Neutral Citation Number: [2019] EWHC 166 (Comm)

Case No: QB/2018/0092

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
(ORDER OF HIS HONOUR JUDGE BAILEY)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/02/2019

Before:

THE HONOURABLE MR JUSTICE FREEDMAN

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Between:

ADONIS PETROU	**Claimant**
- and –	
PETER LAMBROU (t/a KCJ BUILDERS)	**Defendant**

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- -

Laurence Page (instructed by **Comptons**) for the **claimant.**

The Defendant appeared in person.

Hearing date: 18th January 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 JUSTICE FREEDMAN

Mr Justice Freedman:

1. This is an appeal against a decision of HH Judge Bailey ("The Judge") on 16 March 2018, granting the Defendant relief from sanctions ("the Decision"). It comes to this Court with the permission of Mrs Justice Yip granted on 3 August 2018, after Mrs Justice Cheema-Grubb had refused permission on paper on 2 July 2018.

2. On the appeal, the Claimant was represented by Mr Laurence Page of Counsel. The Defendant acted by his Mackenzie friend his wife to whom I granted a right of audience. She acted as such before the Judge. Before doing so, I considered whether this was appropriate. I took into account the Practice Guidance (McKenzie Friends: Civil and Family Courts) [2010] 1 WLR 1881 including that an application for a right of audience should be considered very carefully. Having regard to the factors at paragraph 21 of that Practice Guidance, I allowed that application. It became apparent both during the application and thereafter that whilst the Defendant gets upset about the dispute, Mrs Lambrou is able to maintain calm, to deal with the points sequentially logically and has a good command of the issues. I also express my appreciation to Mr Page of Counsel who conducted the case not only with skill, but who engaged in a particular concern which I raised fairly and fully and without taking advantage of the absence of legally qualified representation on the part of the Defendant.

Background

a. The Dispute

3. The Defendant carried out building works on the Claimant's property in 2007 and 2008. The original contract price was approximately £190,000. The Claimant alleged that the work was delayed and defective. It was in the end suspended, and a new contractor completed the works. After the work had been completed, a claim was issued in the High Court for about £230,000. The Defendant's indemnity insurers agreed to pay the Claimant in partial settlement a sum of £80,000. The claim was reduced to about £145,000.

b. The litigation

4. In 2015, the claim was transferred to the Central London County Court, but it was not placed before a Judge for a long period of time. The Claimant's solicitors chased the matter in a series of emails between August 2016 and February 2017.

5. On 9 March 2017, the Judge made directions on papers ("the Directions Order"). This required the filing and service of witness statements by 21 April 2017. On the day before, the Defendant who by this stage was a litigant in person following the payment by the insurers, emailed the Claimant's solicitors asking for an extension for service of witness statements, saying that he would apply for an extension. He did not do so.

6. On 21 April 2017, the Defendant wrote again by email saying that he did not believe that he would be able to finalise witness statements or instruct experts before proper disclosure had been given, but he did not make an application for specific

disclosure. The Claimant served his witness statements on 21 April 2017 on the basis that a password would be provided to the Defendant for a simultaneous exchange of statements. On 5 May 2017, the Claimant's solicitors referred to a conversation pointing out to the Defendant the need to apply for permission to rely on any witness statement served and filed out of time. He suggested that the Defendant obtain independent legal advice.

7. Due to the failure to serve witness statements, the Claimant's solicitors applied for consecutive extensions of the time to serve expert evidence and a schedule of loss of 2 months and a further 3 months, granted on 6 June 2017 and on 22 August 2017.

8. Still absent anything done by the Defendant to remedy his breaches, on 26 September 2017, the Claimant's solicitor emailed the Court and the Defendant to complain about the Defendant's persistent and ongoing non-compliance with the Court's orders. The Judge emailed the Claimant in reply and offered to make an unless order if the Claimant made such an application to the Court. The application was duly made by the Claimant's solicitors in the following terms providing *"Unless the Defendant serves his witness statements on the Claimant's solicitor by 4pm on 13 October 2017, the Defence and Counterclaim be struck out…"*. On 29 September 2017, the Judge duly made an order on the papers in those terms.

