Ref:	**Master43**

Judgment: approved by the Court for handing down

Delivered:	**23/02/06**

(subject to editorial corrections)

98/000288/09

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

Between:

JAMES HUTCHINSON

Plaintiff;

AND

CHIEF CONSTRUCTION LIMITED

Defendant.

Master McCorry

The plaintiff applies by summons issued 15 November 2005 for an extension of time in which to serve a list of documents upon the defendant, on foot of an unless order made by Master Wilson on 21 May 2004. That order was made following the defendant's application pursuant to Order 24, rule 19, that the action be struck out because the plaintiff had failed to comply with an earlier order for discovery made by Master Wilson on 29 March 2001. It is common case that the order of 21 May 2004 was served on the plaintiff's solicitors on 2 June 2004 and as it required compliance within 28 days of date of service, it allowed the plaintiff until 30 June 2004 to serve the List of Documents. There was no application made to extend time for

compliance before 30 June 2004 and on 7 July 2004 the defendant's solicitor wrote to the plaintiff's solicitor advising that as the time limits had expired the action was now dismissed for want of prosecution. The plaintiff's solicitors did not respond to that letter and there was no further contact between the parties until 10 December 2004 when the plaintiff's solicitors wrote enclosing replies to the defendant's Notice for Further and Better Particulars dated 12 August 2003. In fact those replies had been due within 14 days of date of service of an order made by me on 21 May 2004. On 15 December 2004 the defendant's solicitors wrote to remind the plaintiff that the action had already been struck out for non-compliance with an unless order. On 11 February 2005 the plaintiff's solicitor issued a summons for an extension of time to comply with the unless order but mistakenly issued in the belief that the unless order related to the defendant's Notice for Particulars rather than the order for discovery made 29 March 2001. That summons was initially listed for 18 March 2005 and then adjourned on a number of occasions, primarily to find a time for hearing which suited both counsel, with the result that it was not heard until 6 October 2005. In the course of the hearing defendant's counsel raised the issue that the application was misconceived and the summons was withdrawn with the plaintiff to start afresh. It is that properly formulated summons, issued 15 November 2005, which is now before the court.

In order to clarify the procedure to be followed when there is a failure to comply with the terms of an unless order, on 27 March 2003 the Queens Bench Masters issued a Practice Note, "No. 1 of 2003 Unless Orders". This Practice Note stated that where there is non-compliance with an unless order within the time specified, the action or defence is struck out and judgment entered for the defendant or plaintiff accordingly. There is no need for the party benefiting from the order to return to court with an ex parte application for a further or final order. Henceforth all unless orders carried a clause to the effect that an affidavit or certificate by the solicitor, confirming service of, and non-compliance with, the terms of the order, is accepted by the Taxing Master as evidence that the action or defence has been struck out with judgment for the moving party, which is entitled to tax costs. This Practice Note did not of course prevent a party against whom an unless order had been made making an application for an extension of time in which to comply, but it has been the Masters' practice that such applications, if made after time for compliance had already expired, received scant sympathy.

The chronology in this case is important because of the time which has passed since proceedings were commenced. This is an employer's liability claim arising out of an accident at work on 22 August 1997, in which the plaintiff sustained injuries to his left foot and ankle.

The Writ of Summons was issued with reasonable dispatch on 24 April 1998, An appearance was entered on 5 May 1999 and the statement of claim served on 21 May 1999. Thereafter the defence was served on 11 August 1999 and a reply delivered on 13 August 1999. Thus far the course of events was unremarkable but thereafter the situation changed. On 29 March 2001 the defendant was granted an order for discovery by list of the "plaintiff's employment/ income tax and accounts records for five years prior to 22 August 1997". Like many people in the construction industry the plaintiff apparently worked on a self-employed basis and these records were relevant to his claim for loss of earnings which was still continuing at the time of service of the statement of claim. The order recites that counsel for the plaintiff was heard and it was never appealed or otherwise challenged, and the time for so doing is obviously long since past. The order therefore stands as a valid order with which the plaintiff ought to have complied within 14 days of date of service, on 19 May 2001 which would have been 2 June 2001. However that order, and a reminder letter sent 23 July 2001, was apparently ignored.

