Neutral Citation No. [2013] NIMaster 14 | *Ref:* **2013NIMaster14**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **08/08/2013**

No.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

Between:

SCHEHERAZADE SMYTH

Plaintiff;

AND

PROFESSOR JAMES NIXON

Defendant.

Master McCorry

[1] By summons dated 15th January 2013 the plaintiff applied for an order pursuant to O.3, rule 5 for extension of time for compliance by the plaintiff of the terms of an unless order by Master Bell dated 12th November 2012, or alternatively that pursuant to the inherent jurisdiction of the High Court that the action be "reinstated". Master Bell's order had required the plaintiff to set the action down for trial within 8 weeks of the date of his order, that is, by 7th January 2013, and on 8th January 2013 following the procedure set out in Masters' Practice Note No.1 of 2012, the defendant's solicitors lodged a certificate of non-compliance and requested default judgment against the plaintiff. The plaintiff's solicitor had in fact sent the setting down papers to the court office on 7th January 2013 but these were not received until 8th January, the day after the time for compliance with Master Bell's

order had expired. The defendant's solicitors had acted expeditiously to obtain default judgment, and the plaintiff's solicitors acted equally expeditiously in taking the current application to extend time in circumstances were they were just one day out of time. However, this must be considered in the light of the overall history of the case which, from the plaintiff's perspective, has unfortunately demonstrated a consistent pattern of delay and non-compliance.

[2] On 24th February 2005 the plaintiff, then aged 49 years, of Syrian origin and of the Muslim faith, attended for a medico-legal examination arranged by the defendant in a claim by the plaintiff arising out of a road traffic accident. The examination was conducted by the defendant to this action who is a consultant orthopaedic surgeon. In her statement of claim the plaintiff alleges that during the course of the examination the defendant forced her to strip, failed to arrange for a chaperon to attend and was rude and abrupt. This caused her to suffer (quoting from the particulars of personal injuries in the statement of claim):-

> "Subjective distress and emotional disturbance consistent with a psychological reaction to an unpleasant and upsetting experience including feelings of unhappiness and lowered self worth, increased irritability and poor concentration, emotional reactivity and anxiety regarding exposure to related cues and situations and recurrent mental rehearsal."

A subsequent amendment, apparently in response to an order of the court, added to these particulars: "The plaintiff has developed an adjustment disorder."

[3] The plaintiff's cause of action accrued on 24th February 2005 and the writ of summons was issued just within the 3 year primary limitation period on 20th February 2008. This was not served until 19th February 2009 which was the last day before the validity of the writ expired. This set the tone for the further progress of the case, the statement of claim not being served until 25th June 2009, just one day within the time for compliance with an order dated 24th April 2009 requiring service of the statement of claim by 26th June 2009. That statement of claim was not

accompanied by medical evidence substantiating the injuries alleged in the particulars of personal injuries, prompting an application by the defendant by summons returnable on 26th February 2010, for specific discovery and disclosure of medical evidence. On 10th June 2010 the defendant's solicitors received a medical report by a consultant psychiatrist, Dr Bownes, but they were of the view that this report did not comply with the requirements of Order 25. This court has not been provided with a copy of that report and cannot therefore reach a view as to whether or not it complied with the requirements of Order 25. However it appears that the defendant's summons for specific discovery and disclosure of medical evidence was, after a number of adjournments, eventually heard on 12th October 2010. The court ordered the plaintiff within 21 days, to serve an amended statement of claim which I assume prompted the amendment to the particulars of personal injuries already referred to, and to file an affidavit with respect to particular documents listed on the schedule to the summons. In the face of non-compliance with that order the court at a review hearing on 16th November 2010 made an unless order dismissing the action with judgment to the defendant unless within 15 weeks (i.e. by 28th February 2011) the plaintiff amended the statement of claim and filed the specific discovery affidavit in compliance with the order dated 12th October 2011. Once again, the plaintiff failed to comply with that order and on 1st March 2012 the defendant's solicitor lodged a certificate of non-compliance. On 3rd March 2012 the plaintiff issued a summons for extension of time and this was heard by a deputy master on 16 June 2011, who acceded to the plaintiff's application to extend time.

