Editor's Note

How Seriously Should Unless Orders be Taken?

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An *unless* or *peremptory* order is a court order that directs a party to perform some process requirement by a certain date and specifies the consequences of default (CPR 3.1(3)). The consequences may vary according to the circumstances. Thus an unless order may direct that unless a party files an expert report by a certain time, the party will not be allowed to rely on expert evidence. Or, it may direct that unless the party gives disclosure by a certain time, the party's statement of case would be struck out. Unless orders are normally used where a party has been dragging his feet and has failed to comply with process requirements and where the court has determined that no further default would be tolerated.[1] An unless order stipulating a striking out consequence would be made only where the party in default had already failed to comply with rules or bare orders and only where the court was satisfied that the time already allowed had been sufficient and the failure of the party to comply with an earlier order was inexcusable.[2]

Since unless orders are normally made only after repeated defaults one would have expected that any further failure to comply would be visited with the stipulated consequence, except where unforeseen circumstances prevented compliance. This is not, however, the case. Except where prejudice could be shown to have been suffered by an opponent or where the delay has undermined the possibility of fair trial, the court has generally been willing to forgive non-compliance with time limits and to allow further opportunities

[1] An unless order, Auld L.J. stated, "is by its nature intended to mark the end of the line for a party who has failed to comply with it and any previous orders of the court": *Hytec Information Systems Ltd v Coventry City Council* [1997] 1 W.L.R. 1666 at 1676, CA.

[2] *Star News Shops v Stafford Refrigeration Ltd* [1998] 4 All E.R. 408 at 415; [1998] 1 W.L.R. 536 at 545, CA.

for compliance, even in the face of persistent disregard of court orders.[3] For a long time now parties in default have been able to secure further opportunities to comply, with the result that unless orders are not necessarily taken to not mean what they say.

Before the CPR the lax approach to enforcing unless orders was informed by the profound belief that no matter how serious and persistent a default has been the court should try to decide the case on its real merits rather than on procedural grounds.[4] The possibility of escaping the stipulated sanction had two obvious consequences. First, the granting of an unless order was by no means the end of the road, not even for the persistent defaulter, because further extensions of time could still be forthcoming. It was therefore not uncommon for unless orders to be followed by further litigation about whether to enforce the order or whether to give the defaulter further opportunities to comply. Thus, the need to obtain relief from the stipulated consequence would lead to further applications so that the making of a peremptory order could well give rise to further time consuming and costly satellite litigation.[5] More serious still, the availability of indulgence for default eroded the binding force of unless orders and therefore increased the likelihood of defaults and of further satellite litigation.

This state of affairs may have been tolerable at a time when the court had no case management obligations or indeed adequate facilities for managing. But lax enforcement of final case management orders would hardly be satisfactory in a system in which the ''court must further the overriding objective by actively managing cases'' (CPR 1.4(1)), in order to ensure that the dispute ''is dealt with expeditiously'' (CPR 1.2(2)(d)). Unfortunately, old habits are hard to discard. For while there have been indications that the consequences of default would be allowed to take their course (bar a good explanation for the default),[6] there have also been decisions that reflect the former willingness to

[3] If as a result of a delay it was no longer possible to hold a fair trial (because the evidence had perished, for example), the proceedings would have to be brought to an end regardless of whether it was the party or his lawyers at fault: *Rowe v Tregaskes* [1968] 3 All E.R. 477; [1968] 1 W.L.R. 1475. The same was true in situations where the non-defaulting party suffered some prejudice: *Martin v Turner* [1970] 1 All E.R. 256; [1970] 1 W.L.R. 82, CA; *Pereira v Beanlands* [1996] 3 All E.R. 528. *Cf. Co-operative Retail Services Ltd v Guardian Assurance*, unreported, July 28, 1999, CA. See also *Jokai Tea Holdings, Re* [1993] 1 All E.R. 630 at 636, 637; *Grand Metropolitan Nominee Co (No.2) v Evans* [1993] 1 All E.R. 642; [1992] 1 W.L.R. 1191.