9. On 13 October 2017, the Claimant duly contacted the Court to confirm that the Defendant was in breach of the Unless Order. On 16 October 2017, the Court struck out the Defence and Counterclaim and ordered that there be judgment for the Claimant on his claim.

10. On 29 December 2017, the Defendant applied to stay the order of the Judge of 29 September 2017 and to extend the time limit fixed by paragraph 3 of the same Order to 1 March 2018. Paragraph 3 provides liberty to apply to vary or set aside the Order provided an application was issued within 7 clear days of the service of this Order on the party making the application. There is only an unsealed copy of the order in the bundle.

11. The application was supported by a witness statement of the Defendant. It accepted that he did not serve the witness statements within the time required and that the application and the Order had been properly served on his home address. However, he says that he was unaware of service because he was away in Cyprus with his wife, apparently to look after a property of his wife. They left on 7 October 2017. Whilst there, they received a voicemail on 11 October 2017 from their daughter saying that she had been to the house and some papers had been served. They sought to access email, but there was no facility in the village in Cyprus or nearby, and they were unable to obtain access until 16 October 2017. There was nothing further which they felt able to do without access to the papers upon return to the UK. They returned on 21 October 2017.

12. Shortly thereafter, there was a bereavement in the immediate family. The Defendant relates in the witness statement the particular relation the subject of the bereavement. The Defendant and his wife had to provide a supporting role and participate in the making of the funeral arrangements, which took place on 6 November 2017. Mr Page on behalf of the Claimant took the point that there was unacceptable

delay in October 2017, but, to the credit of the Claimant and his legal team, expressly did not take any delay from the bereavement to the application.

13. He stated that the failure to serve the witness statements on 21 April 2017 was caused by his investigation into why the Claimant's building project turned out to be a disaster relating to a failure to make adequate ground investigations prior to basement investigations which he blamed on the Claimant's architect. He noted that here had been no disclosure of the working papers of the architect as regards the design or advice relating to site investigations. Despite these criticisms, no application for disclosure had been made.

14. By an order made apparently of the Court's motion on 31 January 2018, the Court noted that the application of 29 December 2017 was *"in effect an application for relief from sanction, the Defendant having failed to comply with paragraph 1 of the Order made on 29 September 2017 and serve his witness statements by 4pm on 13 October 2017"*. It was noted that the Defendant had still not served his witness statements and that the witness statements should be served before the hearing if it was to have any realistic prospect of success. The application was ordered to be heard on 16 March 2018. On the day before the hearing, a witness statement of the Defendant was served providing his evidence about the dispute between the parties.

c. The Order and the Judgment which are the subject of the appeal

15. The Order made on 16 March 2018 provided for relief from sanction and extended the time for the service of witness statements to 29 March 2018. There were then a series of detailed directions made to trial. The Defendant was ordered to pay the Claimant's costs of the day on the standard basis.

16. The Judgment of the Judge was given ex tempore after a hearing which was said to have lasted somewhere between 30 minutes and an hour. He said that not enough time had been allowed for the hearing and it was not a straightforward matter.

17. The Judge, in the words of Mrs Justice Cheema-Grubb, misstated some of the background when giving his ex tempore judgment, and these are matters of which criticism is made by the Claimant in this appeal as follows:

    (1) The Judge stated the reduction in the value of the claim following the payment of the insurers was to £233,000, whereas in fact it was to about £145,000. It appears that the deduction of £80,000 was applied on the wrong sum. However, this appears to me to make no difference to the decision: it is background. Either way, there was a substantial sum at stake.

    (2) The Judge stated that the Claimant was *"content to allow the matter to take a very slow course indeed"* and that this was not a precipitate claim. After the payment of the insurers, the Claimant had *"no enthusiasm for getting on with the matter."* The case was brought in February 2014, whereas the relevant works were carried out between 2007 and 2009. The Claimant says that this ignores the fact that during that

period remedial works were done and there was pre-action correspondence and negotiations with insurers. That said, the case did take a very slow course, albeit that the word "content" may have been unnecessary.