[4] The primary points relied upon by the plaintiff is that she omitted to comply with Master Bell's unless order within the time specified by just one day and that this was not a case of her contumeliously or deliberately flouting the order of the court. The defendant's primary submissions were that the fact that the plaintiff was just one day out had to be considered in the light of the overall history in the case and on the authorities it was not necessary that to show that her conduct represented contumelious or deliberate flouting of the rules and order of the court.

[5] Masters' Practice Note No. 1/2012 Unless Order was issued on 12 March 2012 to clarify the way in which unless orders take effect and provides:-

> *"[1] An "Unless Order" is an order of the court by which a conditional sanction is attached to an order requiring performance of a specified act by a particular date or within a particular period.*
>
> *[2] Every unless order made by a master should state in clear terms:*
>
> *(a) the step in the action which the party against whom the order is directed, is required to perform;*
>
> *(b) the time within which that step is to be performed;*
>
> *(c) the rule or previous order of the Court which has not been complied with;*
>
> *(d) the sanction which is to occur in the event of default; and*
>
> *(e) where that sanction is striking out of the action, or as the case may be, the defence, the precise terms of the judgment to be obtained, including any order for costs in the action.*
>
> *[3] An order made in the above terms shall constitute a default judgment in the action, which shall be final for the purposes of enforcement of costs.*
>
> *[4] The sanction specified in an Unless Order takes effect without the need for any further order of the Court if the party to whom it is addressed fails to comply with its terms. The party entitled to judgment in the event of non-compliance with such an Unless Order is not required to apply to the Court for judgment. Rather that party should file in the Office either an affidavit sworn by the party or a certificate completed by the party's solicitor confirming service of the Unless Order and non-compliance with the terms thereof. The Office shall issue a default judgment in the action in terms of the order, in which the judgment date shall be stated as the date of default.*
>
> *[5] A party against whom an Unless Order is made may in appropriate circumstances request the Court for extension of time in which to comply with the terms of the order. Granting an extension of time is a matter for the discretion of the*

Court. Where a request for extension of time is made before expiry of the time for compliance stated in the Unless Order, the request may be made by letter, a copy of which should be sent to the party which has the benefit of the order, explaining why extension of time is sought. Any application for extension of time made after the expiry of the time for compliance stated in the order must be made by summons pursuant to Order 3, rule 5 and supported by an affidavit setting out, inter alia, the reason for non-compliance."

Thus, the practice adopted by the masters is that an action (or, depending upon the precise terms of the order, a part of the claim) is struck out on the expiry of the time allowed for the party against whom the order is made to take some step prescribed in the order. The party entitled to judgment in the event of non-compliance is not required to make a further application to the Court, either ex parte or by summons, for judgment. All that is required is that it files in the court office either an affidavit sworn by the party or a certificate completed by the party's solicitor confirming service of the Unless Order and non-compliance with the terms thereof. The office then issues a default judgment in the action in terms of the order, in which the judgment date shall be stated as the date of default, i.e. the date upon which the time expired for the offending party to comply with the terms of the order. The reason for this is to obviate the need for the party with benefit of the order to make a further application by summons causing further delay and expense in the action and as such is entirely consistent with the overriding objective at Order 1A of the Rules. It is also has regard to the modern interpretation of the various authorities on the use and effect of unless orders. A review of those authorities may be useful.

[6] There is considerable overlap between the authorities on dismissal for want of prosecution and dismissal for failure to comply with the rules of court or orders of the court including unless orders. That overlap arises primarily out of the application of concepts of deliberate or contumelious flouting of the Rules and orders of the court which apply in both situations. The establishment since 2009 in this jurisdiction of the system of judicial case management of personal injuries cases by master's reviews at the stages up to setting down (and reviews before the Senior

Queen's Bench Judge thereafter) has seen a reduction in the number of applications to strike out for want of prosecution. Against that however, the increased use of unless orders by the masters at reviews, means that there has been an increased incidence in failure to comply with such orders, necessitating applications to extend time for compliance. That, along with the issuing of Practice Note 1/2012, makes this an opportune time for the relevant caselaw to be looked at afresh.

[7] The modern baseline is the 1978 House of Lords decision in Birkett v James [1978] A.C. 297. That 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. Thus there were 2 concepts to consider: the first, intentional and contumelious default, suggesting blatant disregard to the rules or even contempt, and the second 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.

