Neutral Citation No: [2024] NI Master 17	*Ref:* [2024]NIMaster17
	ICOS No: 2022/10842
Judgment: approved by the Court for handing down (subject to editorial corrections)	*Delivered:* 25/09/24

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

_____

KING'S BENCH DIVISION

_____

BETWEEN:

CARL FRAMPTON

Plaintiff

and

NICO LEONARD VAN DER HORST

Defendant

_____

Mr Peter Girvan BL (instructed by Finucane Toner Solicitors) for the plaintiff.
Mr Peter Hopkins KC (instructed by WP Tweed & Company) for the defendant.

_____

MASTER HARVEY

Introduction

[1] This is an application by the defendant seeking to set aside the default judgment entered against him on 13 February 2023 as he failed to enter an appearance.

[2] The plaintiff is a well-known former professional boxer and a current television presenter and boxing pundit. The defendant runs a number of businesses engaged in the sale of luxury watches and also operates a YouTube channel. The cause of action relates to a video posted on YouTube, by the defendant on 18 April 2022. The plaintiff argues the video publicly revealed that the plaintiff had purchased an expensive watch from the defendant's shop, exploited the plaintiff's

name and reputation to promote the defendant's watch business and the video was edited in a manner which was offensive to and derogatory of the plaintiff.

[3] There are two grounds for the set aside application. Firstly, the defendant argues it is an irregular judgment as the plaintiff did not follow the correct procedure under the Rules. Secondly, the defendant asserts he has an arguable defence, and the case should therefore proceed to trial. In an application of this nature, the burden of proof is on the defendant to satisfy the court on the balance of probabilities there are grounds to set aside the judgment.

The legal principles

[4] This court recently set out the legal principles relevant to an application to set aside a default judgment in the cases of *Southern Health and Social Care Trust v Tennyson* [2022] NIMaster 7 and *Wilson v O'Hare Transport* [2023] NIMaster 16.

[5] The power is contained within Order 13 Rule 8 of the Rules of Court of Judicature which is in the following terms:

> "Default of appearance to writ
>
> Setting aside Judgments
>
> 8. Without prejudice to rule 7 (3) and (4) the court may, on such terms as it thinks just, set aside of vary any judgment entered in pursuance of this Order."

The procedural issue

[6] The first issue in this application is whether the correct procedure was followed by the plaintiff when he obtained judgment. In a case such as this, that depends on whether the reliefs sought in the writ of summons fall within Order 13 Rules 1-4. These Rules set out the procedure for default judgment where the claim is for an unliquidated demand, unliquidated damages, detention of goods or possession of land. The Rules also set out the procedure where there has been default of appearance to a writ for a claim not mentioned in Rules 1-4. The provision is contained in Order 13 Rule 6 which is as follows:

> "*Other claims*
>
> 6. – (1) Where a writ is indorsed with a claim of a description not mentioned in rules 1 to 4, then, if any defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing and upon filing an affidavit proving due service of the writ on that defendant and, where the statement of claim was not indorsed on or served with the writ, upon serving a statement of claim on him, proceed with the action as if that defendant had entered an appearance."

Meritorious defence

[7] In the event the court determines the judgment was irregular, the judgment will be set aside and that is the end of this interlocutory matter. However, if the judgment was regular, the second issue to be decided is whether the defendant has an arguable defence. In *Bank of Ireland v Mervyn Coulson [2009] NIQB 96,* Gillen J referred to this as a "meritorious defence" and set out the legal principles in relation to the meaning of that expression:

> "[34] The principles to be derived from these authorities are these. First, the procedure for marking judgment in default is not designed to punish the defendant by destroying his right to a fair and full hearing in relation to the plaintiff's claim but rather as part of the disciplinary framework established by the rules of the court which are designed to ensure proper and timeous conduct of litigation (see McCullough's case at p. 584a)
>
> [35] Courts must be wary to form provisional views of probable outcomes which experience has shown can readily be shown to be fallacious when the matter is tried out. In essence I think that Lord Wright at p. 489 in Day's case captured the approach that the courts should adopt when he said: "In a case like the present there is a judgment which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set aside should be exercised in its favour. The primary consideration is whether he has merits to which the court should pay heed; if merits are shown the court will not … desire to let judgment pass and which there has been no proper adjudication …"