[4] This approach was encapculated in Lord Diplock's famous dictum in *Birkett v James* [1978] A.C. 297; [1977] 2 All E.R. 801 at 318 and 805 discussed below.

[5] For instance, in *Caribbean General Insurance Ltd v Frizzell Insurance Brokers* [1994] 2 Lloyd's Rep. 32, a master made an unless order against the claimant in respect of discovery. Thereafter two judges granted ''final extensions''. The defendants entered judgment in default of compliance. The claimants successfully applied to set aside the default judgment. Only on appeal to the Court of Appeal was the default judgment reinstated.

[6] See, for example: *Di Placito v Slater* [2003] EWCA Civ 1863; [2004] 1 W.L.R. 1605; *RC Residuals Ltd (formerly Regent Chemicals Ltd) v Linton Fuel Oils Ltd* [2002] EWCA Civ 911; [2002] 1 W.L.R. 2782.

allow further opportunities to comply with unless orders rather than bring the matter to an end following an inexcusable default.[7]

In some ways matters are now more complicated than before due to CPR 3.9. CPR 3.8(1) states that:

> "[A]ny sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction."

Applications for relief from sanctions fall under CPR 3.9, which requires the court considering such an application to take into account the nine factors set out in the rule and any other relevant factor. These factors have already accumulated considerable case law so that disposing of an application for relief may call for extensive analysis and a lengthy hearing, which may then be followed by a time consuming appeal.[8]

It is against this background that the important decision in *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463; [2007] 3 All E.R. 365 must be read. Marcan commenced proceedings against the defendants for the wrongful termination of an agency agreement. Shortly before the trial an order for disclosure was made but Marcan did not comply. This was followed by a peremptory order that unless the claimant gave disclosure and provided security for costs by a certain date:

> "[T]he claimants' claim shall be dismissed and it is ordered and adjudged that the claimants pay the defendants' costs on an indemnity basis."

Marcan again failed to comply. The judge found that there had been no explanation for the default and dismissed the claim. Marcan objected on the grounds that the striking out of the claim was disproportionate and that in any event the court must not strike out a statement of case for non-compliance except where the breach was so serious as to make it impossible to hold a fair trial. It is on this point that Moore-Bick L.J.'s judgment commands close attention.

However, before addressing this aspect of the decision it is necessary to draw attention to the court's view on the interaction of CPR 3.8 and CPR 3.5. As already noted, the former states that sanctions take effect automatically, unless relief from sanction has been obtained. The non-defaulting party does not, therefore, need to make any application in order to enforce the sanction. Where the sanction consists of striking out a statement of case, the non-defaulting party may wish to put an end to the dispute by obtaining final judgment and thereby securing protection from any further proceedings. CPR 3.5 caters for this need by providing that where the court makes an order which states that a party's statement of case shall be struck out upon default, and the affected party

[7] See, for example: *Tarling v Wabara* [2003] EWHC 450; *Carlco Ltd v Chief Constable of Dyfed Powys* [2002] EWCA Civ 1754.

[8] For instance, in *CIBC Mellon Trust Co v Stolzenberg (Sanctions: Non-compliance)* [2004] EWCA Civ 827 some 150 paragraphs were devoted to an analysis of the CPR 3.9 factors. See also *Hansom v E Rex Makin & Co* [2003] EWCA Civ 1801.

does not comply, the other party may obtain judgment with costs by filing a request for judgment or upon an application, depending on the nature of the claim.

Accordingly, once a striking out sanction has bitten and a defence has been struck out, the claimant may obtain judgment by request under CPR 3.5(2), provided the claim is for a specified amount of money or an amount to be decided by the court. Since a default judgment by request is granted without any judicial examination there is clearly no opportunity for the defaulting defendant to resist final judgment, let alone to seek relief under CPR 3.8. In some situations a default judgment under CPR 3.5 may be obtained only by application, as where it is sought by a defendant, as happened in the case under consideration. In such situations, Moore-Bick L.J. explained, it is important to keep in mind the difference between the operation of the sanction and the exercise of the court's discretion to grant relief. On an application for judgment under CPR 3.5 following non-compliance with an unless order, he held, the court should not entertain arguments that would be relevant to an application for relief from sanction under CPR 3.8. A judge hearing an application under CPR 3.5 must therefore confine himself to deciding whether there had been a breach of the unless order. If no application for relief has been made (which would necessitate following the CPR 23 application procedure), the court must not embark on an examination of whether relief may be granted under CPR 3.9.

