >
> > *(c) dealing with the case in ways which are proportionate –*
> >
> > > *(i) to the amount of money involved;*
> > >
> > > *(ii) to the importance of the case;*
> > >
> > > *(iii) to the complexity of the issues; and*
> > >
> > > *(iv) to the financial position of each party;*

> *(d) ensuring that it is dealt with expeditiously and fairly;*
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> *(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and*
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> *(f) enforcing compliance with rules, practice directions and orders."*

21. In *Robert v Momentum Services Ltd* [2003] EWCA Civ 299 the Court of Appeal had to consider how to exercise a discretion pursuant to CPR 3.1(2)(a) in a case in which the application for an extension of time was made before the time for compliance was required. At paragraph [30], Dyson LJ contrasted Rule 3.1(2)(a) with, amongst other provisions, Rule 3.9 because the former contains no list of criteria for the exercise of the discretion to grant an extension of time. He concluded that this was deliberate. At [33] and [34] he said:

> *"*[33] *It is clear that Brooke LJ treated Sayers's case as a relief from sanctions case, or at least closely analogous to such a case. That is because the time for appealing had already expired when the application for an extension of time was made. I see no reason to import the rule 3.9(1) checklists by implication into rule 3.1(2)(a) where an application for an extension of time is made before the expiry of the relevant time limit. There is a difference in principle between on the one hand seeking relief from a sanction imposed for failure to comply with a rule, practice direction or court order, where such failure has already occurred, and on the other hand seeking an extension of time for doing something required by a rule, practice direction or court order before the time for doing it has arrived. The latter cannot sensibly be regarded as, or even closely analogous to, a relief from sanctions case. If the draftsman of the rule had intended that the checklist set out in rule 3.9(1) should be applied when the court is exercising its discretion under CPR 3.1(2)(a) in such a case, then he could and, in my judgment, would have said so. By not spelling out a checklist in rule 3.1(2)(a), it seems to me that the draftsman was intending that the discretion should be exercised by simply having regard to the overriding objective of enabling the court to deal with cases justly including, so far as practicable, the matters set out in rule 1.1(2).*
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> [34] *It follows that, in my judgment, the judge was wrong to criticise the district judge for failing to apply the rule 3.9(1) checklist. In the result the two reasons given by him for exercising his discretion afresh fail."*

22. In *Kaneria v Kaneria* [2014] EWHC 1165 (Ch), Nugee J had to consider an in-time application for an extension of time in which to serve Defences. The opposing party contended that regard should be had to the well-known *Mitchell*[2] principles arising under Rule 3.9. The application itself was made under CPR 3.1(2)(a). At [26] and [28], Nugee J referred to the Court of Appeal's statement in *Mitchell* that the two matters specifically mentioned in Rule 3.9 reflected a deliberate shift of emphasis and that they should be regarded as of paramount importance and be given great weight. He went on to record at [29] that it had been accepted in the case before him that a similar approach

[2] *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537

to that contained in Rule 3.9 was applicable where an out of time application for an extension of time was made and at [30] he remarked that in such cases there was:

> *"a close analogy to an application for relief from sanctions".*

23. At [31] to [34] he said this:

> "[31] *This case by contrast is one of an in-time application for an extension. Mr Jones submitted that once it was accepted that the Mitchell principles applied to an out of time application for an extension, it was illogical not to apply the same approach to an in-time application for an extension. I do not agree. Of course if time is due to expire on 14 February, there is little practical difference between an application made on 13 February (or 11 February as in this case) and one made on 15 February. Realistically it is unlikely that an application made on 11 February could be heard before 14 February, and even if the court could in theory hear it immediately, it would no doubt usually already be too late for the applicant to comply with the original time limit: that is after all the reason why the application is made. One can see the strict logic of saying that in such a case the realistic position is that unless an extension is granted the applicant is inevitably going to fail to comply with the time limit, and should be treated in the same way as one who has already failed to do so.*
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> [32] *But this is not the approach that has been adopted as a matter of precedent, and I can see sound practical and policy reasons for not doing so. So far as precedent is concerned, in Robert v Momentum Services Ltd [2003] 1 WLR 1577 ("Robert"), the Court of Appeal expressly held that an in-time application for an extension of time (in that case for service of the particulars of claim) was not, and should not be treated as, an application for relief from sanctions. Dyson LJ (with whom Hale LJ and Sir Andrew Morritt V-C agreed) referred to what Brooke LJ had said in Sayers and continued, at para 33:*
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> > *"It is clear that Brooke LJ treated the Sayers case as a relief from sanctions case, or at least closely analogous to such a case. That is because the time for appealing had already expired when the application for an extension of time was made. I see no reason to import the rule 3.9(1) check lists by implication into rule 3.1(2)(a) where an application for an extension of time is made before the expiry of the relevant time limit. There is a difference in principle between on the one hand seeking relief from a sanction imposed for failure to comply with a rule, practice direction or court order, where such failure has already occurred, and on the other hand seeking an extension of time for doing something required by a rule, practice direction or court order before the time for doing it has arrived. The latter cannot sensibly be regarded as, or even closely analogous to, a relief from sanctions case. If the draftsman of the rule had intended that the check list set out in rule 3.9(1) should be applied when the court is exercising its discretion under CPR r 3.1(2)(a) in such a case, then he could and, in my judgment, would have said so. By not spelling out a check list in rule 3.1(2)(a) , it seems to me that the draftsman was intending that the discretion should be exercised by simply having regard to the overriding*

> *objective of enabling the court to deal with cases justly including, so far as practicable, the matters set out in rule 1.1(2)."*
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> [33] *Mr Harty submitted that there was nothing in Mitchell [2014] 1 WLR 795, or the new approach there endorsed, which affected the decision in Robert [2003] 1 WLR 1577. Robert was cited in argument in Mitchell, but the Court of Appeal did not refer to it in their judgment and could not sensibly be regarded as departing from it (even if it was open to them to do so). He referred me to the fact that Robert is still cited in the most recent edition of the White Book (Civil Procedure 2014 , vol 1, p 58), at section 3.1.2 with an editorial comment that it is likely that the distinction between Sayers and Robert remains good law, namely that it is easier to persuade the court to grant an in-time application for an extension than an out of time one.*
>
> [34] *I accept this submission. It seems to me that unless and until a higher court has said that the approach in Robert is no longer to be followed, I am bound by that decision (i) to regard an in-time application for an extension of time as neither an application for relief from sanctions, nor as closely analogous to one, and (ii) to exercise the discretion under that rule by applying the overriding objective rather than the terms of CPR r 3.9*".

24. Shortly after *Kaneria* was decided, the relationship between Rules 3.1 and 3.9 was again the subject of consideration by the Court of Appeal in *Hallam Estates Ltd v Teresa Baker* [2014] EWCA Civ 661. In that case, the relevant time for the filing of the Points of Dispute in the costs assessment was 14 May 2013. On the last day, at 2.43pm, an application for an extension of time was made, seeking further time until 18 June 2013. Accordingly, Jackson LJ decided it was an in-time application for an extension of time as it was made before the expiry of the time limit. At [26] and [27] he said:

> "[26] *An application for an extension of the time allowed to take any particular step in litigation is not an application for relief from sanctions, provided that the applicant files his application notice before expiry of the permitted time period. This is the case even if the court deals with that application after the expiry of the relevant period. The Court of Appeal established this principle in Robert v Momentum Services Limited[2003] EWCA Civ 299; [2003] 1 WLR 1577: see in particular [33]. This still remains the case following the recent civil justice reforms. See Kaneria v Kaneria [2014] EWHC 1165 (Ch) at [31] to [34]. I agree with those four paragraphs in the judgment of Nugee J.*
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> [27] *It therefore follows that on 16th May 2013 the costs judge was dealing with an in-time application. This was a straightforward application to extend time under rule 3.1(2)(a). The principles concerning relief from sanctions which the Court of Appeal enunciated in Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; [2014] 1 WLR 795 are not applicable.*"

25. Based on these authorities, Ms Piercy submits that BN's application for an extension of time for compliance with the Unless Order was made in time (as was the prior application before O'Farrell J) and that I am bound by appellate authority to deal with the matter pursuant to Rule 3.1(2), without regard to Rule 3.9. Her submission was to the effect that it is irrelevant that, by reason of the intervening passing of time, the time

limit for compliance with the Unless Order has since passed so that on its literal reading it has taken automatic effect.