[8] In *Bank of Ireland (UK) plc v Eugene Jones and Eamon Jones* [2014] NIQB 93, Weatherup J dealt with an application to set aside default judgment, and assessed whether it is necessary to establish a serious issue to be tried in advancing such an application. He helpfully set out the merits threshold for a defendant:

> "(i) In order to set aside a judgment it is necessary that a defendant establishes that there is an arguable defence.
>
> (ii) It is not necessary that a defendant establishes that the defence has a real prospect of success.
>
> (iii) It is not necessary for the Court to form a provisional view of the probable outcome of the case.
>
> (iv) The Court will not set aside a judgment if there is no defence to the claim apparent from the materials before the Court. The merits threshold will require the defendant to establish an arguable defence. This has also been expressed as a prima facie defence, a serious defence, a real triable issue, a defence with merits to which the Court should pay heed."

[9] In *Quinn v McAleenan and McConville [2010] NIQB 31*, Gillen J held that:

> "[17] If a judgment is regular, then there is an almost inflexible rule that there must be an affidavit of merits i.e. an affidavit stating facts showing a defence on the merits (Farden v Richter (1889) 23 QBD 124 and Evans v Bartlam (1937) AC 473.
>
> [18] Thus for the purpose of setting aside a default judgment, the defendant must show that he has an arguable case which carries some degree of conviction (see Day v RAC Motoring Services Limited (1999) 1 AER 1007. At page 1013H Ward LJ said: "… The arguable case must carry some degree of conviction but judges should be very wary of trying issues of fact on evidence where the facts are apparently credible and are to be set aside against the facts being advanced by the other side. Choosing between them is the function of the trial judge, not the judge on the interlocutory application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it."

Delay

[10] A further issue the court must consider is delay by the defaulting party and the explanation given as to why he allowed judgment to be entered against him. This was also addressed in the above case of *Bank of Ireland v Coulson*, in which Gillen J stated:

> "[19] There is no rigid rule that the applicant must satisfy the court that there is a reasonable explanation why the judgment was allowed to go by default, though obviously the reason, is any, for allowing judgment and thereafter applying to set it aside is one of the matters which the court will have regard in exercising its discretion. (See Evans v Bartlam (1937) AC 473 at 480). The application should be made promptly and within a reasonable time. Delay if coupled with prejudice to the plaintiff or a bona fide assignee of the judgment debt will also be factors.
>
> …
>
> [31] Whilst therefore there is no rigid rule that the applicant must satisfy the courts that there is reasonable explanation why judgment was allowed to go by default I have taken into account in exercising my discretion the fact that no reasonable excuse was given for the delay. (See Day v RAC Motoring Services Limited (1999) 1 AER 1007)."

Consideration

The procedural issue - Irregular judgment

[11] In the writ of summons, in basis terms, the plaintiff sought several remedies which relate to unliquidated or unspecified damages. In the alternative, the writ

sought an account of profits, namely, a requirement that the defendant specify the money made from the video from advertisers or directly from the online platform on which it was posted.

[12] Based on the materials available to me, including the affidavit from the process server, Mr Weir, I consider there was personal service of the writ, following which the defendant failed to enter an appearance. The plaintiff's solicitor then wrote to the court, requesting that damages be assessed under the provisions of Order 37. It is clear from this correspondence that the plaintiff was seeking damages, not an account of profits. I will turn to this letter shortly. I was referred to various authorities on this issue with the defendant relying on the decision of Colton J in a case also involving a set aside application in which Mr Frampton was a party, *Cyclone Promotions Limited and Blain McGuigan v Carl Frampton and RIP Rock Limited* [2019] NIQB 42. In that case, the learned judge set aside the default judgment as he considered it irregular stating:

> "[22] As to the grounds relied upon, I agree that the judgment has been obtained irregularly. The endorsement on the writ seeks a series of reliefs; declarations, accounts and enquiries and the like which are not relief or claims within the meaning of Order 13 Rules 1-4 and as such judgment cannot be obtained in the manner in which the plaintiffs have proposed to do – see Order 13 Rule 6.
>
> [23] It is correct that a plaintiff may waive elements of a claim and proceed with a claim for damages only (which is a relief within Order 13 Rules 1-4), but no such waiver was indicated before the judgment order was made."