[8] This approach was broadly followed in the Northern Ireland case of Hughes v Hughes [1990] N.I. 295, per Carswell J. 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. The issue in Hughes was one of delay rather than deliberate or contumelious flouting of the orders of the court. 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. On the issue of delay Carswell J approved the dicta of Lord Oliver in Donovan v Gwentois Limited [1990] 1 All ER 1018 where he said:

> "A defendant is always likely to be prejudiced by the dilatoriness of a plaintiff in pursuing his claim. Witnesses' memories may fade, records may be lost or destroyed, opportunities for inspection and report may be lost. The fact that the law permits a plaintiff within its prescribed limits to disadvantage a defendant in this way does not mean that the defendant is not prejudiced. It merely means that he is not in a position to complain of whatever prejudices he suffers. Once a plaintiff allows the permitted time to elapse, the defendant is no longer subject to that disability …."

[9] This approach is to be compared with that adopted by the Court of Appeal in England and Wales in Re Jokai Tea Holdings Ltd [1993] 1 All ER at 630, were the issue was contumelious or deliberate conduct. 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.

[10] 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 Eastern 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 relay 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.

[11] However, compare this to 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 petition 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. However, on appeal the Court of Appeal (Roch, Ward and Chadwick LJJ) [2000] 2 BCLC 167, 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.

[12] 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. However, as I have indicated the reduction in applications for strike out for want of prosecution has been replaced by an increase in applications to extend time for compliance with unless orders after time has expired and the action already struck out for default. Although the Rules and judicial management systems differ between the two jurisdictions the observation by Brooke LJ in Woodhouse v Consignia [2002] 2 All ER 737 at page 738 remains helpful:

> "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."

This would not appear to place exclusive emphasis on the need to demonstrate contumelious or deliberate flouting of rules of court or court orders before an action would be struck out, although it does at (c) include consideration of whether or not failure to comply is intentional. Greater emphasis overall appears to be placed upon on the effect of the defaulter's conduct in terms of fairness and the capacity to have a fair trial.

[13] Returning to this jurisdiction, in McKenna v Quinn (13.02.12) Weatherup J in a commercial action was requested to extend time for compliance with an unless order to compel discovery by a plaintiff and replies to particulars. The plaintiff complied with the order so far as replies were concerned but omitted to comply with respect to discovery because the plaintiff's representatives were unaware of that limb of the order. There had been a previous unless order to compel service of the statement of claim which had been complied with in time. Weatherup J referred to the decision of the Court of Appeal in England & Wales in Hytec Information Systems v Coventry City Council [1997] 1 WLR 1666, to which I will return below, in addition to Hughes v Hughes and Davis v Northern Ireland Carriers [1979] NI 19. Weatherup J held:

> "[13] I am satisfied that the plaintiff's solicitors conduct was not contumeliousness or deliberate. When the plaintiff's solicitors responded with the replies to particulars I accept that they believed the Order had been satisfied. Nothing further occurred until ….. when the plaintiff's solicitors became aware of the correct position. I accept that explanation although it clearly involved a careless reading of the order."

[14] However, he did not approach this as solely a question of whether or not there had been intentional or deliberate non-compliance, as he goes on to state:

> "[14] The time for compliance with the order had sped; non-compliance with the unless order arose by the default of the plaintiff; the effect of granting the application to extend time would be to deprive the defendant of judgment and that cannot be compensated in costs; the plaintiff would be denied a hearing on the merits if the application were refused; there does not appear to be any point of general importance raised by the claim. The prejudice to the plaintiff would be limited if the application were refused as the plaintiff could sue the solicitors as responsible for the action being struck out. The main point in favour of the plaintiff concerns the denial of a hearing on the merits. It is recognised that the default arose from a misreading of the unless order. On the other hand there has been considerable delay on the part of the plaintiff in

> progressing this matter and the plaintiff has been in default of other Orders of the Court. In balancing the prejudice to the plaintiff and to the defendant and taking account of the plaintiff's solicitor's belief that they had complied with the unless order upon serving replies to particulars ….. and they being unaware that the position was otherwise until the matter was listed by the Court ….., I exercise my discretion to extend time for the plaintiff to make discovery."

In so exercising his discretion therefore it appears to me that Weatherup J, rather than concentrating solely on the presence or absence of contumelious or deliberate or intentional flouting of the unless order, looked to the wider considerations of the effect of extending or not extending time for compliance on each party by balancing the prejudice to each respectively.