A difficulty then arose with regard to the liquidity of the defendant's insurer, a provisional liquidation being announced with effect from 17 June 2001. The defendant's solicitors did not however come off record and indeed reminded the plaintiff's solicitor of the discovery order on 23 July 2001, and on 14 December 2001 wrote to arrange a medical appointment. Thereafter the case seems to have gone to sleep for a time until on 26 August 2003 the defendant's solicitors again reminded the plaintiff's solicitors about the order for discovery made 29 March 2001, and served a further Notice for Further and Better Particulars dealing with the plaintiff's employment history.

The plaintiff's solicitor again ignored the order for discovery made on 29 March 2001 and the Notice for Particulars and instead served a Notice of Intention to Proceed on 25 November 2003 and followed this up on 24 May 2004 by setting the action down for trial. The defendant's response was to issue 2 summonses, both served on 23 April 2004 for hearing on 24 May 2004, one to compel replies to the Notice for Particulars of 26 August 2003 and the second to compel compliance with the order for discovery made by Master Wilson on 29 March 2001. The orders sought were granted, the order in relation to discovery being in unless order form, and both were served on 2 June 2004. I have already described what happened thereafter.

I turn then to the plaintiff's application to extend time for compliance with the unless order made 21 May 2004. In addition to its powers to strike out proceedings pursuant to various

provisions in the Rules of the Supreme Court, under its inherent jurisdiction the Court has power to strike out actions in their entirety (or in the case of a defaulting defendant strike out the Defence), for want of prosecution or for non-compliance with a previous order of the court. In the latter category where, as in the present case, there has been failure to comply with a discovery order, very often the party applying will move the application pursuant to Order 24 rule 19, but the principles involved remain largely the same.

Counsel for the plaintiff sought to set the plaintiff's application for extension of time in which to comply with the unless order in the wider context of the power of the court to strike out proceedings for want of prosecution. He cited various authorities on striking out for want of prosecution and non-compliance to show the development of the law particularly in the light of article 6 of the European Convention as incorporated into United Kingdom domestic law by the Human Rights Act 1998. Whilst it may entail following in part a well trodden path nevertheless it is a useful exercise to review these authorities.

The base line is the 1978 House of Lords decision in Birkett v James [1978] A.C. 297. This was a contract case in which the cause of action accrued in 1970; the Writ was issued in 1972, and in 1975, 6 months within the 6 year limitation period, the defendant applied for dismissal for want of prosecution. On appeal to the House of Lords it was held that the power of the court to dismiss an action for want of prosecution should be exercised only where the default of the plaintiff had been intentional and contumelious, or where there had been inordinate and inexcusable delay on his or his lawyers' part giving rise to a substantial risk that a fair trial would not be possible **or** had resulted in serious prejudice to the defendant. There are 2 concepts. The first, intentional and contumelious default, suggests blatant disregard to the rules or even contempt. The second is inordinate and inexcusable delay putting the possibility of a fair trial at risk **or** causing prejudice.

Birkett v James was followed very soon after by the 1979 Court of Appeal decision in Samuels v Linzi Dresses Ltd [1981] Q.B. 115. This was an unless order case. The defendant having failed to serve replies to a notice for further and better particulars, an order was made striking out its defence and counterclaim unless it served the replies within a specified time. The defendant served the replies 3 days late and applied for a 3 day extension in which to comply, which was allowed. The plaintiff appealed unsuccessfully. The Court of Appeal held that it had power to extend time where an unless order had not been complied with in time,

since the modern practice was not to treat the action as dead, but that the power should be exercised cautiously and with due regard to the principle that orders were made to be complied with and not to be ignored. Thus the approach remained essentially concerned with the imposition of a sanction.