[13] The defendant contends that similarly in this case, the writ contains forms of relief which do not fall within Order 13 Rules 1-4. Further, that the plaintiff did not finally abandon or waive the other reliefs claimed in the writ before judgment was entered, meaning he could not avail of the provisions of Order 13 Rules 1-4 in respect of entering judgment for unliquidated damages claims. He instead should have served a statement of claim, proceeding with the action as if an appearance had been lodged in line with Order 13 Rule 6. The defendant further asserts the account of profits claim is different from a standard damages claim and, less convincingly, that compensation under the UK GDPR is "not damages per se."

[14] The plaintiff relies on *Merito Financial Services Ltd v Yelloly* [2016] EWHC 2067 (Ch) as well as the spirit and wording of Order 13 Rule 2. This refers to unliquidated damages which he states should be given a wide definition given the claim involves an unspecified sum and sought to distinguish this case from the aforementioned decision of Colton J in *Cyclone Promotions*.

[15] Further the plaintiff referred to *Ramzan v Brookwide* [2011] EWCA Civ 985. In that case the claimant sought damages for, inter alia, an account of profits as well as

aggravated and exemplary damages. This was in relation to the alleged wrongful acts of the defendant in the expropriation of property belonging to the claimant, incorporating it into his own property without notice. On appeal, Arden LJ at paragraph 58 addressed the issue of a claimant seeking judgment for more than one remedy, stating (my emphasis added):

> "Lord Nicholls of Birkenhead helpfully explained the nature of the doctrine of election, and the time for making an election, with great clarity in these terms ([1996] 1 All ER 193 at 197–199, [1996] AC 514 at 521–522).
>
> …Faced with alternative and inconsistent remedies a plaintiff must choose, or elect, between them. He cannot have both. The basic principle governing when a plaintiff must make his choice is simple and clear. He is required to choose when, but not before, judgment is given in his favour and the judge is asked to make orders against the defendant. A plaintiff is not required to make his choice when he launches his proceedings. He may claim one remedy initially, and then by amendment of his writ and his pleadings abandon that claim in favour of the other. He may claim both remedies, as alternatives. But he must make up his mind when judgment is being entered against the defendant. Court orders are intended to be obeyed. In the nature of things, therefore, the court should not make orders which would afford a plaintiff both of two alternative remedies."

[16] On the issue of choosing between inconsistent remedies in a claim, I was referred to a Privy Council decision, *Personal representatives of Tang Man Sit v Capacious Investments Limited* [1996] AC 514 in which the Lords held at p514 that:

> "…an account of profits in respect of the money received by the deceased from letting houses was not cumulative but alternative to damages for loss of use and occupation and, provided that the plaintiff had all the necessary information, it should have been required when summary judgment was entered to make an election to the extent that the remedies were inconsistent."

[17] In the present action, the court was shown the writ from the *Cyclone Promotions* case relied on by the defendant. It includes equitable or non-money reliefs such as declarations, accounts and enquiries, which would not be dealt with in an assessment of damages hearing but be held over and dealt with separately, unless expressly waived. The wording of the writ in that case is that such reliefs are "further or in the alternative." It is clear there were several, cumulative remedies sought, sufficient in my view to render that case as sufficiently distinguishable from the facts of this claim in which the writ essentially seeks unliquidated damages with the account of profits claim pleaded as an alternative remedy. In this case, the plaintiff has elected between the two reliefs in the letter before judgment, picking the one they are actually pursuing, namely damages. Moreover, plaintiff's counsel expressly states the plaintiff accepts the account of profits claim is "lost."

[18] Turning to the remedies sought by this plaintiff and the precise nature of the judgment he obtained, I now consider the issue of what has been variously described as waiver, abandonment or election in relation to the other reliefs sought in the writ. I note the letter to the court from the plaintiff solicitor of 31 January 2023 seeking judgment. It clearly states:

> "The plaintiff therefore seeks that judgment be entered against the defendant in default of appearance to the Writ being interlocutory judgment for damages to be assessed in accordance with Order 13 Rule 2."

[19] It is regrettable the defendant was not provided with a copy of this letter until the days leading up to the instant application. This meant defence counsel's written submissions understandably could not address it, albeit he did so in oral submissions during the hearing. The initial defence assertion was that there was no evidence of election, however, the late production of the letter of 31 January 2023 obviously weakened this stance.

