Neutral Citation No: [2021] NIQB 10 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **McF11403** *ICOS No:* **14/007212/02/A01** *Delivered:* **28/01/2021**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

LUKE FOSTER

Plaintiff/Respondent

-v-

POLICE OMBUDSMAN FOR NORTHERN IRELAND

First Defendant

-and-

BELFAST HARBOUR COMMISSIONERS

Second Defendant/Appellant

_____

David Dunlop QC (instructed by Carson & McDowell Solicitors) for the Second Defendant/Appellant
Matthew Corkey BL (instructed by James L Russell & Son Solicitors) for the Plaintiff/Respondent

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McFARLAND J

Introduction

[1] This is an appeal by the second named defendant against an order of Master McCorry of 3rd October 2018 whereby he set aside a default judgment of the 9th April 2017. The appeal was lodged on the 8th October 2018. The first named defendant has not appealed the order and has not taken part in the appeal.

Background

[2] The plaintiff was a constable with Belfast Harbour Police employed by the second named defendant ("BHC") between 2007 and 2011. He was dismissed by BHC. In 2010 he made a complaint to the first named defendant. On 22nd January 2012 the plaintiff issued a writ claiming damages for misfeasance in public office and breach of statutory duty.

[3] The case was reviewed by Master Bell on 11th February 2016 and he directed that the plaintiff serve his forensic accountancy report by 7th April 2016. The plaintiff failed to comply with this order and at a further review on the 9th June 2016, Master Bell made an 'unless order' which stated that "*the plaintiff's action shall be struck out, with judgment to the defendants against the plaintiff, with costs to be taxed in default of agreement unless, within 4 weeks of the date hereof, the plaintiff serves financial loss information in compliance with the order of the court dated 11th February 2016.*" The plaintiff was represented at this hearing. The period for service of the outstanding evidence therefore expired on the 7th July 2016. The order also provided that any extension of time for service had to be sought before the expiry of the date.

[4] BHC's solicitors not having received the financial loss information, certified to that fact on the 4th April 2017, and a Proper Officer entered judgment in favour of BHC with costs on the 5th April 2017.

[5] The plaintiff changed solicitors in or about May 2017 but the new firm did not formally come on record until 4th December 2017.

[6] The plaintiff applied to set aside the judgment, to reinstate his claim against BHC and for an extension of the time to serve the financial loss information on 27th March 2018, and this was dealt with by Master McCorry on the 3rd October 2018. The order of Master McCorry was to extend the time for service of the financial loss information to the 3rd October 2018 and to set aside the default judgment. Costs of both defendants were ordered to be paid by the Plaintiff.

The Law

Appeals from the Master

[7] The application to reinstate an action involves a Master exercising a discretion. Recently in *Gibney v MP Coleman Limited* [2020] NIQB 68, I set out how an appeal against the exercise of a discretion by a Master (in that case to order a split hearing) should be dealt with –

> *"[4] The Master has a wide discretion when considering this Rule. Any statutory discretion should be exercised in a manner which furthers the objects of the provision (see Padfield v Minister of Agriculture [1968] AC 997). The objects of the*

Rules of the Court of Judicature are clearly set out in Order 1 Rule 1A –

> *"1A. - (1) The overriding objective of these Rules is to enable the Court to deal with cases justly.*
>
> *(2) Dealing with a case justly includes, so far as is practicable -*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) saving expense;*
>
> *(b) dealing with the case in ways which are proportionate to -*
>
> *(i) the amount of money involved;*
>
> *(ii) the importance of the case;*
>
> *(iii) the complexity of the issues; and*
>
> *(iv) the financial position of each party;*
>
> *(d) ensuring that it is dealt with expeditiously and fairly; and*
>
> *(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.*
>
> *(3) The Court must seek to give effect to the overriding objective when it -*
>
> *(a) exercises any power given to it by the Rules; or*
>
> *(b) interprets any rule."*

Megaw J in Craig v Hamill [1936] NI 78 at 93 succinctly summarised the objects of the then Rules of the Supreme Court as follows - "[to] provide the best way by which justice may be administered between parties, with the highest degree of accuracy, with expedition, and as economically as possible".

[5] An appellate court, although conducting a formal re-hearing, will be slow to interfere with a decision exercising

such a discretion, provided that all material facts and factors appear to have been considered and immaterial facts have not."