This approach was broadly followed in the Northern Ireland case of Hughes v Hughes [1990] N.I. 295, per Carswell J as he then was. Again this was an unless order case in which the order of the master was that unless the plaintiff served a statement of claim within 14 days the action would be dismissed for want of prosecution. The statement of claim was not served within the 14 days and dismissal of the action took effect from that time. The plaintiff applied under Order 3, rule 5 for an extension of time in which to serve the statement of claim. The master allowed the extension and the defendant's appeal was heard, and allowed, by Carswell J. He followed Samuels v Linzi holding that the court had power to extend time where an unless order had not been complied with but the power was to be exercised cautiously. Whether or not to extend was a matter of discretion and in taking into account the various factors, including delay, the court had to balance the prejudice to the respective parties.

Largely based on the Hughes case, in 2003 the Queens Bench masters issued the practice note to which I have already referred, to the effect that an unless order is effectively a judgment in the action taking effect on non-compliance, and consequently, there is no need for any further application by the party on whose behalf it is made. It was the initial view of the masters that as the action was struck out on the day that time for compliance expired, no applications to extend time made after that date should be entertained. However, recognising that such a blanket approach might not survive a challenge based on article 6, the approach adopted was that such applications for extension of time made after the period specified in the unless order has expired, would be entertained and treated on a case by case basis, but that the power to extend time would be exercised cautiously with little sympathy for the defaulting party when it came to balancing prejudice. That has remained the approach to the present time.

That approach, based essentially on Hughes v Hughes is to be compared with a case relied upon by the plaintiff namely a decision of the Court of Appeal in England and Wales in Re Jokai Tea Holdings Ltd [1993] 1 All ER at 630. Once again this involved non-compliance with an unless order, under the terms of which a pleading equivalent in effect to the defendant's defence was to be struck out, unless within a specified time it served replies to the

plaintiff's request for further and better particulars. Sir Nicholas Browne Wilkinson V-C held (at page 637):

> "In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an unless order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failures since obedience to orders of the court is the foundation on which its authority is founded. But, if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed."

This decision may to some extent be coloured by its particular commercial background. The words contumelious and contumacious connote an element of contempt or wilful flouting of orders of the court as opposed to the more common situation where the offending party, in the vernacular, just cannot get its act together. However, what the Court of Appeal is saying is that without that element of contempt or wilful flouting of the court's authority an action ought not to be dismissed. This arguably represents a significant move forward from Birkett v James and the whole question of inordinate delay which forms the basis of most applications to dismiss for want of prosecution.

Grovit v Doctor [1997] 2 All ER 417 is a decision of the House of Lords which is back on the more familiar territory of inordinate and inexcusable delay. In 1989 the plaintiff sued the 2 Defendants, his former employees, alleging that when the 1st defendant was writing a reference for the 2nd defendant he libelled the plaintiff by stating that he being of Middle Easter origin was a very difficult person to work for. In July 1990, the judge at first instance ordered that the question whether these words were capable of bearing a defamatory meaning should be tried as a preliminary issue. However the plaintiff took no further action and in October 1992 a deputy judge struck out the action because there had been inordinate and inexcusable delay by the plaintiff in the preceding 2 years, which caused sufficient prejudice to the defendants to justify striking out. The Court of Appeal dismissed the plaintiff's appeal on the grounds that the plaintiff's delay was relevant to both intentional and contumelious default amounting to abuse of process, and inordinate and inexcusable delay, causing prejudice to the defendant. In effect the Court of Appeal roped together a range of grounds for

striking out: inordinate and inexcusable delay, contumelious default, and abuse of process. On appeal to the House of Lords the plaintiff challenged this hybrid approach, contending that the defendant had to show either intentional or contumelious default amounting to abuse of process, or inordinate and inexcusable delay causing prejudice, and could not rely on inordinate and inexcusable delay not causing prejudice but amounting to abuse of process. The House of Lords held that the court had power under its inherent jurisdiction to strike out or stay actions on the ground of abuse of process irrespective of whether the test for dismissal of want of prosecution was satisfied or not. Since it found that the commencement and continuation of these proceedings without intention to bring them to a conclusion amounted to abuse of process there was no need to establish inordinate or inexcusable delay causing prejudice.