This ruling was determinative of appeal because Marcan had not applied for relief from the sanction when the defendant's application for judgment under CPR 3.5 was heard. Nor was the Court of Appeal willing to entertain an application for relief at the appeal hearing because, Moore-Bick L.J. said:

> "[A]n application of that kind must be made on proper notice to the respondent who must be given an opportunity to file evidence in response. It cannot be made for the first time before this court" ([41]).

Important though this procedural ruling is, it does not directly address the underlying problem which consists in too lax a judicial approach to failure to comply with unless orders. Indeed, it is unlikely that in future defaulting parties could be tripped up by the procedural mistake that the claimant made in this case; namely, failing to apply for relief before the non-defaulting party could take advantage of the CPR 3.5 procedure. Now that it has been established that it is no good advancing mitigating factors at a hearing to determine an application under CPR 3.5, defaulting litigants would take good care to seek relief from sanction beforehand. Where a default judgment by request may be available following failure to comply with a peremptory order, the defaulting party would need to apply for relief in sufficient time before the non-defaulting claimant has been able to obtain judgment by request. Where an application is required for obtaining a CPR 3.5 judgment, the defaulting party would be able to respond to the notice of the application by an application of his own, seeking relief under CPR 3.8 and 3.9. Once this has happened, the court would in all probability direct that the application for relief should be heard together with the CPR 3.5 application.

Even if the non-defaulting party has obtained judgment under CPR 3.5 this is by no means the end of the road for the defaulting party, because a defaulting party is entitled to apply under CPR 3.6 to have the CPR 3.5 default judgment set aside. CPR 3.6(4) requires a court hearing such an application to have regard to the factors listed in CPR 3.9. This brings us back to the really important question of substance: what should the court's approach be in an application for relief from the consequence of failure to comply with an unless order?

As already noted, the claimant's principal argument against the striking out was that the default was not deliberate or contumacious, that it was still possible to conduct a fair trial, and that the defendants would not suffer any significant prejudice as a result. Although not explicitly mentioned, this argument harks back to the test in *Birkett v James*[9] where Lord Diplock said:

> "The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendant either as between themselves and the plaintiff or between each other or between them and a third party."

Yet it was this very approach that eroded the binding force of unless orders prior to the CPR and, furthermore, produced an extensive and complex case law. As a result, an application for relief from sanction could require much legal preparation and extensive hearings.[10] Unfortunately, even after the CPR came into force there were cases in which the court was willing to engage in lengthy and detailed examination of applications for relief from sanction even where the breach was plain and there were no good reasons for the default. This is because the court felt obliged to follow the CPR 3.9 procedure which requires consideration of all the relevant factors and especially those expressly listed in the rule.[11]

In *Marcan* the claimant was able to point to cases decided under the CPR in which relief was granted at the twelfth hour. In *Carlco Ltd v Chief Constable of Dyfed Powys*[12] the claimant had failed to comply with an unless order which directed that unless disclosure was given by a certain date the defaulting party's statement of case would be struck out. There was no application for relief

[9] *Birkett v James* [1978] A.C. 297; [1977] 2 All E.R. 801 at 318 and 805.

[10] See, for example, *Trill v Sacher* [1993] 1 All E.R. 961; [1993] 1 W.L.R. 1379. Referring to this phenomenon in *Woodhouse v Consignia Plc* [2002] EWCA Civ 275; [2002] 2 All E.R. 737 at [32], Brooke L.J. said: "One of the great demerits of the former procedural regimes was that simple rules got barnacled with case-law."