[15] Having reviewed the various authorities I remain of the view that that the most helpful approach to cases of non-compliance with unless orders is that 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, an unfortunate practice not entirely unknown in this jurisdiction. The court refused to adjourn and 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."

[16] The plaintiff in the present case has sought to argue that for the court to refuse to extend time for compliance with an unless order, thereby disentitling the party in default from prosecuting or defending the action as the case may be, there had to be demonstrated a contumelious or deliberate flouting of the rules or orders. However, it appears to me that this argument is not supported by the Court of Appeal in

Hytec. Specifically dealing with this point at page 1677 of his judgment Auld L.J. said:

> "In my judgment, there is no need to confine the test to that of an intentional disregard of a court's peremptory order, whether or not it is characterised as flouting, contumelious, contumacious, perverse, obstinate or otherwise. Such an intent may be the most usual circumstance giving rise to the exercise of this jurisdiction. But failure to comply with one or a number of orders through negligence, incompetence or sheer indolence could equally qualify for its exercise. It all depends on the individual circumstances and the existence and degree of fault found by the court after hearing representations to the contrary by the party whose pleading it is sought to strike out."

This seems to me to be entirely consistent with the guidelines at rule 3.9 of the Civil Procedure Rules in England and Wales, and in particular guideline (c) whether the failure to comply was intentional, and where whether or not the failure to comply is one of a number of considerations for the court to have regard to, and not the overriding test.

[17] Furthermore, 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. However, at page 1675 of his judgment Ward L.J., in rejecting a submission based on this that the failure to comply had to be intentional or contumelious, observed that "The judgment of Sir Nicholas Browne-Wilkinson V.C. must be read as a whole. It is quite plain that there are there are difficulties in giving a narrow meaning to "intentional" linked as it is with "contumelious" ". The submission wholly fails to have regard to the broader terms in which he expresses the basis of the rule and the limited circumstances in which a failure can be exonerated." I think that the same can be

said today of the plaintiff's submission that there is an absence of intentional or contumelious flouting of the order in this case.

[18] That then is the legal framework against which a court should exercise its discretion, whether or not to extend time for compliance with the terms of an unless order, by the party who has failed to so comply. Of course since Hytec the court can no longer approach applications to strike out, whether it is for want of prosecution or for non-compliance, without regard to article 6. I am not however convinced that this requires that we have reached a 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 Court of Judicature (NI) 1980 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, 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.

The 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 having regard to all the circumstances of the case in point.

[19] With this in mind I return to the specific circumstances of the case which is the subject of the present application. This is a case in which the plaintiff or her legal representatives have been dilatory from the outset. The incident giving rise to the cause of action occurred on 24th February 2005. The writ of summons was issued just days within the 3 year primary limitation period, and not served until the last day before the 12 month validity period for service expired. Thus far the case could not have moved more slowly and still remain within the requirements of the rules of court and the Limitation (NI) Order 1989. The observation by Hutton J in DHSS v Derry Construction Ltd [1980] NI 187 at 194A (following Lord Diplock in Birkett v James at 322D) that post-writ delay is worse if the pre-writ delay is marked, is still applicable today as ever, and where an action begins as slowly as this one has then the greater the responsibility there is on the plaintiff, having eventually commenced proceedings, to advance them with alacrity. The plaintiff and her representatives did not do so, because the statement of claim was not served until 25th June 2009 and only then because the defendant's solicitors had obtained an order requiring service of the statement of claim by 26th June 2009. Even then, the statement of claim was not accompanied by any medical evidence substantiating the particulars of personal injuries necessitating an application by the defendant by summons returnable on 26th February 2010 for specific discovery and disclosure of medical evidence. A medical report was served on 10th June 2010, a year after the statement of claim, but the defendant's solicitors were of the view that this report did not comply with the requirements of Order 25. Meanwhile it appears that the defendant's summons for specific discovery and disclosure of medical evidence was, after a number of adjournments, heard on 12th October 2010. The court ordered the plaintiff within 21 days, to serve an amended statement of claim, which I assume prompted the amendment to the particulars of personal injuries already referred to, and to file an

affidavit with respect to particular documents listed on the schedule to the summons. In the face of non-compliance with that order the court at a review hearing on 16th November 2010 made an unless order dismissing the action with judgment to the defendant unless within 15 weeks (i.e. by 28th February 2011) the plaintiff amended the statement of claim and filed the specific discovery affidavit in compliance with the order dated 12th October 2011. Once again, the plaintiff failed to comply with that order and on 1st March 2012 the defendant's solicitor lodged a certificate of non-compliance. On 3rd March 2012 the plaintiff issued a summons for extension of time and this was heard by a deputy master on 16 June 2011 who acceded to the plaintiff's application to extend time.