However, compare this to plaintiff's counsel's sheet anchor, a 1999 Chancery case Arrow Nominees Inc v Blackledge [2000] 1 BCLC 709, in which Evans-Lombe J, at first instance, held that it was not a proper exercise of the court's power under the rules or its inherent power to strike out Arrow Nominees Incorporated's petitioner under section 459 of the Companies Act 1985, where it was found to be in contumacious breach of the Rules or an order of the court, if it could be shown that notwithstanding the claimant's conduct there was no substantial risk that a fair trial could not follow. The fraud in that case was gross misconduct namely the disclosure of forged letters in discovery. In allowing the trial to continue, Evans Lombe J agreed with the dictum of Laddie J in Re Swaptronics Ltd (The Times August 17th 1988) that to conclude that a contemnor should have his case struck out by reason of his contempt notwithstanding that the court took a view that a fair trial could follow, was likely to be a breach of article 6.1 of the European Convention on Human Rights as being a breach of the contemnor's right to a determination of his civil rights and obligations at a fair and public hearing within a reasonable time by an independent tribunal.

Counsel for the plaintiff relies upon this case as authority for the proposition that if a fair trial is still possible then the action ought not to be struck out. However, the respondent in Arrow Nominees Inc. appealed successfully to the Court of Appeal (Roch, Ward and Chadwick LJJ) [2000] 2 BCLC 167. It was held (per Chadwick LJ pp192-193) that the object of the rules as to discovery was to secure the fair trial of the action in accordance with the due process of the court and accordingly a party was not to be deprived of his right to a proper trial as a penalty for disobedience of those rules, even if such disobedience amounted to contempt for or

defiance of the court, if that object was ultimately secured. But where a litigant's conduct amounted to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court was entitled and bound to refuse to allow that litigant to take further part in the proceedings and, where appropriate, to determine the proceedings against him. In this case once the judge reached the conclusion that a petitioner was persisting in his object of frustrating a fair trial, (he continued to lie about the forged documents at trial) the judge ought to have held that it was not fair to the respondents, nor in the interests of the administration of justice generally, to allow the trial to continue.

Since the new Civil Procedure Rules came into operation there has not been a great deal of authority emanating from England and Wales on the subject of dismissal for want of prosecution or non-compliance: the strict case management system would effectively prevent a case from going to sleep. This is an area in which the divergence in practice and procedure between Northern Ireland and England and Wales may mean that to some extent we must plough our own furrow. With this in mind the observation by Brooke LJ in Woodhouse v Consignia [2002] 2 All ER 737 at page 738 is significant:

> "One of the great demerits of the former procedural regimes was that simple rules became barnacled with case law. Under the new regime, the draftsman had sought to dispense with the need for litigants to be familiar with judge made case law by drawing into one place the most common of the considerations a court had to take into account when deciding whether a litigant should be granted relief from a sanction imposed on him."

Nevertheless it is still useful to have regard to the considerations which a court in England and Wales must now take into account. They are set out in succinct terms at rule 3.9 of the Civil Procedure Rules and are quoted verbatim at page 746 by Brooke LJ:

> "(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 including-
> (a) the interests of the administration of justice;
> (b) whether the application for relief has been made promptly;
> (c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;

(f) whether the failure to comply was caused by the party or his legal representative;

(g) whether the trial date or the likely trial date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party; and

(i) the effect which the granting of relief would have on each party."

