

Construction Law Update

Extension of Time Applications for Unless Orders

In *Everwarm Limited v BN Rendering Limited (Rev 2)* [2019], the court considered which CPR rule should apply when deciding whether to grant a last-minute application for an extension of time in which to comply with an 'unless order'.

Background

A trial was due to take place between the parties on 19 July 2019. On 21 May 2019, Everwarm Limited ("Everwarm") applied for an order requiring BN Rendering Limited ("BN") to provide security for costs in respect of a counterclaim it had against Everwarm. An order was made requiring BN to pay £145,000 into court by 4 July 2019 (3 weeks). On 3 July 2019, 1 day before the deadline for compliance, BN requested an extension of time to 12 July 2019. Everwarm sought to oppose the application outright but in the alternative requested that any extension is in the form of an unless order. The judge granted an unless order, requiring compliance by 4:00 pm on 11 July 2019, otherwise BN's counterclaim would be struck out.

BN's application

Half an hour before the deadline for the unless order, BN applied for a further extension to 4:00 pm on the 18 July 2019 (the "Application"). The Application requested an oral hearing. This was scheduled for 19 July 2019 (the official trial start date but in reality a reading day). Half an hour before the revised deadline sought in the Application, BN paid the sum of £145,000 into court. This meant that if the Application was granted, the unless order was complied with, if not, BN's counterclaim would be struck out. In the circumstances, BN asked Everwarm to drop its opposition; but it refused.

The parties' submissions

Submissions were made with reference to case law regarding how the Application should be considered. Everwarm submitted that, due to the proximity of the Application to the unless order's deadline and the fact

that it was in relation to an unless order, it should be treated as an application made pursuant to CPR 3.9 (relief from sanctions) with the relevant principles therein being applied. BN submitted that, regardless of the proximity to the deadline, the Application was 'in-time' and properly made under CPR 3.1(2) (the court's general power to extend or shorten deadlines to comply with court orders) meaning it should be considered in accordance with CPR 1.1 (the overriding objective).

The true position

The court decided that the true position was as follows:

- an application for an extension of time made any time prior to the deadline for the relevant order is *not* an application for relief from sanctions under CPR 3.9;
- this remains the case even where the application is heard *after* the deadline has passed;
- although practically there is little difference between an application made just before a deadline or just after, the applicable law still distinguishes between the two; and
- although ensuring compliance with unless orders is important and in the public interest, the court's power to extend time for compliance with an unless order by virtue of an 'in-time' application is no different to any other court order and the overriding objective should be applied.

The overriding objective requires the court to deal with cases justly and at a proportionate cost, including ensuring the parties are on an equal footing, saving expenses where possible, being quick and fair, allotting only an appropriate amount of the court's resources and enforcing compliance with rules and practice directions.

The court's decision

In this case, the court was convinced by witness evidence that BN had made genuine attempts to

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comply with the orders imposed and was not merely attempting to stall or avoid compliance. This was also shown by the fact security had now been paid from the sale of one of the witnesses' properties.

The court allowed the extension, stating that to not allow an extension in such circumstances would be allowing Everwarm to use the unless order as a weapon and thus go against the overriding objective. Other key considerations included: the original deadline imposed being unusually short due to Everwarm's late application for security (similar cases allowed six week extensions); no actual prejudice being caused to Everwarm by the extension; the trial not being delayed; BN being the weaker financial party and its counterclaim being worth £2 million; and no other court users being affected.

Analysis

This case clarifies for parties seeking to make applications for extensions of time in the future that even very last minute in-time applications are to be treated as an application made under CPR 3.1(2) and determined by reference to the overriding objective. This will be the case even where the application hearing is after the deadline for compliance and could never practicably have been heard before.

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