[20] At hearing, defence counsel pointed to the equivocation on the plaintiff side as to whether they would pursue the account of profits claim, noting references at paragraph 64 and 65 of the plaintiff's affidavit of 21 March 2023 in which he stated he required discovery before opting between an account of profits or damages claim and that the claim for an injunction was not part of the application for default judgment. I consider the former averment by the plaintiff cannot be correct as the letter of 31 January contradicts this and the authorities do not support such a proposition. Moreover, the latter averment regarding an injunction is not mentioned in the writ, which contains no reference to injunctive relief.

[21] The plaintiff also relies on the court's observations in the English Chancery Division case of *Island Records v Tring International* [1995] 3 All ER. That case involved an action for infringement of copyright in which the plaintiff issued an application for summary judgment, claiming an inquiry as to damages and in the alternative an account of profits. The question arose as to the date at which the plaintiff had to elect between the two alternative remedies. At p444 the court observed:

> "It was well established that a plaintiff could not obtain judgment for both damages and an account of profits and that once judgment had been entered for one or the other, any right of election was lost."

[22] This further supports the proposition that the judgment that was obtained in this action has the effect of abandoning the account of profits claim and having regard to the authorities and the aforementioned letter to the court, I consider the account of profits claim was an alternative remedy and it was expressly waived prior to entering judgment. On balance, therefore, I consider the judgment was regular.

Delay

[23] I now turn to consider the explanation provided as to how judgment came to be entered and any subsequent delay in bringing the set aside application. Prior to the issue of proceedings, the plaintiff served a letter of claim on 27 April 2022. There was a reply on 9 May 2022 making a without prejudice offer to resolve the matter meaning the defendant was clearly aware of the plaintiff's claim. The defendant edited the video in question on 27 April 2022, removing references to the plaintiff, after initially appearing to claim he could not do so. The plaintiff then issued proceedings on 15 December 2022. Further correspondence followed, culminating in his former solicitor indicating they did not have authority to accept service of proceedings on 21 December 2022.

[24] The plaintiff's solicitor then served the writ personally on the defendant on 9 January 2023. No appearance was entered on behalf of the defendant, and I note the explanation given for failing to do so, which I consider is flimsy. The plaintiff then obtained default judgment on 13 February 2023 and filed an application for assessment of damages on 23 March 2023. This was listed for hearing on 7 August 2023. The notice of appointment for the assessment of damages hearing was not served on the defendant until 23 June 2023, meaning he did not actually receive the default judgment until then.

[25] The defendant engaged his current solicitor in July 2023 and after their intervention and first correspondence to the plaintiff's solicitor on 31 July 2023, the assessment of damages hearing was vacated by the Court. The current application was then made relatively promptly on 11 September 2023. The defendant belatedly sought to apologise to the court in his affidavit of 28 May 2024, but his conduct and deplorable online comments, twice referring to the court case as "funny" after being served with proceedings clearly showed little regard for this Court or the legal process, never mind the plaintiff. I consider such comments clearly indicate he was aware of the proceedings and their consequences initially gave him little cause for concern.

[26] On balance, I conclude that the defendant's inaction and failure to engage in the process led to judgment being entered. While I have taken this into account, I consider that after receiving the judgment he acted reasonably promptly and that overall, his unsatisfactory conduct after proceedings were served, while clearly unpalatable, and the delay arising from this, are not sufficient in my view of themselves to refuse to set aside the judgment. I further consider that if the defendant succeeds in this application, there is no demonstrable prejudice to the plaintiff other than losing the benefit of a default judgment. Any evidence to be adduced at hearing will not be any less cogent as a result of the delay nor do I consider that a fair trial is not possible. The authorities make clear, however, the

primary consideration is the merits of the proposed defence and I now turn to consider this.

Arguable defence

The materials before the court

[27] In *Bank of Ireland v Jones,* the learned judge stated that when assessing whether a defendant has an arguable defence, this required an analysis of the "materials" before the court. In the present application, this includes the draft pleadings and affidavits. The affidavit from the defendant is manifestly deficient, setting out no arguable defence. The plaintiff's counsel stated that it "proceeds to follow a rubric of setting out the cause of action in respect of which judgment has been entered and then baldly asserting that the claim is denied or not accepted…but no meaningful attempt is made to coherently set out what facts/circumstances the defendant actually relies upon."