It would therefore appear that the test urged upon the court by the plaintiff, namely whether or not it is it still possible to have a fair trial, has not therefore been expressly followed by the architects of the new civil procedure in England and Wales. Clearly it is reflected, particularly in (i) "the effect which the granting of relief would have on each party", but as a consideration to which the court must have regard rather than the question, determination of which is decisive, of the issue whether or not the strike-out sanction is appropriate.

There are few recently reported cases directly on the point in this jurisdiction, and such cases as there have been have been decidedly largely on their own facts. For example in Pollock -v- Northern Health and Social Services Board and McAuley and McAuley [2003] NIQB 22, Girven J, applying essentially the Birkitt v James test allowed an appeal from the master's decision to strike out for want of prosecution. On the other hand there is an increasing article 6 influence apparent in the wider context. An example is the decision of Higgins J in Tracey v O'Dowd [2002] NIJB 124. That case concerns the test to be applied in an application to set aside a default judgment. From an article 6 standpoint the core issues however are similar to want of prosecution or non-compliance applications, in that they involve enforcing compliance with the rules and in effect barring access to the court and preventing a trial of the action as a sanction for non-compliance. Higgins J held that the proper test is whether or not there was a defence which had prospect of success, and this was the most important factor for the court as opposed to failure to enter an appearance or serve a defence, or delay in making the application. At page 136 he stated:

> "If it cannot be said that there is no defence to the plaintiff's claim then the court must consider whether to set aside judgments or not and a major factor in that decision will be whether or not to do so would be unjust in that a defendant would be deprived of the opportunity to present his side of a triable issue between the parties. In that context

art 6 of the European Convention on Human Rights as enacted by the Human Rights Act 1998 must be relevant."

I believe that the most helpful approach to cases of non-compliance with unless orders is comprehensively demonstrated in the guidelines set out by the Court of Appeal in Hytec Information Systems Limited v Coventry City Council [1997] 1 WLR 1666. In that case the plaintiff sought further and better particulars of the defendant's counterclaim, and the defendant failing to comply with the request and a series of orders of the court that it should do so, the court directed that unless the replies were provided by a specified date the defendant's pleadings would be struck out. Some particulars were provided but the plaintiff was not satisfied as to their adequacy and moved to strike out the defendant's pleadings. Counsel for the defendant, taking the view that the pleadings were adequate, did not attend the hearing and instead sent her pupil to adjourn the application. The court refusing to adjourn, held that the particulars served were inadequate and that the defendant had deliberately flouted the court's order and accordingly the pleadings should be struck out. A subsequent application by the defendant to extend time to serve particulars was refused. Dismissing the defendant's appeal the Court of Appeal (per Ward LJ, Lord Woolf MR and Auld LJ assenting) held that each case had to be considered on its own facts but that the underlying approach might be encapsulated by the following:

"1. An unless order was an order of last resort, not made unless there was a history of failure to comply with other orders. It was the party's last chance to put its case in order.

2. Because it was the last chance, a failure to comply would ordinarily result in the sanction being imposed.

3. The sanction was a necessary forensic weapon which the broader interests of the administration of justice required to be deployed unless the most compelling arguments were advanced to exonerate the failure.

4. It seemed axiomatic that if a party intentionally flouted the order he could expect no mercy.

5. A sufficient exoneration would almost invariably require that he satisfied the court that something beyond his control had caused the failure.

6. The judge would exercise his judicial discretion whether to excuse the failure in the circumstances of each case on its own merits, at the core of which was service to justice.

7. The interests of justice required that justice should be shown to the injured party for procedural inefficiencies causing the twin scourges of delay and wasted costs. The public administration of justice to contain those blights also weighted heavily. Any injustice to the defaulting party, though never to be ignored came a long way behind the other two."

I note in passing that one of the cases considered and affirmed by the Court of Appeal in the Hytec Information Systems Limited was Re Jokai Tea Holdings Limited wherein, it is recalled, the approach adopted by Sir Nicholas Browne Wilkinson V.C. was that where there no intention to ignore or flout the order, failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed. There appears however to have been a shift in emphasis away from the question whether or not the failure to comply with an order was intentional and contumelious, and whilst it is not disregarded by the Court in Hytec Information Systems Limited, it is nevertheless just one of a number of matters for consideration and is not of itself the single decisive issue.