[11] For example, *CIBC Mellon Trust Co v Stolzenberg (Sanctions: Non-compliance)* [2004] EWCA Civ 827.

[12] *Carlco Ltd v Chief Constable of Dyfed Powys* [2002] EWCA Civ 1754.

or for extension of time, and the judge struck out the claim. The Court of Appeal held that the claim should not have been struck out because the failure to comply had not been sufficiently "gross". In *Marcan* Moore-Bick L.J. distinguished this decision on the grounds that when the matter was before the judge the parties proceeded on the assumption that it was for him to decide whether in all the circumstances the sanction should take effect and that the appeal was conducted on the same basis. The distinction is purely technical, relying as it is on the absence of a reference to CPR 3.8 by the judge and the Court of Appeal. Nonetheless, it is of considerable significance, because it is indicative of the Court of Appeal's resolve to depart from the old practice, whereby all that happened following a default was that the court would consider afresh the justification for allowing the sanction to stand.

Two comments made by Moore-Bick L.J. lend force to this impression. Having explained that on an application for default judgment under CPR 3.5 the court's function is limited to deciding what order should properly be made to reflect the sanction which has already taken effect, Moore-Bick L.J. stated ([34]):

> "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."

And he added a little further on ([36]):

> ". . . before making conditional orders, particularly orders for the striking out of statements of case or the dismissal of claims or counterclaims, the judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case. Of course, it is impossible to foresee the nature and effect of every possible breach and the party in default can always apply for relief, but a conditional order striking out a statement of case or dismissing the claim or counterclaim is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified."

These passages suggest that if a peremptory order has been made after careful consideration of what should follow from a default, an application for relief from the stipulated consequences must be approached on the basis that the consequences should be allowed to stand, unless something has happened subsequent to the order which would render the consequences unfair, such as where the party was prevented from complying by circumstances beyond his control.[13] Put another way, if a peremptory order was fair, reasonable and proportionate in the first place, its consequences will be equally fair, reasonable

[13] As was the case in *Keen Phillips (A Firm) v Field* [2006] EWCA Civ 1524; [2007] 1 W.L.R. 686.

and proportionate once a default has occurred, except where the party in question could not be blamed for the default. Accordingly, faced with an application for relief from sanctions, the court should not approach the matter as if it was making an original decision about the consequences of the default or as if it were dealing with an application for an extension of time.[14] Rather, it must consider whether there are any factors, of which the court making the order could not have been made aware, that render the imposition of the consequences unfair.

In the past unless orders were not always taken seriously because there was normally a good chance that further opportunities for compliance would be given. Although the Court of Appeal did not spell it out, it seems to have recognised that the approach to the exercise of discretion to grant relief from sanctions following non-compliance with an unless order must now be different. This resolve is very welcome. The wise counsel that one should not make threats that one does mean to carry out applies to court orders with particular poignancy because idle threats tend to diminish the court's authority and to undermine the binding force of its orders. The Court of Appeal's decision in *Marcan* contains the message that unless orders mean what they say and that therefore a party who feels that the time allowed for performance is insufficient or that the specified consequences are disproportionate, should address his objections to the court making the order and, if necessary, appeal the order. Once the time for compliance has passed, it would be too late to seek indulgence, except where the party in default has not been to blame. How seriously this message is going to be taken will crucially depend on the court's willingness to follow the approach advocated by Moore-Bick L.J. It therefore remains to be seen whether unless orders mean what they say.

[14] In *CIBC Mellon Trust Co v Stolzenberg (Sanctions: Non-compliance)* [2004] EWCA Civ 827 at [167], Arden L.J. stated: "The fact that an unless order has been made inevitably means that there is an additional factor to consider . . . Moreover, compliance with orders of the court is not a question of judicial amour propre. It goes to the essence of the rule of law that parties subject to the court's jurisdiction . . . should comply with the court's orders. The gravity of the matter of non-compliance is plainly increased where the non-compliance results from a conscious decision, as in this case."