(3) The settlement with the insurers was in September 2014 and the transfer to the Central London County Court was not until the start of 2017. In fact, there were delays in the transfer of the proceedings due to the Court, as noted above, but over the period of over two years, the Claimant was not driving the case forward. The same criticism could have been made against the Defendant as counterclaimant.

(4) The last criticism is that the Judge is said to have found that the Defendant "had some valid complaints". In fact, the Judge referred to a *"proper concern on the court's part that the Defendant really does have some valid complaints to make of the Claimant."* That amounts to no more than a belief on the basis of the material which he had seen that there was a complaint which raised a real issue to be tried. As Mr Page rightly accepts, it does not mean that the Claimant's case was unlikely to succeed.

18. Overall, I regard these matters as largely background. I do not regard the mistake in (1) above as significant. It may be that the observations in (2) and (3) could have been expressed in a slightly less critical way, but I do not regard that aspect as significant in the round. The point in (4) was an observation which the Judge was entitled to make, albeit that the merits usually do not have a significant part to play in an application for relief from sanctions unless the merits are very strong one way or the other, which the Judge was not saying. In my judgment, none of these matters invalidated the exercise of the Judge's application of the Denton test or the exercise of his discretion in respect of limb 3 of Denton.

19. The Denton test is the three-stage process set out in Denton v TH White [2014] EWCA Civ 906. This arises under the CPR in connection with CPR 3.8 and 3.9 which read as follows so far as material for this case:

> *"**3.8***
>
> *Where a party has failed to comply with a rule, practice direction or court order, any 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.*
>
> *(Rule 3.9 sets out the circumstances which the court will consider on an application to grant relief from a sanction)*
>
> …
>
> ***3.9***
>
> *(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.

(2) An application for relief must be supported by evidence."

20. The three stages to consider on an application for relief from sanctions are as follows:

    (1) identifying the default and assessing its "seriousness or significance": if it was neither, relief would usually be granted;

    (2) considering why the default occurred, that is whether there was a good reason for it;

    (3) considering "all the circumstances of the case, so as to enable [the court] to deal justly with the application". This was even where the default was serious or significant and without a good reason for it. The particular factors mentioned in the rule ((a) the need for litigation to be conducted efficiently and at proportionate cost and (b) the need to enforce compliance with rules, practice directions and court orders) have to be considered. According to the majority in Denton (Lord Dyson MR and Vos LJ), they were of particular importance and to be given particular weight. The promptness of the application, and other past or current breaches, will also be relevant at this stage.

21. The Judge applied the three-stage test, but apparently by reference to the Directions Order about the provision of witness statements by 21 April 2017. He said that the breach was serious referring to the fact that it was only on the day before the hearing that the Defendant served "a very lengthy witness statement".

22. The Judge characterised fairly the reasons of the Defendant for failing to comply with the Directions Order as "singularly unimpressive". The Judge referred to the possibility that the Defendant did not receive the Directions Order or the orders extending time for expert evidence, but the Defendant knew about the time for service of the witness statements. Despite this, there was no application for an extension of time. The Judge held correctly that it was not a good excuse simply to correspond with the other side's solicitors without making an application.

23. As to the third stage, the Judge said that he did not consider that it was appropriate to hold the Defendant to the sanction in that (i) the Claimant did not pursue the matter with vigour until recently, (ii) there were real grounds for concern that the Defendant did not receive the court documents, and (iii) there did appear to be real areas of dispute between the parties. Thus, relief was granted against sanction.

24. As to (i), the Claimant submitted that the Judge was wrong in that regard, and downplayed the Defendant's very serious and significant procedural defaults. As to (ii), the Claimant must have known about the order to serve a witness statement, and he

was validly served with the unless order and he was sent it by email on 9 October 2017. As to (iii), there was no reason why the merits ought to be an important factor, absent a case that the Claimant's case was poor.

25. As to the matters which the Judge had in mind, there is no reason for serious criticism of the first factor which was in essence that the litigation had gone at a slow speed. I refer to my observations at paragraphs 17(2) and 17(3) above. Different considerations might operate in a case which had been brought and prosecuted diligently and where the other party's attempt to have an expeditious resolution of matters had been frustrated by the persistent default of the applicant for relief from sanctions. It is a part of the circumstances which the Judge was entitled to have in mind.