Having regard to the foregoing, I think that the court can no longer approach applications to strike out, whether it be for want of prosecution or for non-compliance, without regard to article 6. I am not however convinced that things have moved to the point where there must be a contumacious or intentional element before proceedings can be struck out, and the power to strike out for want of prosecution in cases of inordinate and inexcusable delay causing prejudice remains and will remain, as does the power to strike out proceedings for persisting non-compliance. I think therefore that the guidelines set out in Hytec Information Systems Limited remain the proper basis upon which a court should approach an application such as that in the present case.

The Rules of the Supreme Court are not rules for rules sake, but are there to facilitate an objective which is succinctly described as the overriding objective now enshrined at Order 1, rule 1A of the Rules of the Supreme Court (Northern Ireland), which provides:

"(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;

(c) 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 Courts 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."

A court cannot achieve this objective unless it has at its disposal effective forensic tools to enable it to enforce its authority and compliance with its rules and its orders. Such tools must be used with article 6 in mind at all times, but if the position now urged upon me on behalf of the plaintiff is correct then regardless of the seriousness of a parties misconduct, if that misconduct does not ultimately render a fair trial impossible, then the defaulting party cannot be penalized by the ultimate sanction of striking out their case. This, with respect, cannot be correct because it leaves the court with no effective way of dealing with the situation where a party to proceedings simply refuses to comply with the Rules or with the orders of the court. There is no inconsistency between a proper regard of article 6 and the need for the court to enforce its authority, and indeed, mindful of the fact that the innocent party has article 6 rights too, it may fairly be argued that a court which does not enforce its own authority is by such a failure itself in breach of article 6. In that context the seventh of the principles set out by Ward LJ in Hytec Information Systems Limited is worth repeating: "The interests of justice required that justice should be shown to the injured party for procedural inefficiencies causing the twin scourges of delay and wasted costs. The public administration of justice to contain those blights also weighted heavily. Any injustice to the defaulting party, though never to be

ignored came a long way behind the other two." That aside I believe that the proper approach for this court to adopt is, in short, that where an unless order is made as a last resort, against a party to proceedings whose conduct demonstrates a persisting failure to comply with the rules or orders of the court, then in the absence of some explanation exonerating that party, the action should be struck out on the expiry of the time allowed for compliance, and an order for extension of that time refused.

I turn then finally to the application of these principles to the facts of the present case. The original order with which the plaintiff has failed to comply is not the unless order of 21 May 2004 but the order for discovery made by Master Wilson on 29 March 2001, nearly 5 years ago, in a case in which the cause of action accrued in August 1997 and the Writ of Summons was issued in April 1998. It is not therefore unfair of me to describe this as an old case, which means that it is all the more important that the parties comply expeditiously with the rules and orders of the court. Despite the fact that time for compliance with the unless order of 21 May 2004 expired on 30 June 2004, with no application to extend time being made prior to expiry, and the action therefore being struck out on 30 June 2004, the plaintiff took no steps to extend time for compliance until February 2005 when the first, misconceived and subsequently aborted application was commenced by summons with a return date on 18 March 2005. Primarily because of difficulties in arranging a time for hearing which suited both counsel the summons was not heard until 6 October 2005. However, even if that delay between March and October 2005 is disregarded, there still remains a period between June 2004 and February 2005 when the plaintiff took no steps whatsoever, despite the fact that the defendant's solicitor warned him on 7 July 2004, and again on 15 December 2004, that the action had been struck out for failure to comply with the unless order. It seems to me that on any reasonable interpretation the plaintiff's solicitors simply ignored the unless order in the same way as they had ignored the original discovery order of Master Wilson made 29 March 2001. There was no further contact between the parties until 10 December 2004 when the plaintiff's solicitors wrote enclosing replies to the defendant's Notice for Further and Better Particulars in late compliance with my order of 24 May 2004, despite the fact that he had been told that the action had been struck out for non-compliance with the unless order.