Unless Orders

[8] The law in this jurisdiction relating to 'unless orders' follows the English case of *Hytec Limited v Coventry City Council* [1997] 1 WLR 1666 (see the comments of Gillen J in *Walsh v McClinton* [2009] NIQB 32 at [20], Morgan LCJ in *Ritchie v McKee* [2016] NICA 8 at [13], and Maguire J in *McNeely v Pierse Contracting* [2018] NIQB 37 at [13]). In *Hytec* Ward LJ at 1654h stated 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 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."*

Service

[9] The law in relation to the service of documents was set out recently by the Supreme Court in *UKI (Kingsway) Limited v Westminster City Council* [2018] UKSC 65. Lord Carnwath at [15] – [24] discusses the various issues. Critically, he quotes with approval, the words of Gibson LJ in *Tadema Holdings Ltd v Ferguson* (1999) 32 HLR 866 - "'*Serve' is an ordinary English word connoting the delivery of a document to a particular person.*" Ultimately, the question is whether the document has been delivered, i.e. received by the intended recipient. How the document completed that journey is of less importance to the courts, unless court rules or legislation mandate a certain type of service.

[10] Order 65 of the Rules of the Court of Judicature provides for a variety of methods of service of documents (unless the document is required to be served personally). I consider that 'documents' is not restricted to pleadings and other documents to be served under the Rules of the Court of Judicature, but includes any document required to be served, as in this case, by court order. (Although not specifically provided for in the Rules of the Court of Judicature, the English CPR at 32.4.10 provides that a witness statement is to be regarded as a document.) The alternative methods include by post – Rule 5 (1)(b). No class of postage is specified. Section 7 of the Interpretation Act 1978 provides –

> *"Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."*

Royal Mail asserts that first class post will be delivered the next working day and second class post will be delivered within 2 to 3 working days. Working days include Saturdays.

Discussion

[10] The Respondent raised three issues concerning the unless order made by Master Bell and compliance with it. The first is that as the plaintiff was in default of one aspect of the provision of evidence for part of his claim, namely financial loss, and therefore the unless order should, in normal circumstances, have only provided for a sanction striking out that aspect of the claim. There may be some merit in that submission, but the time to deal with it is in submissions before the Master at the time the order is being made, or to appeal the unless order should the nature of the proposed sanctions be considered to be too draconian.

[11] The second is that BHC did not comply with the Practice Direction by not serving the plaintiff with a copy of the unless order, and by omitting a reference to this in the certificate of non-compliance, lodgement of which resulted in the issue of the order. This would only be of relevance had the compliance date been related to the date of service of the court order (e.g. four weeks after service) or had the plaintiff been unaware of the existence of the order, but the evidence clearly indicates that his legal representative was present at the hearing when the order was made, and subsequent correspondence indicates that his solicitors were aware of the order and its terms. Those terms indicated a specific date for service, and not a date within a period from the date of service of the order. There was no requirement for service in the order, and there was no unfairness to the plaintiff as he was fully aware of the contents of the order.

[12] The third point is that the financial loss information, in the form of the accountancy report, had actually been served within the time specified. The plaintiff asserts that the report was properly served by the posting of it to BHC's solicitors on the 1st July 2016, it having been received by the plaintiff's solicitors on the 16th June 2016. The plaintiff relies on the provisions of Order 65 Rule 5.

[13] There was some discussion during the hearing concerning the provisions of Order 65. Although the plaintiff asserts that the financial information was served by post, he did not place before the Master, or this court, actual evidence of this. The two affidavits of the solicitor, then having carriage of the case, do not specifically say anything other than "I served the … report … under cover letter of 1st July 2016". In his second affidavit after repeating that averment, he then sets out the office practice concerning post. There may be an inference to be drawn from this, but when dealing with matters such as this, it is imperative that proper and precise evidence is placed before the court.

[14] Whether a party is relying on the provisions of Order 65 to prove service in whatever form is permitted, or generally trying to prove service, the court should be given chapter and verse as to how service was effected. Order 54 Rule 8 sets out what is required in an affidavit of service. If, as in this case, it is asserted that service was by post and the plaintiff is relying on the deeming provisions of the Interpretation Act 1978, the affidavit proving service should be sworn by the person actually effecting service, and the averments should include the fact that the document requiring service was in a properly addressed envelope bearing the intended recipient's correct address, the fact that the envelope was properly stamped and whether that was first or second class, recorded delivery etc, and finally when, where and how they effected service, either in a post box or over a Post Office counter. None of this was provided in this case. It is unsatisfactory that a court is left with the task of trying to infer a fact from very modest evidence.

