

## **Failures to Comply with Court Orders and Directions**

Courts have an inherent power to control the proceedings before them. In addition to these inherent powers, the Civil Procedure Rules (“CPR”) expressly provide case management powers to (1) make case management directions (i.e. “timetables”), and (2) sanction non-compliances with case management directions made by the court.

In the event that a Claimant or Defendant fails to comply with case management directions or other orders of the Courts, courts may exercise its discretion to exercise its coercive powers to maintain the proper conduct of the legal proceedings conducted before it.

A Case Management Conference is a hearing which takes place before a Judge for the purpose of deciding a timetable for the matters to be dealt with before the start of the trial. These will include dealing with the mutual exchange of the parties documentary evidence and the witness statements of the parties and their respective experts.

The measures able to be imposed by courts are wide and varied. These sanctions stand apart from the law of contempt, which broadly speaking operates to prevent abuse or interference with the administration of justice. Compliance with case management directions by litigants is fundamental to the court in exercising its primary function which is to finally and conclusively determine the rights between the parties.

In keeping with the courts’ concept of fairness, when it comes to consider imposing sanctions, it will look to impose sanctions which are proportionate and just in the circumstances of the failings of the litigant in default. In civil litigation, the court’s general case management powers are set out at Part 3 of the CPR.

The CPR is peppered with instances empowering the court to make direction and orders to address failures of litigants to comply with court directions, timetables, and abuse of its processes.

The CPR also set out sanctions which are mandatory and automatic in some circumstances, and others which may be made in the discretion of the court having regard for the circumstances of the case. For instance:

1. A party may not rely on a document which has not been disclosed, without permission.
2. Striking out a statement of case (the claim or the defence) where an allocation fee or listing fee has not been paid, and the issues a notice that the payment must be made by a specified date.
3. Failures to comply with the formal requirements for witness statements, affidavits, or exhibits, may result in the court refusing to admit the evidence and/or refuse to allow the costs for its preparation.
4. A party may not rely on expert evidence at the trial where such evidence has not been disclosed to the other litigants prior to the trial.
5. Imposing costs sanctions against the party in default.
6. Awarding interest on a higher or lower basis, or refusing to order interest be payable where it might otherwise be payable.
7. Making orders for payment of costs.
8. Paying money into court.

When deciding whether or not to impose a sanction at all or the scale of the sanction, the court will ordinarily have regard to the seriousness of the non-compliance by the party in default, in all the circumstances in light of the overriding objective.

### **Unless Orders**

Unless Orders are court orders which specify that a party to the proceedings must do some act by a specified date, and if that act is not done, some specified consequence will follow. Issuing orders in this form provide the litigant one final opportunity to comply with the directions of the court.

If a litigant fails to file an Allocation Questionnaire within the time specified by the Court.

The court may order as follows:

*On the Courts own initiative  
IT IS ORDERED that:*

*1. Unless the defendant files and serves an Allocation Questionnaire by 4.00 pm on .....the day of.....2012, the claim/defence and counterclaim shall be struck out.*

An order such as this would mean that a claimant would be entitled to enter judgment against the defendant on the claim with little difficulty.

Where the litigant has been issued a notice to pay a relevant fee and fails to do so, the court may order that

- (i) The claim/defence will automatically be struck out without further order of the court; and*
- (ii) The claimant will be liable for the costs which the claimant/defendant has incurred unless the court orders otherwise.*

### **Striking Out**

The most serious sanction able to be imposed by a court is to **strike out** a statement of case, usually the claim, defence or counterclaim or defence to counterclaim. This is because the statement of case represents the factual account alleged by the litigant to either pursue or defend its claim. Measures such as these will be imposed where the defaulting party repeatedly failed to comply with the directions of the court. The court may also have regard to the relative weakness of the defaulting party's case when determining the sanction to be imposed. Prejudice caused to the innocent party by the delay may also play a part in the measure of the sanction imposed.

Once a statement of case has been struck out, the opposing litigant is able to make a request for judgment with relative ease. Where the defence is struck out, and the claim is for a specified amount of money,

- (i) an amount of money to be decided by the court, and/or
- (ii) Delivery of goods where the claim form gives the defendant the alternative of paying their value, the claimant may apply for judgment by filing a request with the court.

The defaulting party may apply for the judgment to be set aside within 14 days of being served with the judgment. In any other case, the applicant may apply for relief from the sanction of the court.

### **Relief from Sanction**

In the event that a statement of case has been struck out or any other adverse consequence of a court order, a litigant may also appeal the decision or apply for relief from sanction.

In the context of failing to comply with case management directions which has imposed consequences on the defaulting party, the appropriate course is for the defaulting party to apply for relief from sanction. When deciding whether to grant relieve the defaulting party from the consequences of the particular order or a practice direction, the court will consider prior to exercising its discretion:

1. The interests of the administration of justice;
2. Whether the application for relief has been made promptly;
3. If the failure to comply was intentional;
4. Whether there is a good explanation for the failure to comply with requirement for the litigant to act;
5. The extent to which the party in default has complied with other rules, practice directions, court orders and any relevant preaction protocol;
6. If the failure to comply was caused by the party or his legal representative;
7. Whether the trial date or the likely trial date can still be met if relief is granted;
8. The effect which the failure to comply had on each party; and
9. The effect which the granting of relief would have on each party.

Applications for relief from sanction should be supported by evidence, detailing the reasons for the delay and the steps taken by the defaulting party to meet the court's timetable. The factors listed above are considered in the light of the overriding objective. Previous non-compliances with orders or the CPR may be taken into account, along with the reasons given in the application.

### **Postponement of the Trial**

Due to the inherent difficulties of managing litigation amongst parties, once trial dates are fixed, courts are extremely reluctant to further delay the proceedings. The interim stages of disclosure, filing of evidence (including expert evidence, if necessary) are geared to prepare for the trial. Accordingly, where parties fail adhere to case management directions, the court will make further directions if possible to preserve the trial date and only as a last resort delay the trial.

In circumstances where the defaulting party has caused delay which prejudices the trial date, the court:

1. is likely to exercise its case management powers in a manner so that the trial date is preserved
2. Evaluate the steps that may be taken to ensure the litigation is ready for the trial, and impose sanctions for non-compliance. Such sanctions are likely to be geared to deprive a litigant from raising a particular claim or defence at the trial in the event of non-compliance
3. May consider that it is appropriate in the circumstances that the court order that those issues that are ready to be heard at the trial proceed on the fixed date, and issues which are not ready will be heard at a later date at the expense of the party in default
4. Where there is no option other than to postpone the trial, the court will postpone it for the shortest possible time and make directions to rectify the litigants' defaults with the court timetable

Sanctions may also be imposed in legal proceedings where either the claimant or defendant has failed to conduct themselves in accordance with the pre-action protocols.

### **Conclusion**

Failing to comply with court timetables can have serious consequences and results in undesirable satellite litigation in order to preserve litigants' rights. Courts expect litigants to comply with directions issued, and ultimately insist upon compliance, as failures serve to unnecessarily increase the administrative burdens on the administration of justice which affect other litigants seeking to use the court system to resolve disputes, and defend claims brought against them. Most defaults with case management directions and the CPR are perfectly avoidable. In the cases where non-compliances are unavoidable, litigants must act quickly to rectify the situation and if necessary apply to the court for appropriate relief, as unexplained above delay or unconvincing reasons for delay are likely to be detrimental to the outcome of any such applications.