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strike out application:**

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been made**



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Introduction

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Advocate Damian Molyneux reviews

how failure to pursue legal proceedings with all due haste can lead to the case being struck out

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Manx Court rules on strike out application: Strike out is possible even where no 'unless order' has been made

It is established law in the Isle of Man that a Plaintiff's failure to comply with a peremptory order of the Court can be classified as contumelious conduct and thus justify an action being struck out (*Birkett v James* [1978] AC 297, per Lord Diplock at page 318 paragraph F as approved in Manx cases). The position has been less clear as to whether a failure to comply with a non peremptory order would also support a finding of contumelious conduct however. Certainly in the Isle of Man the issue had not been specifically decided. However, in a recent decision of the High Court, following an application to strike out the Plaintiff's claim, it was found that a deliberate failure to comply with a specific order of Court, whether peremptory or otherwise, is capable of founding a successful application to dismiss an action. The relevant procedural history of that case was as follows:

Clinical negligence proceedings were issued on 27 April 2007 claiming a cause of action arose from actions of the Defendant over a period from December 2003 to April 2004. The summons was not served until 23 April 2008, almost one year after issue of proceedings but

still within the 12 month period of validity under Manx Court rules. A Statement of Case was then due on 12 May 2008 but was not served.

A motion to strike out the claim of the Plaintiff was filed by the Defendant on 22 May 2008 on the grounds that there had been unreasonable delay in service of the Summons and that the same had been served outside limitation. On 12 August 2008 the application was heard and dismissed (with no finding as to the limitation issue) and at the same time the Court ordered the Plaintiff be allowed until 28 October 2008 to file a Statement of Case.

The decision not to strike out only was appealed. That appeal was heard and dismissed on 26 November 2008. Meanwhile there had been no service of the Statement of Case as ordered and so, by motion of 12 January 2009, the Defendant applied for a second time to strike out the claim of the Plaintiff on the basis that, in direct contravention of the Order of 12 August 2008, the Plaintiff had failed to file a Statement of Case either by 28 October 2008 or at all. By reactive motion of 27 January 2009 the Plaintiff



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applied for an extension of time to serve the Statement of Case until 21 April 2009.

In submissions at the second strike out hearing the Defendant relied upon the fact that, by reference to the previously quoted passage in *Birkett*, the categories of what amounts to contumelious default are not defined. Further, by reference to English cases such as *Choraria v Sethia* [1998] CLC 625, *Culbert v Stephen G Westwell* [1993] 2 PIQR and *Lace Co-ordinates Limited v NEM Insurance Co* [1998] EWCA 4167 it was argued that non compliance with a non peremptory order alone was sufficient to be deemed contumelious, especially when a Plaintiff had received a warning shot in the form of a previous application to strike out, and had survived it.

In opposition the Plaintiff argued that all of the cited cases involved much more than a single breach of a non peremptory order and in some cases multiple breaches as well as further breaches of the rules.

The Court decided in the favour of the Plaintiff after taking other factors into account, and in particular the difficulty there had been in engaging an expert to produce a report. In doing so however the Court did confirm that breach of a non peremptory order on its own could be contumelious sufficient to justify strike out. The Court then allowed the Plaintiff's application for an extension ordering that unless it was filed by the date set the matter would be struck out without the

need for further application.

Of interest to note in this case also was that limitation had remained in dispute between the parties. However both accepted at hearing, per Lord Diplock in *Birkett* (Page 322) and *Barclays Bank plc v Miller* [1990] 1 WLR 343, that expiry of the limitation period or otherwise was not a relevant factor for the Court to consider in such applications. The Court agreed.

Whilst the Defendant's application was not successful, this recent Manx decision has made the position clear as to non peremptory orders and the issue of limitation in such matters. Each case will of course turn to be decided upon its own facts but although failure to comply with a specific order can be contumelious conduct justifying strike out, it is unlikely to be sufficient on its own. It may be however that failure to comply with an order following timely reminders from the Defendant would be sufficient. It is therefore in the Defendant's best interests to be as focussed as the Plaintiff should be in respect of the latter's obligations to proceed expeditiously with legal proceedings.



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