26. As to the second point about failure to serve the court orders, if the focus was on the Directions Order, then this point may not be pivotal, but it is a major point is if it is by reference to the Unless Order. I shall return to this later in the Judgment.

27. As regards the third point, the merits of the case do not usually have significance at the stage of relief from sanctions in the sense that the Court discourages argument directed to the merits unless they point to a case being susceptible to summary judgment. However, the Judge was able to bear in mind that the defence that was put forward was a matter which might give rise to a valid complaint on the part of the Defendant, and to put that into the overall balance in relation to the circumstances.

d. The breach of the Directions Order or the Unless Order?

28. I shall return to the exercise of the discretion of the Judge later in this Judgment. However, there was an examination in the course of the hearing, instigated by the Court, as to whether the concentration in the case was on the breach of the Directions Order and the need for relief from sanctions rather than on the failure to comply with the Unless Order. The order that was made by the Judge was to extend the time to exchange witness statements to 29 March 2018, which seems to be a variation of the Directions Order, which had provided for exchange on 21 April 2017. It does not appear to be by reference to the Unless Order: had it been, there would have been the following, first the setting aside of the Judgment in default, and, second, an extension of time for service of the witness statements under the Unless Order.

29. Although this is technical, it is important to see the application in its correct context. The application which was made by the Defendant was to extend the time for compliance with the unless order. It was not for relief from sanctions for the failure to serve the witness statement on 21 April 2017. This shifts the analysis for the purpose of the Denton test. Each of the steps is in the first instance by reference to the Unless Order, albeit that as I shall set out, the breach of the Directions Order is not unimportant. How then would the analysis be different if the three-stage test was by reference to the Unless Order, and not the Directions Order?

30. As to the first stage of the Denton test, the seriousness or significance of the breach is the failure to serve the witness statements. The period of delay is the period from 13 October 2017 and not from 21 April 2017. In the instant case, although the unless order was served validly, the evidence was that it did not come to the attention of the Defendant until his return to the UK on 21 October 2017, by which time a default judgment had been entered. It has not been suggested that his evidence was false. Further, although there was some significant delay after the time of the family bereavement, this delay is not relied upon by the Claimant. It was said that there was therefore a delay of about 2 - 3 weeks

31. That said, in assessing the seriousness or significance of the breach of the unless order, the *Court of Appeal has held that it is also necessary 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"*: per Jackson LJ in *British Gas Trading Ltd v Oak Cash and Carry Ltd* [2016] EWCA Civ 153; [2016] 1 WLR 4530 at paragraphs 38-39.

32. Seen this way, it is not right to look at the breach of the Unless Order in isolation. Taking into account the seriousness and significance of the delay of the breach of the Directions Order, the failure to comply with the unless order was both serious and significant. The Judge was plainly right to conclude that, albeit that he appears to have done so by reference to the Directions Order alone. Given the reasoning in *British Gas Trading Ltd v Oak Cash and Carry Ltd* above, that makes no practical difference in the circumstances of this case. The breach against the background of the breach of the Directions Order was serious and significant.

33. As to the second stage of assessing whether or not there was a good reason, this is to be assessed by reference to the default in failing to comply with the Unless Order. The Judge's view was based on whether there was a good reason for not complying with the Directions Order, for which plainly there was no good reason: see paragraphs 7 and 12 of the Judgment. It is a more difficult question to answer as regards the Unless Order. Given the Defendant's evidence which was not challenged about his not knowing of the Unless Order until his return to the UK on 21 October 2017 by which time the default judgment had been entered, was it a good reason that he did not know about the Unless Order? On balance, I have come to the view that there was not a good reason. There is a reason, but it is not a good reason, because the Defendant ought to have taken more steps than he did.