26. Mr Quirk submits that these cases can be distinguished because none of them concern "unless" orders which, he submits, have a special character. His submission was that as an "unless" order had been made, the principles in Rule 3.9 are applicable even in the case of an in-time application for an extension of time.

27. In this context, he first draws to my attention to *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463 at [34] and [35]. I have already cited part of this above. After that passage, Moore-Bick LJ then continued:

> "[34] … *If an application to enter judgment is made under rule 3.5(5) , the court's function is limited to deciding what order should properly be made to reflect the sanction which has already taken effect. Unless the party in default has applied for relief, or the court itself decides for some exceptional reason that it should act of its own initiative, the question whether the sanction ought to apply does not arise. It must be assumed that at the time of making the order the court considered all the relevant factors and reached the decision that the sanction should take effect in the event of default. If it is thought that the court should not have made an order in those terms in the first place, the right course is to challenge it on appeal, but it may often be better to make all reasonable efforts to comply and to seek relief in the event of default.*
>
> [35] *The second consequence, which follows from the first, is that the party in default must apply for relief from the sanction under rule 3.8 if he wishes to escape its consequences. Although the court can act of its own motion, it is under no duty to do so and the party in default cannot complain if he fails to take appropriate steps to protect his own interests. Any application of this kind must deal with the matters which the court is required by rule 3.9 to consider*."

28. In developing his theme about the particular nature of "unless" orders, Mr Quirk also referred to *C v Magnet Ltd* [2016] EWCA Civ 906 in which Gross LJ said at [6]:

> "[6] *The unless order was not complied with. An unless order means what it says. If a party does not comply with it, the sanctions automatically follow. Even if the consequences in the individual litigation are not immense, the consequences for the system are. It is also important to appreciate that by 2014 seven years had passed since from the date of the incident. Miss C had also benefited from a number of stays and a certain degree of indulgence in the procedural timetable, flowing from having been a litigant in person at various points in time. There is, however, nothing which allows a litigant in person to simply depart from the rules completely*."

29. Chronologically, the next case cited by Mr Quirk was *Oak Cash & Carry Ltd v British Gas Trading Ltd* [2016] EWCA Civ 153. In that case an "unless" order was made requiring the defendant to file a listing questionnaire by 19 February 2014 failing which its Defence would be struck out without further order. The order was not complied with and took effect. Thereafter on 24 March 2014 an application was made to the court for relief from the sanction contained in the "unless" order. Relief was granted in the County Court but on appeal to the High Court it was refused. The defendant therefore

appealed to the Court of Appeal. It was undoubtedly a Rule 3.9 case. The Court therefore applied the *Denton* guidance. I was referred to Jackson LJ's judgment at [38] to [41] in which he said:

> "[38] *An "unless" order, however, does not stand on its own. The court usually only makes an "unless" order against a party which is already in breach. The "unless" order gives that party additional time for compliance with the original obligation and specifies an automatic sanction in default of compliance. It is not possible to look at an "unless" order in isolation. A party who fails to comply with an "unless" order is normally in breach of an original order or rule as well as the "unless" order.*
>
> [39] *In order to assess the seriousness and significance of a breach of an unless" order, it is necessary also to look at the underlying breach. The court must look at what X failed to do in the first place, when assessing X's failure to take advantage of the second chance which he was given.*
>
> [41] *In my view the phrase "the very breach" in para 27 of the Denton case, when applied imposed by the original order or rule and (b) extended by the "unless" order.*"