[28] As stated above, however, the court has the benefit of draft pleadings in this case, including the draft defence. This was similarly the case in the *Cyclone Promotions* case, in which there was also criticism from the plaintiff regarding the failure of the defendant to set out the basis of his potential defence within the grounding affidavit to the application. The court had seen the pleadings in that case and had regard to those in determining there was a defence to which it should pay heed. While there are deficiencies in the draft defence in this action, such as various bland denials and raising some issues which are matters of quantum, I must consider whether it forms the basis of an arguable defence.

The defence to the claim

[29] I will briefly summarise the basis of the defence being put forward in respect of each aspect of the plaintiff's claim and whether I consider this is arguable.

[30] The defendant asserts with regard to the passing off claim that there was no misrepresentation to the public likely to give rise to confusion as in fact the defendant makes clear in the video that the plaintiff no longer used his shop and in fact bought watches from a rival establishment, therefore it cannot be said that there was any false message or that he was endorsing his business. Having viewed the video this is a reasonable argument by the defendant and will require evidence to be called.

[31] The copyright claim is rejected on the basis that copyright cannot subsist in the plaintiff's name or image as alleged and it was assigned by him to a third party, namely BT sport, meaning any claim in that respect would vest in the third party. Having considered the documents relied on by the defendant, including the television contract, I consider there is merit in this defence.

[32] Turning to the alleged breach of a duty of confidence, the defendant denies the sale of the watch gave rise to such a duty and the information said to be confidential was in the public domain at the material time. The defendant relies on material from a magazine publication and an online posting by the plaintiff himself.

[33] I note in the English High Court Chancery Division case of *JN Dairies Ltd v Johal Dairies Ltd* [2009] WL 1657143 the court set out the elements to be proven for a breach of confidence, stating:

> "In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the Saltman case on page 215, must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it…."

[34] While I am sceptical regarding the argument that an online "tweet" regarding the servicing of a different watch at the same shop and a picture in a magazine at a charity event amount to the plaintiff putting the information in the public domain, it is at the very least arguable.

[35] The misuse of private information claim is denied as the defendant does not accept the plaintiff had a reasonable expectation of privacy or that he knew or ought to have known that there was such a reasonable expectation of privacy. Again, this can only be properly determined by the trial judge having heard the evidence. In the event the trial judge determines that the plaintiff had a reasonable expectation of privacy, the court will have to balance that expectation against the defendant's right to freedom of expression under article 10 ECHR.

[36] I note in *ZXC v Bloomberg LP* (SC(E) [2022] AV the court, quoting from *Murray v Express Newspapers plc* [2009] Ch 481 stated that:

> "the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case."

Clearly this will require consideration at trial as to the circumstances, including the so-called "Murray factors". These are the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant, and the circumstances in which and the purposes for which the information came into the hands of the publisher.

[37] I was referred to *Gatley on Libel and Slander,* 12th ed (2013) where at paragraph 22.5 it suggests that there are certain types of information which will normally, but

not invariably, be regarded as giving rise to a reasonable expectation of privacy so as to be characterised as being private in character. These include "personal financial and tax related information." Counsel for the plaintiff pointed to a similar list to be found in *Carter-Ruck on Libel and Privacy*, 6th ed (2010) at paragraph 19.7. It will be for the court to determine whether the purchase of a watch in the circumstances of this case would fit into one of such categories and I consider the defence that no reasonable expectation of privacy exists, is arguable.

[38] The personal data claim is defended on the basis the processing of any such personal data was necessary for the purposes of the defendant's legitimate interest, namely his watch business and the online videos he publishes from which he generates revenue. This would appear a particularly weak argument as there was no express consent from the plaintiff and the purported legitimate reason for processing the data was effectively to make money, which is not an exemption under UK General Data Protection Regulations.

[39] On balance, whether the defence will ultimately succeed in whole or part, is uncertain but I do consider the defendant raises issues which can only be dealt with at trial. I therefore conclude there are sufficient merits put forward by the defendant to which the court should pay heed and based on the material available to me, on the facts of this application, there is an arguable defence which requires me to set aside the judgment.

Conclusion

[40] I grant the defendant's application to set aside the judgment but award both the costs arising from the application for default judgment and also the costs of this application to the plaintiff, to include counsel, such costs to be taxed in default of agreement.