34. The reason for non-compliance according to the evidence is that the Unless Order did not come to his attention due to his absence in Cyprus and to the absence of email reception in Cyprus. Considering that reason afresh, it seems to me that the Defendant has provided an explanation for his default, but that reason is not sufficient to amount to a good reason. The Defendant has not explained what happened as a result of the email sent by the Claimant's solicitor of 26 September 2017 stating that an application was going to be made for an unless order. Whilst it appears that he personally did not receive the Unless Order, there was some culpability in not making arrangements before going to Cyprus to have a means of checking the post and of finding a method to check emails after receiving such an email. Further, when hearing from his daughter on 11 October 2017 about some papers arriving, it seems to me that he should have made enquiries as to what they were and have them read to him instead of leaving it until he returned.

35. I have considered whether allowance could be made for the fact that the Defendant is a litigant in person. A litigant in person generally cannot be afforded a different standard for compliance than a represented person: see *Barton v Wright Hassall LLP* [2018] UKSC 12 at [18]. To that end, it seems to me that I am unable to find that there was a good reason for a litigant in person in circumstances where it would not have availed a person legally represented. However, the fact that a person is a litigant in person may affect the matter at the 'margin' as Briggs LJ observed in *Nata Lee Ltd v Abid* [2015] 2 P & CR 3, [2014] EWCA Civ 1652 as approved in *Barton v Wright Hassall LLP* above. In my judgment, the fact that the Defendant is a litigant in person should not enable him to say that he had a good reason. However, the Court is entitled to factor that into the assessment of the overall circumstances to a limited extent.

36. I now consider the third stage. Here, if the first focus is on the Unless Order, then even although a good reason has not been established, the reason is nonetheless relevant to the overall justice of the matter at the third stage. Although I am of the view that the circumstances in which the Defendant do not amount to a good reason, they do amount to an explanation. The default was not intentional. There is no serious culpability that attaches due to the default.

37. The Judge bore in mind a concern about the Defendant not receiving court documents, although he was not precise as to which orders he was referring to. If he had concentrated on the Unless Order, it seems to me that this would be a very significant factor in respect of the exercise of the discretion. Exercising the matter afresh, I regard this as a very significant circumstance.

38. There was some delay in respect of the making the application, but most of the delay prior to 29 December 2017 is conceded not to be relevant having regard to the bereavement, and so the relevant delay was said to be about two to three weeks. This depends on whether the time period is said to start from the time when the Defendant was served with the order (but did not know about it) or 13 October 2017, the latest date for the service of the witness statements or a later date when the Defendant opened the email (16 October 2017) or returned to the UK (21 October 2017). The delay was imprecise and short before the bereavement. More criticism can be made as regards the failure to serve the witness statement until the day before the hearing.

39. In looking at all of the circumstances, the Court was entitled to look at the breach of the Directions Order requiring service of the witness statement on 21 April 2017 and the continued breach which led to the need for the Unless Order. The same reasoning as in the British Gas Trading case applies. However, in calibrating the factors, in my judgment, the importance of not knowing about the Unless Order assumes a greater significance.

40. The Judge took into account the three matters above on the basis that he was considering the question of relief from sanctions relating to the failure to serve the witness statements by 21 April 2017. The second of those matters was the fact that the Defendant did not receive the relevant orders. Where the focus is in the first instance on the Unless Order, that seems to me to be a weighty point at the third stage of the Denton analysis. Although there was not a good reason for this, the default was not intentional and the culpability was low. There is a marginal significance to the fact that the Defendant was a litigant in person.

41. To the extent that the Judge did not analyse matters in this regard, it would fall to the appellate court to exercise the discretion afresh. The Court takes into account the serious and significant breach of the Directions Order and the damaging effect which this has had on the disposal of this case. There is also to be taken into account the absence of a good reason for this, and the failure of the Defendant to seek relief from sanctions.

42. However, in the end, in my judgment, it is an important matter that the Unless Order was worded in a manner which enabled the Defendant not to have to obtain relief from sanctions. When asked, Mr Page did not seek to contend that relief from sanctions would be required in the event that the Defendant had served the witness statements by 13 October 2017. Although the Defendant does not give a 'good reason' for that failure, the Defendant has gone a long way to do so, albeit not such as to have established a 'good reason' which could have ended the analysis at the second stage. Looking at all the circumstances including the breach of the Directions Order and the failure to apply from relief from sanctions, the matter which weighs the heaviest is the fact that if the Defendant had known about the Unless Order during its currency, he would have had the opportunity to act so as preserve his ability to defend and counterclaim. He would then have been able to act at that time rather than, as he did, after the judgment had been obtained against him. Thus, exercising the discretion afresh, relief from sanctions should be granted, by extending the time to comply with the Unless Order and setting aside the Judgment.