30. Then, Mr Quirk relies on *Sinclair v Dorsey & Whitney (Europe) Ltd* [2015] EWHC 3888 (Comm). As it happened, that case concerned an "unless" order relating to the non-provision of security for costs. The clamant had failed to comply with the "unless" order and it took effect on 25 September 2015. The subsequent application was made pursuant to Rule 3.9 and issued on 7 October 2015. Given it was a Rule 3.9 application it was undoubtedly one which fell to be assessed in accordance with the principles set out in *Denton v TH White Ltd* [2014] EWCA Civ 906 which explained the earlier *Mitchell* case to which I have referred. Mr Quirk relies on [24], [25] and [26] in which Popplewell J said this:

> "[24] *What Richards LJ said at paragraph 38 of Michael Wilson & Partners is also in point:*
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> > *"In the ordinary course there is a clear distinction between the initial imposition of a sanction and the exercise to be conducted under rule 3.9 in considering whether to grant relief from sanction. I made that point, in relation to the sanction of strike-out, in my judgment in Walsham Chalet Park (t/a The Dream Lodge Group) v Tallington Lakes Ltd [2014] EWCA Civ 1607; [2014] 1 Costs LO 157, at paragraph 44:*
> >
> > > *"It must be stressed, however, that the ultimate question for the court in deciding whether to impose the sanction of strike-out is materially different from that in deciding whether to grant relief from a sanction that has already been imposed. In a strike-out application under rule 3.4 the proportionality of the sanction itself is in issue, whereas an application under rule 3.9 for relief from sanction has to proceed on the basis that the sanction was properly imposed (see Mitchell, paras 44-45). The importance of that distinction is particularly obvious where the sanction being sought is as fundamental as a strike-out…""*

> [25] *Likewise, it seems to me that when a court is considering an application for relief from sanction where there has been a failure to comply with an unless order which has specified that a strike out is the sanction for failure to comply, the court must proceed on the basis that the sanction of strike out contained in the unless order was properly imposed as a proportionate sanction for failure to comply. It will, therefore, be a comparatively rare case in which the applicant can persuade the court, absent a material change of circumstances, that it would now be appropriate to grant relief from the sanction as being disproportionate.*
>
> [26] *I turn, therefore, to apply the three stage approach. The first stage is to enquire whether the breach is serious or significant. I have no doubt that in this case the breach ought properly to be categorised as very serious. The starting point is that breach of an unless order will almost always be treated as serious. It is a failure to comply with a court order in the knowledge that the court has already attached sufficient importance to the need to comply with it so as to impose the sanction of strike out as the proportionate consequence of non-compliance. Secondly, the requirement in this case that the claimants provide security for costs is an important one. The first claimant is resident in the United Arab Emirates, the second claimant is a Delaware corporation. Neither has at any stage, including on the present application, given a full and frank account in a witness statement of their assets. There are very real and justifiable concerns about their ability or willingness to meet a costs order in favour of the defendants if and when one is made."*

31. Reliance was also placed on [42] and [43] in which Popplewell J said:

> "[42] *So far as the other particular aspect which rule 3.9 requires to be given particular importance, that is to say the imperative in subparagraph (b) of enforcing compliance with rules, practice directions and orders, that is a consideration of particular weight in this case against the grant of relief from sanctions. There has been an unless order. There has been no proper excuse for failure to comply. It was accepted at the hearing on 11 September 2015 that this would be a last chance and there is a very powerful public interest in ensuring that parties recognise the importance of complying with unless orders.*
>
> [43] *In addition, all the factors I mentioned under the first heading which make this a very serious breach come into play again at the third stage. Of particular importance to my mind at the third stage, is the fact that Flaux J has already determined that the striking out of the claims is an appropriate and proportionate sanction for failure to comply with the provision of security for costs. He made that determination when considering whether to make, and in making, the unless order and in granting an additional period of 14 days. There is nothing to put this case in that rare category of cases where that value judgment should be revisited. There has been no material change in circumstances which has led to a failure to comply from what could reasonably have been contemplated and as being within Flaux J's expectation at the time that the order was made."*