[15] The burden is on the plaintiff to show that the report was served on BHC. No such evidence has been received, and I accept the evidence provided by BHC's solicitors that no financial loss information was ever received from the plaintiff's

solicitors before they applied for judgment. It is not for them, as the plaintiff suggested, to prove non-receipt. The burden is always on the plaintiff to prove that he has served the document. Once he has done so, and he is relying on a deeming provision, then the burden shifts to the defendant to prove non-service.

[16] It is inexplicable why the plaintiff's solicitors knowing that there was an unless order and the critical date was fast approaching, having received the outstanding financial report in electronic form did not forward it on under cover of email, a virtually certain method of being able to prove transmission, and having done so, to follow that up with emails, letters or telephone calls to confirm receipt. When an unless order is made, as it is an order of last resort with significant sanctions attached, there is a very high duty on the solicitor who comes into possession of the outstanding documentation within the time period to ensure that it is properly served, and that they can prove service. Service should be a matter of fact rather than conjecture. If a solicitor wishes to entrust service to a third party, be that the Royal Mail or a courier service, unless they can rely on a specific provision in the Rules of the Court of Judicature, they must ensure that they have a receipt to prove service.

[17] I therefore reject the plaintiff's assertion that the evidence required to be served by the unless order was actually served. The plaintiff was therefore in default of the order. As the Master made an order to extend time for service, this, by implication, was also a finding of the Master, as an extension of time would not be necessary if service had been effected.

[18] I now turn to the decision of Master McCorry whereby he exercised his discretion to re-instate the action. Unfortunately, there does not appear to be written reasons, and if an oral ruling was delivered, a note of that ruling has not been placed before this court.

[19] I set out below what I consider to be the relevant factors in this case. My use of the word plaintiff and defendant, includes their legal representatives. (Whether the fault lies with the plaintiff or his solicitor is not of much relevance as the consequences of the default is the same to the other parties and to the court. A party must take responsibility for the conduct of his solicitors (see *Allen v McAlpine* [1968] 2 QB 229 at 254 and 256)).

(a) There has been a history of delay on the part of the plaintiff in this case. The cause of action arose at least 9 years ago, the writ was issued 8 years ago, and the statement of claim 6 years ago in 2015.

(b) This was the second 'unless order' issued against the plaintiff, the other being on 16th January 2015 requiring the service of the statement of claim.

(c) The financial loss information had not been served for a significant period before the defendant took steps to mark judgment. Nine months had passed

without the plaintiff ever engaging with the defendant concerning the financial information that the plaintiff considered had been served;

(d) Despite being aware of judgment being marked against him, the plaintiff did not apply to the court to set aside the judgment for a period of a year;

(e) The financial loss information directed by the Master was actually in existence within the time stipulated with the Master;

(f) I am inferring from the evidence, albeit limited in scope, that the plaintiff's solicitors had an honest belief that the financial loss information had been properly served;

(g) Although the plaintiff must take responsibility for his decisions about his legal representation, the period in question covered a time when it is apparent that a process of changing solicitors was ongoing, meaning that there was little direction being given to the case on behalf of the plaintiff.

[20] All these points had been made by way of written submissions by the parties and I am confident that Master McCorry took them all into account when exercising his discretion.

[21] I consider that the decision to reinstate the action was within the overall discretion properly exercised by Master McCorry. The issues referred to in [19] do require a weighing up of competing matters. An 'unless order' is an order of last resort, and should be enforced strictly to ensure that litigants, and their representatives understand that the terms of such orders must be complied with. If courts do not enforce unless orders then a practice will soon develop of them being ignored. It will only be in exceptional circumstances that a court will not enforce. I consider that it was within the discretion of the Master to find that there were such circumstances in this case as the financial information was in existence within the specified time and there may very well have been a genuine effort to serve it, followed by a misguided assumption, that the order had been complied with.

[22] Master McCorry made the correct order in respect of costs by directing that the plaintiff pay the defendants' costs.

Conclusion

[23] In all the circumstances I dismiss the appeal. I will hear counsel on the question of the costs of this appeal.