43. If the above approach is wrong, and the matter falls to be dealt with by reference to the Directions Order as the Judge had done, then in my judgment, the Judge did not exercise his discretion improperly or wrongly. To the extent that he made any error in the four factual matters referred to above, none were material for the reasons above set out. His three factors for exercising his discretion were not wrong. He bore in mind the fact that the litigation had not been pursued particularly diligently, there were issues about the Defendant's knowledge of Court orders and the Defendant's complaint warranted investigation by the Court. I conclude after this examination, as did Cheema-Grubb J, that *"the Judge had a discretion whether to grant relief from sanction. The breaches were serious and the Defendant's approach to the litigation was slow and showed little regard for the process of the court. However, the judge correctly considered the overall context of the case and granted relief in order to do justice. While he appears to have mis-stated some of the background he was giving in an ex tempore judgment within a list of cases. Putting those matters to one side his approach to the third aspect of the Denton v TH White Ltd [2014] EWCA Civ 906 test was principled and his conclusion was one reasonably open to him."*

44. At the permission application where permission was granted, Mrs Justice Yip expressed a concern about the order made by the Judge locked the Claimant into facing a Counterclaim from an apparently impecunious litigant. That has led to a refinement of the position of the Claimant who offers openly to abandon the claim subject to receiving the costs of already ordered by the Judge and the costs of the appeal, provided that the Defendant does not pursue his Counterclaim. The Defendant has refused this offer. This was not a matter which was raised before the Judge. It can only therefore be raised if the discretion is being exercised afresh. On the basis of my reasoning above, the discretion is not to be exercised afresh if the key order is the Directions Order. However, on my analysis that the key order is the Unless Order, then this matter

can be factored into the third stage of the Denton analysis. There is some concern about the economics of the litigation, but the Court is unable to form a view about the Counterclaim, and having regard to the Judge's view that there was a complaint which warranted investigation, this new consideration does not lead to a different outcome.

Conclusions

45. The conclusions which are not comprehensive or even a full summary are as follows:

(1) The Court ought to have focussed more on the Unless Order and in particular the reasons for not complying with the Unless Order;

(2) That was a serious error because the effect of the Unless Order would have been, if complied with, to allow the witness statements to be served without having to seek relief from sanctions due to the default relating to the Directions Order;

(3) That enables the Court to do the Denton exercise afresh by reference to the Unless Order, but taking into account the default relating to the Directions Order. Doing so, the Court concludes that in the exercise of the discretion of the Court, it would be appropriate to extend time for compliance with the Unless Order and to set aside the default judgment. In short, it is to reach the same conclusion as the Judge, but for different reasons.

(4) If that approach is wrong, and the Judge was right to consider the matter by reference to the Directions Order, then I have come to the conclusion that the Judge was entitled to come to the view which he did in the exercise of his discretion.

(5) These conclusions are not affected by the willingness of the Claimant to forgo its claim on certain terms. Nevertheless, I reiterate the remarks of Mrs Justice Yip to encourage the parties to consider alternative dispute resolution and to explore the settlement of this litigation as a whole.

46. There is a matter which merits further consideration arising out of this case, but which, in the event, has no impact on the result. It is that where a party is seriously in breach of a directions order, it may make a difference as to whether the application is for an unless order or some other course which would force the defaulting party still to make an application for relief from sanctions. That might be seeking a striking out order due to the default, to which a defaulting party might have to apply for relief from sanctions to be able to serve the witness statements. Alternatively, it might be to seek an unless order which provides as the event not the service of the witness statements, but the making of an application for relief from sanctions so as to be able to serve the witness statements. An unless order such as the one in this case had as its effect that a party could serve the delayed witness statements within the time provided in the unless order freed from the burden of having to seek relief from sanctions.

47. In any event, for the reasons which I have given, the result is the appeal is dismissed.