32. Lastly, Mr Quirk cited *Eaglesham v Ministry of Defence* [2016] EWHC 3011. Paragraph [1] of the Judgment of Andrews J records that it was an application for an extension of time for compliance with an "unless" order and for relief from sanctions. In that case the "unless" order required the defendant to provide disclosure by 21 October 2016 failing which the Defence would be struck out and judgment would be entered for the claimant. The application notice was issued on 20 October 2016, the day before the deadline for compliance. In that sense, it is comparable to this case because it was an in-time application for an extension of time made before the "unless" order took effect. The application was heard on 23 November 2016 which was obviously after the default date in the "unless" order. At paragraph [4] Andrews J noted that even by the date of the hearing, the terms of the "unless" order had still not been complied with. Reliance was placed by Mr Quirk on, amongst other passages, [4], [5] and [39].

> "[4] *The Defendant has still not fully complied, although four more weeks have passed; and it is seeking up to a further two months' indulgence. A party who faces genuine difficulties in compliance with a court Order, particularly an Unless Order, should come back to the Court and explain the problems that it is facing as soon as they arise, if those problems are sufficiently serious to give rise to a real risk of non-compliance.*
>
> [5] *The effect of issuing an application notice at the latest possible moment was that although it was impossible to list a hearing before the deadline for compliance expired, technically this is not an application for relief against sanctions because the sanction has yet to bite, see Hallam Estates Ltd v Baker [2014] EWCA Civ 661 . However, Mr Heppinstall realistically conceded that the Court of Appeal's reasoning and approach in Denton v TH White Ltd [2014] 1 WLR 3926 should be applied, as they were by Laing J on the previous occasion. The observations of Jackson LJ in Oak Cash & Carry Ltd v British Gas Trading Ltd [2016] EWCA Civ 153 at [38]-[41] are also relevant, given that this is a case of non-compliance with an Unless Order."*
>
> "[39] *The burden is on the Defendant to persuade the Court that this is an appropriate case in which to grant the extension of time for compliance. In dealing with this application I must, of course, bear in mind the overriding objective. In the present context the factors listed in* CPR 1.2(d)(e) and (f) *are of particular importance. The Court must endeavour to ensure that cases are dealt with expeditiously and fairly; it must allot to a case an appropriate share of the court's resources, whilst taking into account the need to allot resources to other cases; and it must seek to enforce compliance with rules, practice directions and orders. An "Unless Order" is an order of last resort and the nature of the Court's indulgence to the Defendant in the present case was underlined by Laing J's warning that if the Defendant did not comply it was very unlikely to be given any further leeway to do so."*

33. As Ms Piercy submitted, it is clear from [5] that the application proceeded on the basis of a concession that, although technically it was not a relief from sanctions case, the principles in *Denton* should apply. She submits that, having regard to the appellate authority to which she referred and which I have cited above, this concession was wrongly made. Mr Quirk accepted that the case proceeded on a concession but

submitted that I should attach importance to the fact that Andrews J described the concession as one *"realistically"* made.

34. In summary, Mr Quirk's submission was that BN was wrong to assert that the present application was to be assessed on "normal" rules for extension of time, by which he meant Rule 3.1(2) and Rule 1(2). He urged me to conclude that an "unless" order was an order of last resort and that I should apply the relief from sanctions test i.e. follow the approach endorsed in *Eaglesham*.

35. Other authorities were relied on but they are not sufficiently material to warrant specific mention.

The Test – Decision

36. Having considered the authorities cited above, in my judgment the position is as follows:

(a) An application for an extension of time allowed to take a particular step in litigation is not an application for relief from sanctions provided that the applicant files his application notice before the expiry of the permitted period: *Robert v Momentum* and *Hallam Estates*.

(b) This is the case even if the court actually deals with the application after the expiry of the relevant period: *Hallam Estates*.

(c) Although there may be little practical difference between an application made just before the expiry of the permitted period and one made just after it had expired, the law has sound practical and policy reasons for distinguishing between the two: *Kaneria* and *Hallam Estates.*

(d) An in-time application for an extension of time is neither an application for relief from sanctions nor is it closely analogous to one: *Kaneria* and *Hallam Estates.*

(e) An "unless" order is an order of last resort. There is a powerful public interest in ensuring that parties recognise the importance of complying with "unless" orders: *Sinclair v Dorsey*.