No proper explanation for this has ever been provided. At paragraph 16 of the affidavit grounding this application sworn by the plaintiff's solicitor Karl J Doherty, he avers:

> "It proved extremely difficult to obtain clear and accurate information from the Plaintiff regarding his working history. It also proved difficult to obtain any verifying documents from him regarding income derived from his work and tax paid on his income. The only vouching document supplied by the Plaintiff was part of a Self Assessment Tax calculation form for 1996-1997."

If he had moved expeditiously to extend time for compliance, or even responded to the defendant's solicitors letter of 7 July 2005, one might have a measure of sympathy for the plaintiff's solicitors placed in this predicament by a less than co-operative client. However, that sympathy is diminished by the manner in which the plaintiff's solicitors have conducted these proceedings, and it does not extend at all to the plaintiff himself. He raised the issue of financial loss and it is for him to furnish the documentation to substantiate the claim. If he was making tax returns in the proper way, or had an accountant, it is difficult to understand why these documents were so difficult to find, either in 2001 when the order was made, or in August 2003 when the action began to move again after the insurer's liquidity issues resolved.

The plaintiff makes the point that the discovery order did not relate to the fundamental issues of liability but to the claim for financial loss only, however, it is clear that at the end of 2004 the defendant was still concerned with what was clearly a potentially important aspect of the claim. It appears from paragraph 27 of Mr Doherty's grounding affidavit that in or about June 2004 the plaintiff instructed his solicitor that he would abandon his claim for financial loss but this was not conveyed to the defendant and in any event would not automatically entitle the plaintiff to ignore previous orders of the court. No party can be allowed to conduct proceedings on their own terms in disregard to the rules and previous orders of the court.

The proper test to be applied in this case is not that adopted by Evans-Lombe J in Arrow Nominees Inc. v Blackledge, which in any event was not followed on appeal. It seems to me that the proper approach is that set out by the Court of Appeal in Hytec Information Systems Limited -v- Coventry City Council. In the present case the unless order made 21 May 2004 was an order of last resort, where the plaintiff had failed to comply with Order 24, rule 2 (service of list of documents within 14 days of close of pleadings), and the order for discovery made 29 March 2001. At the same time he ignored a notice for further and better particulars dealing with the same issues, and various letters from the defendant's solicitors. There was nothing else that the court could do on 21 May 2004 but make an unless order giving the

plaintiff a last chance to put his case in order. He did not take that chance and in the absence of some cogent explanation exonerating his failure to so do then the normal sanction should follow. A sufficient exoneration should almost invariably require that the plaintiff satisfy the court that something beyond his control had caused his failure to comply, but the only explanation proffered here is that the plaintiff did not co-operate with his solicitor. That, in my view, is not good enough.

In exercising its discretion whether or not to excuse this plaintiff's failure to comply with the unless order the court must have regard to the circumstances of the case on its own merits, and in so doing it must have regard to the fact that the interests of justice requires that justice should be shown to the injured party as a victim of procedural inefficiencies causing the twin scourges of delay and wasted costs. No party to litigation can put forward its case in a fair and expeditious manner, having regard in particular to the question of cost and delay, if the other party can simply ignore the rules of court and previous orders of the court, in the way the plaintiff has sought to do in this case. Any injustice to the defaulting party, though not to be ignored, must come a long way behind injustice to the innocent party, in this case the defendant. This plaintiff's action was struck out on the 30 June 2004 after he failed to avail of the last chance to put his case in order. Over a year and a half later no good reason is shown why time for compliance ought to be extended so as to effectively resurrect the action. I therefore refuse to extend time, dismissing the plaintiff's application with costs to the defendant, and I certify for counsel.