[20] It seems to me that this history renders two observations incontrovertible. The first is that the plaintiff's current application has the taint of déjà vu in that she and her legal representatives have been in an almost identical position earlier in this action but would not appear to have to have learned from it. The second is that the attempted compliance with the order of Master Bell at the last minute was entirely in keeping with their practice from the outset of complying with rules of court and orders just within time and no more. It seems to me that this is precisely the sort of case that Ward L.J. in Hytec had in mind when he referred to the "difficulties in giving a narrow meaning to "intentional" linked as it is with "contumelious" ". I have already indicated that I do not accept that the correct or only test to be applied is whether or not there has been intentional or contumelious flouting of court orders, but when one looks at the overall circumstances of this case, it is debatable whether or not it is even strictly accurate to say that there has not been intentional conduct in this case in the sense that the plaintiff or her representatives have seemingly adopted an approach whereby they did everything at the last minute. Such an approach carries with it an obvious risk of leaving it too late and predictably on at least two occasions they did just that, necessitating applications to extend time for compliance with unless orders after time for compliance had expired. It seems to me therefore that leaves only one point of any real merit to be made by the plaintiff, which is that on this second occasion, she was only one day late. That of course is a relevant

consideration but it is not determinate and must be viewed in the light of the overall history of the case.

[21] Whatever decision this court takes will prejudice one or other party. If time is not extended then the plaintiff loses the opportunity to prosecute her claim leaving her with one possible alternative, namely to sue her own solicitor in negligence. I cannot comment upon whether or not such an action might succeed because it is not clear whether the general approach which appears to have been adopted by her is caused by the plaintiff herself or is simply due to dilatoriness on the part of her solicitor. From the defendant's perspective he now has a judgment in his favour and no order for costs will compensate him for having that judgment set aside. He is then left in the situation where over 8 years after the incident allegedly giving rise to the cause of action, pleadings in the action arguably have still not closed and possibly no medical evidence substantiating the personal injuries alleged has yet been served, although as I have not seen the report by Dr Bowens I cannot be sure about that. In any event the opportunity for the defendant to arrange a medical examination on his own behalf, to counter whatever appears in Dr Bowen's report has largely passed. This of course is aside from the inevitable impact due to passage of time upon the recollection of the only two people who know what occurred at the time the cause of action accrued, in a case which will turn on the parties' evidence as to precisely what occurred rather than analysis of records. This must inevitably impact upon the defendant's capacity to properly defend the action.

[22] The plaintiff has embarked upon this application, grounded on a short affidavit by her solicitor consisting of just 4 paragraphs, of which only the 4th contains any substantive averments. It does not refer at all to the overall history of the case, the 4th paragraph dealing only with the events of 7th and 8th January when the time for compliance expired, from the plaintiff's perspective. Significantly, it provides no explanation as to how or why the situation had arisen in the first place, or attempts to set this in the context of the previous history of the case. Guideline 5 of the Hytec guidelines is of course: "A sufficient exoneration would almost invariably require that he satisfied the court that something beyond his control had

caused the failure." Once again, I do not apply this consideration as being of itself determinate but it seems to me that a complete failure to explain why an unless order has not been complied with in time, is a very serious omission in any application to extend time for compliance after time has expired, which becomes near fatal in a case with a history such as this one. If a court exercises its discretion to extend time without any basis or understanding as to how time for compliance was permitted to expire, then the use of the unless order as an order of last resort becomes devalued, which of course is inconsistent with the court's duty to act in a way which has regard to service to justice.

[23] For all of these reasons I am compelled to conclude that the plaintiff in this instance has failed to demonstrate to the court that this is a case in which the interests of justice and fairness are best served by extending time for compliance with the unless order of Master Bell made 12 November 2012 and the application is therefore refused.