(f) However, the power to extend time for compliance with a court order pursuant to Rule 3.1(2)(a) does not distinguish between routine court orders on the one hand and "unless" orders on the other.

(g) Accordingly, when determining an in-time application for an extension of time for compliance with both routine court orders and "unless" orders, the Court applies the overriding objective.

37. Where an extension of time is sought in respect of an "unless" order, it is not an application which should be treated either as, or akin to, an application for a relief from sanctions case pursuant to Rule 3.9 even if, as is likely, the date for the sanction to be engaged will have passed by the date upon which the application for further time is heard. An in-time application to extend time for compliance with an "unless" order

which was in fact heard before the expiry of the time limit could not properly be regarded as one for relief from sanctions. It therefore makes no sense to treat the same application differently because the hearing of it takes place after the sanction would otherwise have bitten. It therefore follows that I accept Ms Piercy's submission that *Eaglesham* proceeded on the basis of an erroneous concession in law. I also accept her submission that both *Oak Cash & Carry Ltd* and *Sinclair v Dorsey* are both cases which can be distinguished from the present one because they are considering "unless" orders in the context of the application of Rule 3.9, in circumstances where the sanction had taken effect before relief was sought.

38. The principles I have outlined above are not intended to reduce the undoubted importance which must be attached to the need for compliance with "unless" orders. In that sense, paragraph [38] of *Oak Cash & Carry Ltd* is directly relevant. The Court is entitled to take into account the need to enforce compliance with prior orders as part of the overriding objective: see Part 1.1(2)(f). It can also take into account the need to conduct litigation efficiently and at proportionate cost because that is also a factor within Part 1.1(2) both generally and specifically within (c), (d) and (e). In the case of a failure to have complied with an "unless" order, the Court can and ordinarily would give those particular factors considerable weight. Those are the two factors which also have particular mention in Rule 3.9.

39. If an application is in time, that determines Rule 3.1(2) applies, however brief may be the period between the application for more time and the expiry of the time limit (see *Kaneria*). However, once the correct rule has been identified, the lateness of the application may well be a relevant matter. An in-time application made shortly after the "unless" order was first imposed is likely to be treated differently from one made just before the time allowed for compliance was about to expire. However, that factor may carry less significance in a case where the period for compliance was already short.

40. To conclude, when applying the principles of the overriding objective in determining an in-time application made pursuant to Rule 3.1(2)(a), the Court is entitled to, and should ordinarily be expected to, take into account that the additional time being sought relates to an "unless" order, in respect of which there is always a powerful public interest in ensuring compliance. The Court should consider both this, and the need to conduct litigation efficiently and at proportionate cost, not because those matters are identified within Rule 3.9 but because they fall within the overriding objective.

The Facts

41. I now turn to what was done by BN to comply with the Orders. The initial steps it took were only briefly explained in the fourth witness statement of Ms Boland Shanahan. In that statement she explained that she was instructed that BN would be able to provide security by 12 July 2019 which was the date sought in the application. Mr Gordon later explained in his witness statement dated 11 July 2019 what steps had been taken in an attempt to comply with the Orders since they were made and, in doing so, shed more light on the brief description which had previously been given. In particular, Mr Nemeth, the sole director and shareholder of BN, tried to raise loans, both personal and corporate, and to borrow money charged against property he owns in the UK. These attempts failed. In a second plan, he then tried to obtain a loan from someone in Hungary backed by a property owned by Mr Nemeth's mother. This was the plan which

was extant at the time of the first application for more time and on the basis of which an extended date of 12 July 2019 was sought.

42. However, this second plan also failed because it became apparent that it would have breached financial regulations. By the date of Mr Gordon's witness statement, the third method by which it was intended to raise the money was the sale of a property in Hungary belonging to Mr Nemeth's mother. In the meantime, Mr Gordon had agreed to loan BN the funds released to him on 3 July 2019 from the sale of his own house on the basis that, when the Hungarian property was sold, he would be reimbursed for the loan. His witness statement explained that time was needed to draw up legal documentation in Hungary to enable this; this would be followed by the signature of the owner in Budapest; signatures in the Hungarian consulate in Edinburgh and then the release of funds. He intended to obtain a banker's draft to be deposited in the Court Funds Office in Sunderland. The forecast was that this would occur on Thursday 18 July.

43. I am satisfied on the evidence that bona fide attempts were made by BN to comply with the order for security made by Cockerill J and, thereafter, by O'Farrell J. Criticisms were made by Everwarm both in the letter to the Court of 4 July 2019 and in Ms Morgan's sixth witness statement. There is force in the submission that Ms Boland-Shanahan's witness statement lacked sufficient explanation of what was being done. I agree BN should have provided much more detail than it did. Ms Morgan's witness statement expressed real scepticism as to whether Mr Gordon's agreement to lend money would actually be successful, there being too many conditions and "ifs" attached to it. But I cannot shut my eyes to the fact that, in the end, it actually happened. This supports the conclusion that, throughout the period, BN was not stalling or seeking to avoid the need to comply. It was trying to do so. I do not criticise it for trying to raise money by other means first without the need to borrow money from Mr Gordon personally. Indeed, that option only became available in the period after 3 July 2019 when Mr Gordon had received the proceeds of sale from his house.

Application of the Test

44. Having regard to the need to deal with this case justly and at proportionate cost in the ways mentioned in Part 1.1(2), I am satisfied that it is appropriate to grant the extension of time sought. Indeed, it is fair to say that Mr Quirk only faintly pressed the contrary submission if I was against him on the legal test to be applied.

45. In my judgment, the following factors are material:

Unless Order

(1) As set out above, an "unless" order is of a special character. It is an order of last resort which usually reflects the fact that a party has already been in breach of a prior order. But the Unless Order in this case has three particular characteristics. First, BN was not in breach of the prior Order made by Cockerill J. It made an in-time application for further time before time for compliance had expired. Second, the period set by O'Farrell J within the Unless Order was short. This was necessarily dictated by the need to have security in place before the trial began, itself a product of the relatively late application for security. If the application for security for costs had been made earlier and the parties had been further away from trial, I can

conceive of circumstances in which a party such as BN would have been given a more generous period of time within which to comply with the Unless Order: see *Radu v Houston* [2006] EWCA Civ 1575 at [18]. In this regard, I note that because of the impending trial the periods of time given to BN to obtain security were less than allowed in two of the cases cited to me. In *Sinclair*, six weeks was given in the first place and a further month was then allowed. In *Radu v Houston* [2006] EWCA Civ 1575, the initial period given was also about six weeks. In the present case, the initial period given to BN was three weeks and, subsequently, two further weeks will have been sought. Third, there was no history of prior disobedience by BN with other court orders. I accept the application was made at the last minute but in this case the whole period for compliance with the Unless Order was only one week anyway so this factor is less important than might otherwise apply in other cases.

Compliance

(2) Most obviously, BN has ultimately provided security, albeit late. This means that Everwarm is now fully protected to the extent required by the Court. It has exactly what it was entitled to. It is true that it has received the security later than ordered, but that is a question of prejudice, which I consider below. Ms Piercy was right to rely on *Radu v Houston* [2006] EWCA Civ 1575 at both [18] and [20]. In that case, Walker LJ said at [18]:

> *"The making of an order for security is not intended to be a weapon by which a defendant can obtain a speedy summary judgement without a trial".*

I agree that, in circumstances where security has now been provided, which is the very thing which the Court ordered, Everwarm's pursuit of its objection to further time should be regarded as the deployment of a weapon. Rather than keep the security which the court had ordered, Everwarm would now prefer to have the benefit of the sanction. In the absence of prejudice, that is unacceptable. At [20], Walker LJ said:

> *"In my experience, if a court has ultimately made an unless order, and even if judgment has been entered pursuant to it, the security not having been paid, if a claimant within a short period of time has come to court with the right sum, the court is and indeed should be willing to consider granting relief and setting the judgment so obtained aside."*

The present case is a fortiori, as the application for more time was made before judgment would have been entered.

Prejudice

(3) Realistically, Mr Quirk did not suggest that there had been any prejudice caused to Everwarm as a result of the delay in compliance with the Unless Order. Necessarily Everwarm had to continue with its preparations for trial, including the Counterclaim, because it could not be confident that security would not be provided within the time limit. Before the time limit expired, an application for an extension of time was made. Once again, there was no suggestion that, in the intervening week before this application was heard, Everwarm's subsequent preparations for trial

were impaired in any way by the uncertainty over whether the extension would retrospectively be granted.

Overriding objective

(4) I now turn to the specific factors that are worthy of mention. As to (a), if more time is granted, the parties will be on an equal footing. Everwarm has the protection of security which Cockerill J ordered. By contrast, if I refuse more time, BN will never have its Counterclaim determined in circumstances where the degree of overlap between the issues raised in defence of the Claim and Counterclaim is potentially significant. As to (c), the Counterclaim is worth nearly £2m in circumstances where, as subcontractor, BN is the weaker financial party. As to (d), the case can be dealt with fairly and expeditiously if more time is allowed. It would be fair to allow the Counterclaim to be heard. There is no delay to the trial and none was sought. No prejudice is alleged to have flowed from the additional time required. As to (f), it is important to have regard to the fact that it was an Unless Order, but it was one with the characteristics mentioned above. BN did not ignore the Order. It tried to comply with it but under-estimated the length of time it needed in order to comply.

46. Balancing these factors, I am wholly satisfied that the extension of time should be granted. Accordingly, as set out above, the consequence is that in retrospect the Counterclaim is treated as never having been struck out at all.

Rule 3.9

47. For the reasons I have given, I do not consider this to be a Rule 3.9 case nor akin to it. However, for completeness, I will very briefly state the conclusions which I would have reached had I been satisfied that the Rule effectively applies.

48. In my view, a breach of an "unless" order will almost always be regarded as serious and significant. I also agree that the starting point must be that the sanction was properly imposed for breach of it. The fact that BN did not wilfully neglect or disobey the order is not material. Thus, I proceed on the basis that the first stage of the *Denton* test is made out.

49. Has a good or bad reason for non-compliance been given? I have accepted the explanation given. In my judgment, from the outset, and subsequently, BN under-estimated the time that would properly be needed to obtain security and therefore gave an inaccurate view about its ability to comply when originally asking for more time. It was not dilatory in seeking to comply. In that sense, the reason for non-compliance was that, despite acting with sufficient diligence, it was not possible to comply within the time that had been allowed.

50. I turn to consider the third stage: all the circumstances of the case. Much of the reasoning above applies. A key factor is the effect of the (assumed) breach. As set out above, there has been no effect. Everwarm has not been prejudiced in its preparations for trial. The litigation has not been delayed and no other court users are affected. A second key factor is the importance of compliance with orders. BN's conduct is very different from the type of behaviour considered in the cases cited to me in this context. In addition, the Unless Order in this case had the particular characteristics mentioned above. Other relevant factors are that an in-time application for more time was made and that BN has now complied, albeit late. As a result, Everwarm is now using the

"unless" order as a weapon: *Radu*. In *Sinclair*, Popplewell J said it would be a comparatively rare case in which the applicant can persuade the court, absent a material change of circumstances, that it would now be appropriate to grant relief from sanctions. I accept Everwarm's submission that there was no material change of circumstances but I do consider this to be one of those rare cases in which it would be appropriate to grant relief.

51. Accordingly, I would also have granted relief from sanctions had that been the relevant test.

Conclusion

52. For the reasons given above, I extend time for compliance with the Unless Order of O'Farrell J until 4pm on 18 July 2019.

53. Since my decision was given orally on 19 July 2019, the parties have agreed a form of order which reflects this outcome.